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**THE**  
**PENAL CODE**  
**AND**  
**CODE OF CRIMINAL PROCEDURE**

**OF THE**  
**STATE OF NEW YORK**

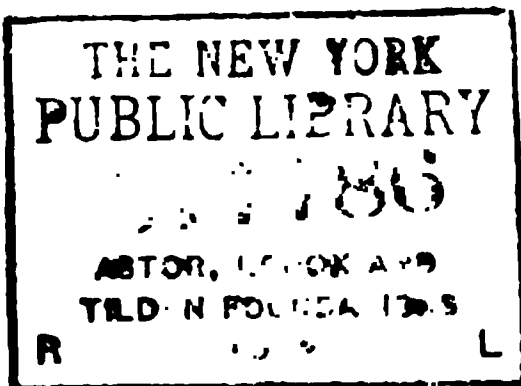
**WITH ALL THE AMENDMENTS TO AND INCLUDING THE YEAR 1904**

**A COMPLETE INDEX, COPIOUS FORMS**

**FULL ANNOTATION OF ALL THE DECISIONS RELATING THERETO  
TO SEPTEMBER 1, 1893, WITH APPENDIX CONTAINING  
ANNOTATIONS TO JUNE 1, 1905.**

**BY**  
**WILLIAM H. SILVERNAIL**

**ALBANY, N. Y.:**  
**W. O. LITTLE & CO. LAW PUBLISHERS,**  
**1905.**



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**PENAL CODE**

**OF THE**

**STATE OF NEW YORK,**

**WITH ALL THE AMENDMENTS TO AND INCLUDING  
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# THE PENAL CODE.

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## CHAPTER 676, LAWS OF 1881.

**AS AMENDED BY LAWS OF 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897 and 1898.**

### AN ACT to establish a Penal Code.

PASSED July 26, 1881; three fifths being present.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

#### PRELIMINARY PROVISIONS.

**SECTION 1.** Title of Code.

2. Its effect.
3. Definition of "crime."
4. Division of crimes.
5. Definition of felony.
6. Definition of misdemeanor.
7. Objects of the Penal Code.
8. Procedure, how regulated.
9. Conviction must precede punishment.
10. Jury to find degree of crime.
11. General rules of construction of this act.
12. Of sections declaring crimes punishable.
13. Punishments, how determined. Corporations punishable by fine.
14. Punishment of felonies when not fixed by statute.
15. Punishment of misdemeanors.

**SECTION 1. Title of Code.**—This act shall be known as the Penal Code of the State of New York.

See notes under section 7, *post*.

**§ 2. Its effect.**—No act or omission begun after the beginning of the day on which this Code takes effect as a law, shall be deemed criminal or punishable, except as prescribed or authorized by this Code, or by some statute of this state not repealed by it. Any act or omission begun prior to that day may be inquired of, prosecuted and punished in the same manner as if this Code had not been passed.

A section of this Code, even if it purported to enact a rule applicable to past as well as future transactions, is void as to the former only, in case they are separable. *People v. O'Neil*, 109 N. Y., 262; 14 St. Rep., 829; *Jaehne v. People*, 6 N. Y. Cr., 240.

See *Darrow v. Family Fund Society*, 116 N. Y., 542; 27 St. Rep., 476; *People v. Jaehne*, 3 St. Rep., 111; 103 N. Y., 193; 4 N. Y. Cr., 193; *People v. Beckwith*, 7 id., 148; 12 St. Rep., 795; *People v. Bernardo*, 1 N. Y. Cr., 248; *People v. Hollenbeck*, id., 431, note; 65 How., 401; *People v. Hatter*, 22 N. Y. Supp., 690.

**§ 3. Definition of "crime."**—A crime is an act or omission forbidden by law, and punishable upon conviction by

1. Death; or
2. Imprisonment; or
3. Fine; or
4. Removal from office; or
5. Disqualification to hold any office of trust, honor, or profit, under the state; or
6. Other penal discipline.

The case of *People v. Richards*, 7 St. Rep., 756; 44 Hun, 275; 5 N. Y. Cr., 355, was reversed in 108 N. Y., 137; 13 St. Rep., 515.

**Definitions.**—The definition of crimes is confined to the Penal Code. *People v. Dewey*, 33 St. Rep., 428; 13 St. Rep., 515.

Common law definitions are a material aid in many cases in the interpretation of statute definitions of common law offenses. *People v. Most*, 128 N. Y., 113, 38 St. Rep., 829; 8 N. Y. Cr., 278. But the law-making power may extend common law definitions of particular offenses so as to include acts not punishable under the common law and not embraced within the common law definitions of the offense. *Id.* Identity in the name of offenses at common law and under a statute does not necessarily imply that the same precise constituent, and no others, enter into each. *Id.*

**Power of legislature.**—The power of the legislature to define and declare public offenses is unlimited, except in so far as it is restrained by constitutional provisions and guaranties. *People v. West*, 106 N. Y., 295; 8 St. Rep., 713.

The power of the legislature to declare what shall amount to a crime is exceedingly large, and it is difficult to define its exact limit. *People v. Gillson*, 109 N. Y., 406; 16 St. Rep., 185. But there is a limit to this power under the constitution. *Id.*

The legislature may not declare that to be a crime which, in its nature, is and must be under all circumstances innocent; nor can it, in defining crimes or in declaring their punishment, take away or impair any inalienable right secured by the constitution. *Lawton v. Steele*, 119 N. Y., 233; 29 St. Rep., 581. But it may, within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. *Id.*

**What are.**—The offense of intoxication, under the former act of 1857, was held, in *People ex rel. Kopp v. Com'rs, etc.*, 2 St. Rep., 532; 102 N. Y., 588; 4 N. Y. Cr., 447, to be a crime.

Gambling is a crime within the meaning of this section. *Steinhart v. Farrell*, 3 St. Rep., 292.

**Infamous crime.**—An infamous crime is an offense implying such a dereliction of moral principle as carries with it a conviction of a total disregard to the obligation of an oath. *People v. Parr*, 42 Hun, 316.

See *People v. Meakim*, 44 St. Rep., 751; 8 N. Y. Cr., 409; 133 N. Y., 221; aff'g 61 Hun, 327; 40 St. Rep., 686; *People v. Lenhardt*, 4 N. Y. Cr. 326; *Darrow v. Family Fund Society*, 42 Hun, 247, 3 St. Rep., 745.

**§ 4. Division of crimes.**—A crime is either

1. A felony; or
2. A misdemeanor.

The case of *People v. Richards*, 7 St. Rep., 756; 44 Hun, 278; 5 N. Y. Cr., 355, was reversed in 108 N. Y., 137; 13 St. Rep., 515.

**Grade of offense.**—The grade of the offense, as a general rule, is determined by the nature of the punishment prescribed. *People v. Lyon*, 3 N. Y. Cr., 163; 99 N. Y., 216.

It is not the actual, but the possible, sentence which determines the grade of the offense. *People v. Hughes*, 50 St. Rep., 64; *People v. Borges*, 6 Abb., 182.

**Punishment.**—No instance can be found in which an offense, which is declared to be a misdemeanor, can be visited with the punishment prescribed for a felony. *People v. Lyon*, 3 N. Y. Cr., 164; 99 N. Y., 216. See *People v. Lenhardt*, 4 N. Y. Cr., 326.

**§ 5. Definition of felony.**—A felony is a crime which is or may be punishable by either

1. Death; or
2. Imprisonment in a state prison.

The case of *People v. Richards*, 7 St. Rep. 756; 44 Hun, 278; 5 N. Y. Cr., 355, was reversed in 108 N. Y., 137; 13 St. Rep. 515.

**Definition.**—The common law definition of a felony is inapplicable. *People v. Lyon*, 3 N. Y. Cr., 164; 99 N. Y., 216.

In this state, the definition of felony is found in the punishment which may be inflicted. *Benedict v. Williams*, 48 Hun, 125; 15 St. Rep., 677.

**Instances.**—Assault in the second degree is made a felony. *People v. Cole*, 2 N. Y. Cr., 112; *People v. Sweeney*, 4 id., 288; 41 Hun, 840; *People v. Terrell*, 33 St. Rep., 369; 11 N. Y. Supp., 365.

An attempt to escape from lawful confinement on a charge of grand larceny in the first degree and burglary in the third degree, is a felony. *People v. Johnson*, 46 Hun, 670; 13 St. Rep. 48; *aff'd*, 110 N. Y., 141; 16 St. Rep. 846.

The offense of being a common gambler in selling lottery policies under § 344, *ante*, is a felony. *People v. Dewey*, 33 St. Rep., 427; 11 N. Y. Supp., 603.

Extortion is a felony. *People v. Hughes*, 50 St. Rep., 64.

The obtaining of goods by false pretenses is within the class of offenses made felonies. *Benedict v. Williams*, 48 Hun, 125; 15 St. Rep. 677.

Peculation is a felony. *People v. Lyon*, 99 N. Y., 219; 3 N. Y. Cr., 161. See *People v. Cooper*, 3 N. Y. Cr., 119.

**§ 6. Definition of misdemeanor.**—Any other crime is a misdemeanor.

The case of *People v. Richards*, 7 St. Rep. 756; 44 Hun, 278; 5 N. Y. Cr., 355, was reversed in 108 N. Y., 137; 13 St. Rep. 515.

**Instances.**—The offense of assault in the third degree is but a misdemeanor. *People ex rel. Devoe v. Kelly*, 2 N. Y. Cr., 431; 32 Hun, 536.

The keeping of a bawdy house is a misdemeanor. *People ex rel. Van Houton v. Sadler*, 97 N. Y., 146; 3 N. Y. Cr., 473.

Libel is a misdemeanor. *People v. Parr*, 4 N. Y. Cr., 546; § 243. *post*.

Petit larceny is a misdemeanor. *People ex rel. Laughlin v. Finn*, 26 Hun, 60. See *People v. Lyon*, 3 N. Y. Cr., 166; 99 N. Y., 219; *People v. Cooper*, 3 N. Y. Cr., 119.

**§ 7. Objects of the Penal Code.**—This Code specifies the classes of persons who are deemed capable of crimes, and liable to punishment therefor; defines the nature of the various crimes; and prescribes the kind and measure of punishment to be inflicted for each.

**Object.**—The Penal Code was designed to codify the existing law. *People v. Sharp*, 9 St. Rep., 165.

This Code was enacted for the purpose of embodying in a single statute the system of criminal law applicable to the state. *People v. Jaehne*, 3 St. Rep. 11; 103 N. Y., 193; 4 N. Y. Cr., 478.

It was intended as a revision of the prior laws in respect to crimes and their punishment, and as a substitute for the scattered and fragmentary legislation which preceded it. *Id.*

This Code was intended to define all, or nearly all, crimes, and to provide for their punishment. *People v. Hallenbeck*, 1 N. Y. Cr., 437, *note*; 65 How., 401.



This Code is to be regarded more in the light of a codification of the body of the criminal law than as materially altering and enlarging its scope and nature. *People v. Richards*, 108 N. Y., 144; 13 St. Rep. 515.

The design in 1881 was to codify the criminal laws of the state and embrace them all in a single enactment under a uniform system. *People v. Moran*, 123 N. Y., 263; 8 N. Y. Cr., 114; 33 St. Rep., 398; *rev'g*, 54 Hun, 279; 7 N. Y. Cr., 336; 27 St. Rep., 20. It must be assumed that the authors of the criminal legislation of that year had considered the existing laws on any subject and had omitted only such provisions thereof as they deemed superseded by the proposed Code or as was otherwise repealed. *Id.*

This section does not relate to or include the evidence which may be given or the degree of proof required upon an inquiry or during a prosecution, to secure a conviction and punishment for crime. *People v. Beckwith*, 12 St. Rep. 795; 108 N. Y., 73; 7 N. Y. Cr., 162. See *People v. McTameny*, 30 Hun, 507; 1 N. Y. Cr. 443, 13 Abb. N. C., 59; 66 How., 75; 17 W. Dig., 492.

**§ 8. Procedure, how regulated.**—The manner of prosecuting and convicting criminals is regulated by the Code of Criminal Procedure.

See chap. 442 of 1881.

The case of *Matter of McDonald*, 2 N. Y. Cr., 82, was reversed in *People ex rel. McDonald v. Keeler*, *id.* 141. This case was itself reversed by the court of appeals in 99 N. Y., 474; 3 N. Y. Cr., 348.

The manner of inquiring into and prosecuting an act criminal in its nature is regulated by the Code of Criminal Procedure. *People v. Beckwith*, 12 St. Rep., 795; 108 N. Y., 73; 7 N. Y. Cr. 162.

**§ 9. Conviction must precede punishment.**—The punishments prescribed by this Code can be inflicted only upon a legal conviction in a court having jurisdiction.

See section 3 of Code of Criminal Procedure; section 1, Art. 1 of State Constitution.

The case of *Matter of McDonald*, 2 N. Y. Cr., 82, was reversed in *People ex rel. McDonald v. Keeler*, *id.*, 141. The latter case was itself reversed by the court of appeals in 99 N. Y., 474; 3 N. Y. Cr., 348.

**Jurisdiction.**—The courts of this state have no jurisdiction over crime committed in the New York city post-office. *People v. Marra*, 4 N. Y. Cr., 804.

**§ 10. Jury to find degree of crime.**—Whenever a crime is distinguished into degrees, the jury, if they convict the prisoner, must find the degree of the crime, of which he is guilty.

See sections 35, 436–438 and 440, *post.*

See section 444 of Code of Criminal Procedure.

**Object.**—The object and intention of this section evidently were to guard and protect the rights of the defendant so that the court, in inflicting the punishment, might be advised of the exact nature of the crime of which he was convicted. *People v. Rugg*, 98 N. Y., 551; 3 N. Y. Cr., 172.

**Construction.**—This section must be construed with the qualifications and restrictions contained in sections 436 and 437 of the Code of Criminal Procedure. *Id.*

**§ 11. General rules of construction of this act**—The rule that a penal statute is to be strictly construed does not apply to this Code or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law.

**Construction, rules of.**—The provisions of the Code must be construed, according to the fair import of their terms, to promote justice and effect the objects of the law. *People v. Whedon*, 2 N. Y. Cr., 320; *People v. Phelps*, 44 St. Rep., 911; 133 N. Y., 269.

The requirements of the Code, if they are expressed in plain and unambiguous language, are not subject to any rule of construction which tends to subvert its plain meaning and effect. *People v. Moran*, 123 N. Y., 263; 8 N. Y. Cr., 114; 33 St. Rep., 398; rev'g 54 Hun, 279; 7 N. Y. Cr., 336; 27 St. Rep., 20.

This Code is a revision of prior law on criminal offenses and a substitute for the scattered and fragmentary legislation that preceded it, and must be construed with reference to the law which it replaced. *People v. Fanshawe*, 59 St. Rep., 3; aff'g 47 id., 331. Where an offense is defined in the same language as was employed before, or substantially the same, it will be presumed that no change was intended, unless the legislative intent in that direction is clear. *Id.*; *People v. Jaehne*, 103 N. Y., 193; 3 St. Rep., 11; *People v. Stevens*, 109 N. Y., 162; 14 St. Rep., 808; *People v. Richards*, 108 N. Y., 114; 13 St. Rep., 515; *People v. Palmer*, 109 N. Y., 110; 15 St. Rep., 78.

Identity in the names of offenses at common law and under a statute does not necessarily imply that the same precise constituents, and no others, enter into each. *People v. Most*, 128 N. Y., 113; 38 St. Rep., 829; see *People v. Hollenbeck*, 1 N. Y. Cr., 437, note; 65 How., 401; *People v. Bauer*, 37 Hun, 408.

**§ 12. Of sections declaring crimes punishable.**—The several sections of this code which declare certain crimes to be punishable as therein mentioned devolve a duty upon the court authorized to pass sentence to determine and impose the punishment prescribed, but such court may in its discretion suspend sentence, during the good behavior of the person convicted, where the maximum term of imprisonment prescribed by law does not exceed ten years and such person has never been convicted of a felony. Courts of special sessions are empowered to suspend sentence and at any time within the longest period for which a defendant might have been sentenced, may issue process for the re-arrest of the defendant, and when arraigned the court as it is then constituted may proceed to enter judgment and impose sentence. In the case of children under sixteen years of age, at the time of conviction, the longest period of time after suspension of sentence within which a sentence may be imposed for such offense shall be one year; and in any proceeding of a criminal nature, triable before a magistrate, the magistrate upon conviction, may suspend sentence and place the offender under probation and at any time thereafter, during the longest period for which he could have been committed in the first instance, such magistrate, or his successor, if his term has expired, may pronounce any judgment or sentence or impose any fine or other penalty, or make any commitment which might have been pronounced, imposed or made at the time the conviction was had.

Am'd by ch. 655, L. 1905. Takes effect Sept. 1, 1905.

**§ 13. Punishments, how determined. Corporations punishable by fine.**—Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by this Code. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars.

Amended by chap. 218 of 1892.

This amendment added the provision as to the manner of punishing corporations. See section 705, *post*.

**§ 14. Punishment of felonies when not fixed by statute.**—A person convicted of a crime declared to be a felony, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment for not more than seven years, or by a fine of not more than one thousand dollars, or by both.

To take a case out of the general provisions, prescribed by this and the following section, it is needful to find some provision of law specially prescribing the punishment for the particular crime under consideration. *People v. Meakim*, 44 St. Rep., 752; 8 N. Y. Cr., 412; 133 N. Y., 223; *aff'g*, 61 Hun, 327; 40 St. Rep., 686.

**§ 15. Punishment of misdemeanors.**—A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both.

See notes under preceding section.

See section 706, *post*.

The case of *Loos v. Wilkinson*, 51 Hun, 85; 10 St. Rep. 297; 5 N. Y. Supp., 414; was reversed in 118 N. Y., 485; 23 St. Rep. 282.

**Before Code.**—This section is not applicable to a crime committed before this Code took effect. *People ex rel. Van Houton v. Sadler*, 97 N. Y., 146; 3 N. Y. Cr., 474.

**When appealable.**—A sentence is properly pronounced under this section in case there is no other punishment for the offense specially prescribed by any other statutory provision in force at the time of the conviction and sentence. *People v. Palmer*, 6 St. Rep. 341; 43 Hun, 408; 5 N. Y. Cr., 107.

When crimes are defined in the Code, and are therein declared to be misdemeanors, and no punishment is therein prescribed, the punishment specified in this section is proper. *People v. Hollenbeck*, 1 N. Y. Cr., 437, *note*; 65 How., 401.

The exception in this section was not to take away the effect of section 726, *post*. *People v. Hollenbeck*, 1 N. Y. Cr., 437, *note*; 65 How., 401; *People v. McTameny*, 1 N. Y. Cr., 442; 30 Hun, 505; 13 Abb. N. C., 56; 66 How., 70.

When, by some other provision of the Code, an offense is simply made a misdemeanor, the punishment is not considered as thereby "specially prescribed." *People v. Christy*, 47 St. Rep., 926; 65 Hun, 351; 20 N. Y. Supp., 279.

Libel is punishable under this section. *People v. Parr*, 4 N. Y. Cr., 546.

Imprisonment for assault in the third degree must be in a penitentiary or county jail, pursuant to the provisions of this section. *People ex rel. Devoe v. Kelly*, 2 N. Y. Cr., 432; 32 Hun, 536; S. C., on appeal to court of appeals, 97 N. Y., 212; 2 N. Y. Cr., 437.

**Special sessions.**—The court of special sessions is restricted by section 717 of Code of Criminal Procedure, in imposing sentence. *People ex rel. Stokes v. Riseley*, 38 Hun, 281; 4 N. Y. Cr., 109; *People v. Carter*, 48 Hun, 167; 15 St. Rep. 840.

This section does not provide for and limit the judgment of a court of special sessions. *Burns v. Norton*, 35 St. Rep., 418. Section 717 of the Code of Criminal Procedure governs such cases. *Id.*

This section does not expressly or impliedly repeal section 717 of the Code of Criminal Procedure. *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr., 439.

See *People v. Meakim*, 133 N. Y., 224; 8 N. Y. Cr., 412; 44 St. Rep., 752; aff'g 61 Hun, 327; 40 St. Rep., 686; *People v. Upton*, 38 Hun, 107; 4 N. Y. Cr., 469; *Brummer v. Downs*, 43 St. Rep., 824; 17 N. Y. Supp., 636; *Matter of Hampe*, 2 City Ct., 403, *note*.

## TITLE I.

### PERSONS PUNISHABLE FOR CRIME.

- SECTION 16.** What persons are punishable criminally.
17. Presumption of responsibility in general.
  18. *Id.*, as to child under seven years.
  19. Age of capability for crime. Age, how determined by examination By record of baptism or birth. By family bible.
  - 20, 21. Irresponsibility, etc., of idiot, lunatic, etc.
  22. Intoxicated persons.
  23. Morbid criminal propensity.
  24. Rule as to married woman.
  25. Rule as to persons acting under threats, etc.
  26. *Id.*, when not done in defense of self or another.
  27. Exemption of public ministers.

**§ 16. What persons are punishable criminally.**--The following persons are liable to punishment within the state:

1. A person who commits within the state any crime, in whole or in part;
2. A person who commits without the state any offense which, if committed within the state, would be larceny under the laws of the state, and is afterward found with any of the property stolen or feloniously appropriated within this state;
3. A person who, being without the state, causes, procures, aids or abets another to commit crime within the state;
4. A person who, being out of this state, abducts or kidnaps by force or fraud, any person contrary to the laws of the place where such act is committed, and brings, sends or conveys such person within the limits of this state, and is afterward found therein;
5. A person who, being out of this state, and with intent to cause within it a result contrary to the laws of this state, does an act which, in its natural and usual course, results in an act or effect contrary to its laws.

See sections 185, 540 and 676, *post*.

See *People v. Bliven*, 112 N. Y., 79; 14 St. Rep. 495 *People v. Lyon*, 99 *id.*, 210; 3 N. Y. Cr., 161; *People v. Marra*, 4 *id.*, 304.

**§ 17. Presumption of responsibility in general.**--A person is presumed to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person, except as otherwise prescribed in this Code.

The provision of the Revised Statutes (part 4, chap. 1, title 7, section 2) was abrogated by this section. *People v. Taylor*, 52 St. Rep., 919; 138 N. Y., 407.

If the prisoner is sufficiently in possession of his faculties to form an intent,

and voluntarily and willfully does an act which has a direct tendency to destroy another's life, the jury have the right—are not bound to do so—to presume that he intends the natural consequences of his act. *People v. Fish*, 125 N. Y., 153;; 8 N. Y. Cr., 143; 34 St. Rep., 843.

In capital, as well as other cases, it must be presumed that a person intends that which is the natural and necessary consequence of the act done by him, unless such act was done under circumstances which preclude the existence of such an intent. *People v. Conroy*, 97 N. Y., 77.

All homicide is presumed to be malicious, and amounting to murder until the contrary appears from circumstances of alleviation, excuse or justification. *Id.*

But there is no legal presumption arising from the proof of the commission of a homicide which concludes a jury from finding upon such evidence alone that there was not such deliberation and premeditation as constitute the crime of murder in the first degree, or but that the act was justifiable or excusable. *Id.*

**§ 18. Presumption as to child under seven years.**—A child under the age of seven years is not capable of committing crime.

**Child under seven.**—The law does not define when a child becomes *sui juris*. *Kunz v. City of Troy*, 104 N. Y. 351; 5 St. Rep. 642.

A child under seven years has not reached an age at which infants are generally supposed to be of full discretion or capable of crime, of which *laches* and neglect are but degrees. *Moebus v. Herrman*, 108 N. Y., 353; 13 St. Rep. 648.

Infants under seven years of age are deemed incapable of committing crime, and such incapacity presumptively continues until the age of twelve. *Stone v. Dry Dock, etc.*, 115 N. Y., 109; 23 St. Rep. 551.

**§ 19. Age of capability for crime. Age, how determined by examination. By record of baptism or birth. By family Bible.**—

A child of the age of seven years and under the age of twelve years, is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him and to know its wrongfulness. Whenever in any legal proceedings it becomes necessary to determine the age of a child, the child may be produced for personal inspection, to enable the magistrate, court or jury, to determine the age thereby; and the court or magistrate may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of age. A copy of the record of baptism of any child in any parish register, or register kept in a church, or by a clergyman thereof, or a certificate of baptism duly authenticated by the person in charge of such register, or who administered said baptism, and also a transcript of the record of birth recorded in any bureau of vital statistics or board of health, duly authenticated by its secretary or under its seal, and the entries made in a family Bible, shall also be competent evidence upon the question of the age.

Amended by chap. 46 of 1884.

This amendment added to the original section, a provision as to an examination to determine age.

Amended by chap. 145 of 1888.

This amendment added to this section, as amended in 1884, a provision as to proof of age by record of baptism or birth, and family Bible.

See section 279, *post*.

**Effect.**—The Code preserves the rule of the common law, except that it fixes the age of twelve instead of fourteen as the time when the presumption of incapacity ceases. *Stone v. Dry Dock, etc.*, 115 N. Y., 109; 23 St. Rep., 551.

**Burden.**—On a criminal charge against an infant between the years of seven and twelve, the burden is on the People to show that he has intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent. *Stone v. Dry Dock, etc.*, 115 N. Y., 109; 23 St. Rep., 551.

**Appearance.**—In determining the age of a child at the time an offense is alleged to have been committed, her appearance upon the witness stand may be taken into consideration by the jury. *People v. Stott*, 4 N. Y. Cr., 308.

The jury have the right to determine the age of the female alleged to have been abducted, by personal inspection and by her general appearance, in connection with other competent testimony. *People v. Platt*, 3 N. Y. Cr., 137. This case was reversed in 100 N. Y., 590, but upon another point.

**Production.**—As to the production of a child for personal inspection, see *People v. Sheppard*, 9 St. Rep. 35; 44 Hun, 565; 5 N. Y. Cr., 136.

**§ 20. Irresponsibility of idiot, lunatic, etc.**—An act done by a person who is an idiot, imbecile, lunatic, or insane, is not a crime. A person cannot be tried, sentenced to any punishment, or punished for a crime, while he is in a state of idiocy, imbecility, lunacy or insanity, so as to be incapable of understanding the proceeding or making his defense.

Amended by chap. 884 of 1882.

This amendment was made before Code took effect.

**Presumption.**—The law presumes sanity in all cases. *People v. Coleman*, 1 N. Y. Cr., 5. To overthrow this presumption, the burden is upon the person who alleges the insanity. *Id.* When evidence has been given in its support, the prosecution then holds the affirmative. *Id.*

**Insane person.**—An insane man frequently deliberates, and, after the most mature deliberation, commits acts which, but for his insanity, would be crimes. *People v. Wood*, 126 N. Y., 268; 36 St. Rep., 963. The question always is, not whether the party deliberated, but whether he was, at the time, insane within the legal definition of the term. *Id.*

An insane person cannot be lawfully punished for an act which was committed by him while in a state of insanity, or when he has become insane during or after a trial or conviction. *People v. McElvaine*, 125 N. Y., 600; 36 St. Rep., 181.

An insane person is incapable of crime. *People v. Coleman*, 1 N. Y. Cr., 2.

**Lunatic.**—A lunatic is not criminally liable for his unlawful acts. *Autremont v. Fire Ass'n*, 48 St. Rep. 43; 65 Hun, 477; 20 N. Y. Supp., 345. But he is responsible civilly for any tort committed by him where a wrongful intent is not an essential thing to be proved. *Id.*

**Moral insanity.**—The species of insanity, called by some moral insanity, constitutes no defense for the commission of crime. *People v. Wood*, 126 N. Y., 269; 36 St. Rep., 963.

**Epileptic mania.**—Where the defense is that the homicide was the unconscious and uncontrollable result of epileptic mania, the absence of motive is important, as bearing upon the issue so presented. *People v. Barber*, 115 N. Y., 475; 25 St. Rep. 184.

**Irresistible impulse.**—The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. *Flanagan v. People*, 52 N. Y., 467; *People v. Carpenter*, 1 St. Rep., 642; 102 *id.*, 250; 4 N. Y. Cr., 187; *People v. Walworth id.*, 395; *Willis v. People*, 32 N. Y., 717; *Moett v. People*, 85 *id.*, 379.

Where the offender knew what he was doing and had the ability to discover



his legal and moral duty in respect to it, the theory of irresistible impulse cannot be invoked, in order to excuse the criminal act. *People v. Coleman*, 1 N. Y. Cr., 3.

**Test.**—When it is said that a prisoner must, at the time of the alleged criminal act, have sufficient capacity to distinguish between right and wrong with respect to such act, it is implied that he must have sufficient capacity to know whether such act is in violation of the law of God or of the land, or of both. *Moett v. People*, 85 N. Y., 380.

The test of responsibility is the capacity to distinguish between right and wrong at the time the act was done, and in respect thereto. *People v. Casey*, 2 N. Y. Cr., 190. The law does not find irresponsibility where the claim is that such capacity exists, without the power to chose between them. *Id.*; *Flanigan v. People*, 52 N. Y., 467. The case of *People v. Casey ante*, was reversed in 2 N. Y. Cr., 194; 96 N. Y., 115, on other grounds.

The test of responsibility for criminal acts, where insanity is asserted, is the capacity of the accused to distinguish between right and wrong at the time and with respect to the act which is the subject of inquiry. *People v. Coleman*, 1 N. Y. Cr., 2.

The true test of criminal responsibility is whether the accused had sufficient reason so know the nature and quality of his act, and whether he has sufficient reason to know right from wrong. *Walker v. People*, 1 N. Y. Cr., 24.

**Reasonable doubt.**—In order to sustain the defense of insanity, the evidence should be clear and substantial. *Walker v. People*, 1 N. Y. Cr., 27. And if there is upon the whole evidence in the case any reasonable doubt, the accused is entitled to the benefit of that doubt and to an acquittal. *Id.*

**Effect of commissioner's report.**—The report of the commissioners under sections 636 to 662 of Criminal Code will not prevent the accused from having the question as to sanity passed upon by a jury on the trial of the indictment. *People v. Haight*, 13 Abb. N. C., 198.

See *People v. Haight*, 3 N. Y. Cr., 61; *People v. Rhineland*, 2 *id.*, 340.

**§ 21. Irresponsibility, etc., of idiots, lunatics, etc.**—A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason, as either

1. Not to know the nature and quality of the act he was doing ;  
or

2. Not to know that the act was wrong

Amended by chap. 384 of 1882.

This amendment was made before Code took effect.

See notes under preceding section.

See notes under section 23, *post*.

The rule established by this section has been criticised because it excludes consideration of the question whether the accused possessed sufficient power of self-restraint to forbear the commission of an act which he clearly perceived to be criminal. *People v. Taylor*, 52 St. Rep., 920; 138 N. Y., 407.

An insane delusion with reference to the conduct and attitude of another cannot excuse the criminal act of taking his life, unless it is of such a character that, if it had been true, it would have rendered the homicide excusable or justifiable. *People v. Taylor*, 52 St. Rep., 919; 138 N. Y., 406.

Under the provision of this section partial insanity, or incipient insanity, is not sufficient, if there is still the ability to form a correct perception of the legal quality of the act and to know that it is wrong. *People v. Taylor*, 52 St. Rep., 919; 138 N. Y., 407. In such case the law presumes that the person has also the power to choose between the right and wrong course of action, and will not permit either courts or juries to speculate as to its possible non-existence. *Id.*

A desire for self-destruction, and the adoption of means to secure it, do not



of themselves indicate a mental impairment, which has advanced to the stage of irresponsibility, otherwise the law would not make the attempt to kill one's self a crime. *People v. Taylor*, 52 St. Rep., 920; 138 N. Y., 408.

See 1 St. Rep., 648; *People v. Carpenter*, 102 N. Y., 250; 4 N. Y. Cr., 187; *People v. Haight*, 3 id., 61; 13 Abb. N. C., 198; *People v. Rhineland*, 2 N. Y. Cr., 340.

**§ 22. Intoxicated person**—No act committed by a person while in a state of voluntary intoxication, shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

**Effect of intoxication.**—The law expressly declares that voluntary intoxication, though furnishing no excuse for a criminal act, may be considered by the jury upon the questions of intent and of the degree of crime. *People v. Conroy*, 2 N. Y. Cr., 248; 33 Hun, 121. It may also be considered upon the question of deliberation. *Id.*

The jury have a right to consider the intoxicated condition of the accused. *People v. Cassiano*, 30 Hun, 388; 1 N. Y. Cr., 505.

Intoxication does not absolutely tend to show an absence of deliberation and premeditation. *People v. Mills*, 98 N. Y., 181; 3 N. Y. Cr., 187; 21 W. Dig., 137. It is a question for the jury to determine whether it did not tend to show such absence. *Id.*

The only materiality of the evidence of the defendant's intoxication is its bearing upon the questions of deliberation, premeditation and intent. *People v. Fish*, 125 N. Y., 146; 8 N. Y. Cr., 136; 34 St. Rep., 843. If he was sober enough to form an intent and to deliberate and premeditate the crime, his responsibility is the same as though he had been perfectly sober. *Id.* His condition in this respect must be taken into account in weighing the evidence as to deliberation and meditation. *Id.*

An appetite for strong drink, so powerful as to overcome the will of the accused, and to amount to a disease, where he was able, at the time of, and in respect to, the act committed, to distinguish between right and wrong, will not exonerate him from responsibility for the crime. *Flanigan v. People*, 86 N. Y., 559.

In the case last cited, it was held that the rule is well settled that voluntary intoxication of one who, without provocation, commits a homicide, although amounting to a frenzy, does not exempt him from the same construction of his conduct, and the same legal inferences, upon the question of intent, as affecting the grade of his crime, as are applicable to a person entirely sober. But this section seems to have changed this principle of law by making this fact an element for the consideration of the jury in determining the purpose, motive or intent.

**§ 23. Morbid criminal propensity.**—A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been capable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.

**Eccentricities**—Where the acts of the accused were such as to satisfy the jury that the killing was the result of premeditation and deliberation, his bad temper or eccentricities of character, not amounting to insanity, cannot detract from the effect of his acts or shield him from responsibility therefor. *Andram v. People*, 88 N. Y., 200.

The theory that eccentricities of character and inordinate passion can render a sane man incapable of committing an offense which involves deliberation wholly untenable. *Id.*

**Irresistible impulse.**—The doctrine of irresponsibility for a crime committed by a person who had sufficient mental capacity to comprehend the nature and quality of his act, and to know that it was wrong, on the ground that he had no power to control his actions, has not met with favor in the adjudications in this state. *Walker v. People*, 88 N. Y., 86; 1 N. Y. Cr., 24.

That the accused pretends that he is impelled by an irresistible and overwhelming impulse to commit the act, is no defense. *People v. Waltz*, 50 How 214

**Propensity to drink.**—Effect of a morbid propensity to drink as a defense on the trial of an indictment for murder. *People v. Otto*, 88 Hun, 96 N. Y. Cr., 154.

**Passion.**—The accused is responsible even though some controlling disease was, in truth, the acting power within him, which he could not resist, or if he had not a sufficient use of his reason to control the passion which prompted the act. *People v. Carpenter*, 1 St. Rep., 648; 102 N. Y., 250; 4 N. Y. Cr., 1 *People v. Walworth*, 4 *id.*, 395; *Willis v. People*, 32 N. Y., 717.

**Spirits.**—Belief of spirits, in itself, is no defense, provided the judgment and reason declared to the consciousness of the accused that the act was wrong. *People v. Waltz*, 50 How, 214.

**§ 24. Rule as to married woman.**—It is not a defense, to a married woman charged with crime, that the alleged criminal act was committed by her in the presence of her husband.

**Coercion.**—In *Seiler v. People*, 77 N. Y., 413, and *Goldstein v. People*, *id.*, 233; 10 W. Dig., 506, it was held that coverture was no protection when the wife is shown to have taken an active and willing part in the criminal act or where she is the inciter of it. It was also held that the fact of the husband's presence was but *prima facie* evidence of coercion, which, like other presumptions, may be rebutted and overcome by proof. See *People v. Ryland*, 28 How 572; 1 N. Y. Cr., 123; 16 W. Dig., 232. But this section has removed the burden from the People of overcoming any presumption in favor of married women who participate with their husbands in the commission of crime.

Whatever of a criminal nature the wife does in the presence of the husband is presumed to be compelled by him. *People v. Ryland*, 97 N. Y., 126; 2 N. Y. Cr., 442. This presumption is *prima facie*, and not conclusive. *Id.* It appears that she was not urged or drawn to the offense by him, but was the inciter of it, she is liable as well as he. *Id.* This section extinguishes the presumptive defense of duress in favor of married women.

**§ 25. Rule as to persons under threats, etc.**—When a crime is committed or participated in by two or more persons, and is committed, aided, or participated in by any one of them only because, during the time of its commission, he is compelled to do, or to aid or participate in the act, by threats of another person engaged in the act or omission, and reasonable apprehension on his part of instant death or grievous bodily harm, in case he refuses, the threats and apprehension constitute duress, and excuse him.

**§ 26. Rule, when act is done in defense of self or another.**—An act, otherwise criminal, is justifiable when it is done to protect the person committing it, or another whom he is bound to protect, from inevitable and irreparable personal injury, and

injury could only be prevented by the act, nothing more being done than is necessary to prevent the injury.

See sections 203, 204, 205 and 223, *post*; sections 79, 80 and 81 of Code of Criminal Procedure.

See note upon self-defense in *People v. Lyons*, 6 N. Y. Cr., 119.

**Personal property.**—Defense of personal property. *Gyre v. Culver*, 47 Barb., 592; *Morgan v. Durfee*, 21 Alb. L. J., 215.

The owner of personal property is liable to an indictment for using force to prevent an officer from levying upon such property by virtue of an execution against another person, where the officer acts, not wantonly, carelessly or oppressively, but in good faith, believing the property to be that of the judgment debtor. *People v. Hall*, 2 N. Y. Cr., 137; 18 W. Dig., 357.

**Real property.**—Defense of possession of real property. *Corey v. People*, 45 Barb., 262; *Woods v. Phillips*, 43 N. Y., 152; *People v. Gulick*, Lalor's Supp., 229; *Harrington v. People*, 6 Barb., 607.

**Felony.**—Resistance to prevent felony. *People v. Hand*, 4 Alb. L. J., 91; *Ruloff v. People*, 45 N. Y., 213.

One who is opposing and endeavoring to prevent the consummation of a felony by others may properly use all necessary force for that purpose, and resist all attempts to inflict bodily injury upon himself, and may lawfully detain the felons and hand them over to the officers of the law. *Ruloff v. People*, *ante*.

**Burden.**—The burden is upon the accused, after it is established that he shot the complainant, to show to the satisfaction of the jury the existence of sufficient cause to justify him in the use of the deadly weapon. *Sawyer v. People*, 1 N. Y. Cr., 249; 16 W. Dig., 394.

**Application to authorities.**—A person assaulted and beaten should, if he has opportunity to do so, apply to the proper authorities for redress and protection. *People v. Lyons*, 6 N. Y. Cr., 118.

He cannot take the law into his own hands, arm himself, and go to the place where he expects to meet his former assailant and inflict bodily injury upon him. *Id.* And if, while intent upon such purpose, he meets such assailant, and, before he is ready to fire the shot, and while the intent still exists, he accidentally discharges his pistol and kills his enemy, the homicide is not excusable. *Id.*

A person need not first invoke protection against anticipated assault. *Evers v. People*, 3 Hun, 716; 63 N. Y., 625.

**Provocation.**—Where a person is himself the cause of an assault made upon him, and has intentionally provoked it, he cannot afterwards excuse himself for inflicting needless violence upon the person of such party. *People v. McGrath*, 13 St. Rep., 359; 47 Hun, 326. To justify a person in beating another, the beating must appear to be necessary for his own defense and protection. *Id.*

**Homicide.**—In order to justify resistance, the party assailed must avoid attack if possible. *People v. Sullivan*, 7 N. Y., 396; *People v. Cole*, 4 Park., 36; *People v. Harper*, Edm. S. C., 180; *Shorter v. People*, 2 N. Y., 193.

If one is attacked with a dangerous weapon, it is incumbent upon him to avoid the assault by retreat, if retreat is open to him; but if he cannot by so doing avoid the attack, he has a right to defend himself; and, if in such defense he kills the attacking party, the law will justify him. *People v. Minisci*, 13 St. Rep., 737.

A person if attacked, and justified in reasonably apprehending great bodily harm, and the danger is imminent, may kill his assailant. *Shorter v. People*, 2 N. Y., 193; *Patterson v. People*, 46 Barb., 625. See *People v. Lamb*, 54 id., 342; *People v. Austin*, 1 Park., 154; *People v. Cole*, 4 id., 35; *Pfomer v. People*, id., 558; *Uhl v. People*, 5 id., 410.

**§ 27. Exemption of public ministers.**—Ambassadors and other public ministers from foreign governments, accredited to the president or government of the United States, and recognized according to the laws of the United States, with their secretaries,

messengers, families and servants, are not liable to punishment in this state, but are to be returned to their own country for trial and punishment.

Section 2, Art. 3 of Federal Constitution.

## TITLE II

### OF PARTIES TO CRIME.

- SECTION 28.** Principal and accessory.  
 29. Definition of principal.  
 30. Definition of accessory.  
 31. All principals in misdemeanors.  
 32. Punishment of accessories.  
 33. Punishment of accessories.

**§ 28. Principal and accessory.**—A party to a crime is, either.

1. A principal; or,
2. An accessory.

Parties to the commission of a crime are either principals or accessories, as classified or defined by this and the following two sections. *People v. Sanborn*, 14 St. Rep., 125.

**§ 29. Definition of principal.**—A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal.

The case of *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 35, was reversed in 6 St. Rep., 328; 105 N. Y., 146; 5 N. Y. Cr., 335.

The case of *People v. Sharp*, 10 St. Rep., 522; 45 Hun, 502, was reversed in 12 St. Rep., 217; 107 N. Y., 427.

**Principal.**—This definition embraces and defines the offense heretofore known as being an accessory before the fact, and makes a person who is guilty of that crime principal to the felony. *People v. Sanborn*, 14 St. Rep., 126.

The effect of the provisions of this section is to abolish the offense of being an accessory before the fact as defined by the common law. *Id.*

The case of an accessory before the fact has now, by means of this section, been made the case of a principal, and he occupies the same position in the case of felony as such an individual heretofore occupied in cases of treason and misdemeanor. *People v. Bliven*, 112 N. Y., 83; 20 St. Rep., 487; 14 id., 495.

Prior to the Code, a person, who merely counselled and abetted another in a scheme to commit a crime, was not deemed a principal, and could not be convicted under an indictment charging him as such. *People v. Kief*, 58 Hun, 344; 34 St. Rep., 528; 11 N. Y. Supp., 927. Now, under the Code, an issue as to the real principal's guilt may arise under an indictment charging the abetter, or both, as principals. *Id.*

Before the enactment of this section, where a party was indicted as accessory before the fact to a felony, for which another had been indicted as principal, the trial and conviction of the principal were essential to the prosecution of the charge against the accessory. *People v. Kief*, 126 N. Y., 663; 4 Sil. (Ct. App.), 450; 37 St. Rep., 479. But, with the change effected by this section, the distinction between principal and accessory disappeared, and, thenceforward, he who aids, abets or counsels in the commission of a crime becomes

equally guilty with him who commits it, and can be indicted, tried and convicted as a principal. *Id.*

This section includes in the term "principal," one who, though absent at the time, counsels the commission. *People v. Bliven*, 112 N. Y., 91; 20 St. Rep., 487; 14 *id.*, 495.

A person who, though not present when the act was committed, had advised, commanded or procured the doing of the act, may be indicted and convicted of the same crime with the person who in fact committed the act. *People v. Cotto*, 131 N. Y., 597; 42 St. Rep., 715; 4 Sil. (Ct. App.), 10.

Person confederating and present with another, while the latter commits a felony, is a principal. *People v. McElroy*, 37 St. Rep., 650.

Persons, who knowingly promote and participate in carrying out a criminal scheme, are all principals. *Leonard v. Poole*, 28 St. Rep., 753; 114 N. Y., 878.

One who counsels another to commit a crime is a principal. *People v. Phelps*, 61 Hun, 115; 39 St. Rep., 599; 15 N. Y. Supp., 492. But where the crime is not committed, such person is not a principal, whatever counsel he may have given. *Id.*

**Instances**—All who procure the commission of felonies, whether present or absent, are principals. *People v. Bliven*, 14 St. Rep., 496; 6 N. Y. Cr., 368.

A person, who induces another to commit the crime of burglary in the third degree, is a principal. *People v. Bosworth*, 64 Hun, 74; 45 St. Rep., 517; 19 N. Y. Supp., 115.

A person, who procures the forged indorsement of a promissory note to be written, being present at the time, aiding and abetting the forgery, is properly charged as a principal. *People v. Tower*, 48 St. Rep., 488; 135 N. Y., 459.

Where the participation of the defendant in the crime of larceny has been confined to the fact of counselling and inducing its commission, he is a principal in the crime. *People v. Wiley*, 48 St. Rep., 500; 20 N. Y. Supp., 446.

The person who employs another to commit a larceny and the employe are principals in the commission of the crime. *People v. Brien*, 53 Hun, 498; 25 St. Rep., 229; 7 N. Y. Cr., 171; 6 N. Y. Supp., 199.

Persons aiding and assisting another in committing the crime of rape are liable as principals. *People v. Batterson*, 50 Hun, 45; 5 N. Y. Cr., 176; 2 N. Y. Supp., 377; 18 St. Rep., 845.

**Bar.**—The acquittal of one of several persons indicted for forgery is no legal interruption to the conviction of another of them. *People v. Bassford*, 21 W. Dig., 349; 3 N. Y. Cr., 223.

See *People v. Fitzgerald*, 5 N. Y. Cr., 343; 6 St. Rep., 599.

**§ 30. Definition of accessory.**—A person who, after the commission of a felony, harbors, conceals or aids the offender, with intent that he may avoid or escape from arrest, trial, conviction or punishment, having knowledge or reasonable ground to believe that such offender is liable to arrest, has been arrested, is indicted or convicted, or has committed a felony, is an accessory to the felony.

**Accessory after fact.**—The offense of being an accessory to a felony, after the fact is preserved by the Penal Code and is defined in this section. *People v. Sanborn*, 14 St. Rep., 127.

To constitute the offense, one must help the principal to elude or evade the capture. *People v. Dunn*, 53 Hun, 381; 7 N. Y. Cr., 186; 25 St. Rep., 460; 6 N. Y. Supp., 805. Failing to prosecute or preventing the attendance of witnesses, does not render one an accessory after the fact. *Id.* Nor does any participation in negotiating a compromise have such effect. *Id.*

**§ 31. All principals in misdemeanors.**—A person who commits or participates in an act which would make him an acces-

sory if the crime committed were a felony, is a principal and may be indicted and punished as such, if the crime be a misdemeanor.

See section 682, *post*.

The case of *People v. Lyon*, 33 Hun, 623; 2 N. Y. Cr., 515, was reversed in 99 N. Y., 210.

**No accessories.**—It is an elementary principle that in misdemeanors there can be no accessories. *People v. Clark*, 8 N. Y. Cr., 197; 14 N. Y. Supp., 648, 655. This principle was incorporated into this section. *Id*.

There are no accessories in cases of misdemeanors. *People v. Lyon*, 99 N. Y., 210; 3 N. Y. Cr., 163.

Accessories, if the crime is a misdemeanor, may be indicted and punished as principals. *People v. Clark*, *ante*.

**§ 32. Punishment of accessories.**—An accessory to a felony may be indicted, tried, and convicted, either in the county where he became an accessory, or in the county where the principal felony was committed, and whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and although the principal has been pardoned or otherwise discharged after conviction.

See section 126, *post*.

The court intimated in *People v. O'Connell*, 60 Hun, 111; 38 St. Rep., 108, that a man cannot legally be indicted and tried as accessory to a felony until the principal be convicted. This dictum is opposed to the plain language of this section.

What evidence sufficient to justify a conviction as a principal, not simply as an accessory before the fact. *People v. Ryland*, 97 N. Y., 126.

See *People v. Bassford*, 21 W. Dig., 349; 3 N. Y. Cr., 223.

**§ 33. Punishment of accessory.**—Except in a case where a different punishment is specially prescribed by law, a person convicted as an accessory to a felony is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both.

The reference to this section in *People ex rel. Kopp v. Com'rs, etc.*, 3 St. Rep., 538; 102 N. Y., 587; 4 N. Y. Cr., 447, should be to section 3, *ante*.

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## TITLE III

### DEGREES IN THE COMMISSION OF CRIMES AND ATTEMPTS TO COMMIT CRIMES.

**SECTION 34.** What is an attempt to commit a crime.

35. Prisoner indicted may be convicted of lesser crime, or attempt.

36. Acquittal or conviction bars indictment for another degree, or attempt.

**§ 34. What is an attempt to commit a crime.**—An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime.

See section 685, *post*.

The case of *People v. Moran*, 54 Hun, 282; 27 St. Rep., 23; 7 N. Y. Co., 333; 7 N. Y. Supp., 584, was reversed in 123 N. Y., 254; 8 N. Y. Cr., 106; 33 St. Rep., 397.

**What is an attempt.**—Under the assumption that an attempt cannot be predicated of any act tending to the perpetration of a crime, unless the condi-



tion was such as to render its commission possible, the general term, in *People v. Moran*, 54 Hun, 279; 7 N. Y. Cr., 336; 27 St. Rep., 20, gave a construction to this section, which materially circumscribes its plain meaning and effect.

But this section was intended to reach cases where an intent to commit a crime and an effort to perpetrate it, though ineffectual, co-exist. *People v. Moran*, 123 N. Y., 257; 8 N. Y. Cr., 107; 33 St. Rep., 398; rev'g 54 Hun, 279; 7 N. Y. Cr., 336; 27 St. Rep., 20; 7 N. Y. Supp., 584. The question whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. *Id.* The attempt constitutes the offense, though for some reason, not discoverable by him, the actual crime may, under existing circumstances, be incapable of accomplishment. *Id.*

There is such an offense as an attempt to commit an assault in the first degree. *People v. O'Connell*, 60 Hun, 113; 38 St. Rep., 108; 14 N. Y. Supp., 486. An approach with an intent to commit the assault, though not near enough to enable it to be committed, will constitute such an attempt. *Id.* If the defendant arms himself with a deadly weapon and endeavors to place himself in the position to use it by executing his intention to kill, he is guilty of an attempt to commit an assault in the first degree. *Id.*

See *People v. Phelps*, 61 Hun, 115. 39 St. Rep., 599. 15 N. Y. Supp., 442; *People v. Johnson*, 18 St. Rep., 48; 46 Hun, 470; *People v. Dartmore*, 15 St. Rep., 839; 48 *id.*, 323; 2 N. Y. Supp., 311.

**§ 35. Prisoner indicted may be convicted of lesser crime, or attempt.**—Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime.

See section 10, *ante*; section 685, *post*; sections 444 and 445 of Code of Criminal Procedure.

**Less degree.**—The charge of a crime in the first, permits conviction in the second, degree. *People v. Sullivan*, 4 N. Y. Cr., 197.

This section allows of conviction, under a charge for a higher, for an inferior degree of crime. *People v. McCallam*, 3 N. Y. Cr., 199.

An indictment, under section 27 of 2 R. S., 702, for murder in the first degree, in the common law form, permitted a conviction of manslaughter in the first degree, upon a plea of guilty to the last named offense. *People v. McDonnell*, 92 N. Y., 657; 1 N. Y. Cr., 366.

It is only after the jury have found the prisoner not guilty of the crime charged in the indictment, that they are authorized to find him guilty of any inferior degree of the crime charged. *People v. Willson*, 109 N. Y., 357; 15 St. Rep., 508.

Upon the trial of an indictment for manslaughter, under subdivision 1 of section 189, *post*, the prisoner may be convicted of the misdemeanor in the commission of which he was engaged at the time of the homicide, if the evidence warrants such conviction. *People v. McDonald*, 49 Hun, 69; 17 St. Rep., 494.

**Attempt.**—Upon an indictment for a crime, the defendant may be convicted of an attempt to commit the crime charged. *People v. O'Connell*, 60 Hun, 113; 38 St. Rep., 108; 14 N. Y. Supp., 485.

**When not to convict of attempt.**—If the commission of the crime is established or admitted, the defendant is not entitled to have the jury instructed that they may convict of an attempt to commit it. *People v. Dartmore*, 15 St. Rep., 839; 48 Hun, 323; 2 N. Y. Supp., 311.

In *Sullivan v. People*, 27 Hun, 88, it was held that, where burglary in the first degree is charged in the indictment, and the proof shows the commission of the offense of burglary in the second degree, the jury cannot convict of an attempt.

See *People v. Palmer*, 43 Hun, 406; 5 N. Y. Cr., 105; 8 St. Rep., 500.



**§ 36. Acquittal or conviction bars indictment for another degree, or attempt.**—Where a prisoner is acquitted or convicted, upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime, in any other degree, nor for an attempt to commit the crime so charged, or any degree thereof.

See section 6, Art. 1 of State Constitution.

**When bar.**—This section has reference only to cases where the prior judgment of conviction has remained unreversed. *People v. Palmer*, 109 N. Y., 419; 15 St. Rep., 78.

It was held in *People v. Palmer*, 43 Hun, 397; 5 N. Y. Cr., 109; 8 St. Rep., 500; 6 id., 341, that, where the defendant has been acquitted of the higher crimes charged in the indictment, he cannot be tried for those crimes in any other degree. But, upon appeal to the court of appeals, it was held otherwise. 109 N. Y., 418; 15 St. Rep., 78.

Only where the result of the former trial was, in effect, an acquittal of another crime charged in the indictment, may the defendant plead that result in bar of a further prosecution for that crime. *People v. Palmer*, 109 N. Y., 420; 15 St. Rep., 78.

For the commission of the same crime, in any degree, the defendant cannot be again tried so long as the judgment therefor stands unreversed. *People v. McCarthy*, 110 N. Y., 315; 18 St. Rep., 267.

The omission of the jury to find one way or the other upon some of the counts in the indictment is equivalent to an acquittal on those counts, and any judgment as to them is a bar to a further prosecution. *People v. McDonald*, 49 Hun, 70; 17 St. Rep., 494; *People v. Seeley*, 3 N. Y. Cr., 282.

**When not a bar.**—A conviction for the offense of assault and battery, obtained during the lifetime of the assaulted party, is no bar to a prosecution for the offense of manslaughter found after his decease. *People v. Warren*, 109 N. Y., 617; 14 St. Rep., 34.

Where a defendant indicted for murder in the first degree is put on trial for that crime, a conviction of murder in the second degree, or of manslaughter, is an acquittal of any higher degree of the crime than that for which he was convicted. *People v. Cignarale*, 110 N. Y., 30; 16 St. Rep., 155. And though he procures a reversal of such judgment, he cannot thereafter be tried for any higher degree of crime than that of which he was formerly convicted. *Id.* But where he interposes a plea of not guilty to an indictment for murder, then withdraws such plea and pleads guilty of murder in the second degree, which he subsequently withdraws, renews his former plea of not guilty, and goes to trial thereon, the latter withdrawal operates as a waiver of the benefit of the implication, which existed so long as the plea of guilty remained, of an acquittal of the higher crime. *Id.*

## TITLE IV.

### TREASON.

**SECTION 37.** Treason against the state defined.

38. Treason, how punished.

39. Levying war defined.

40. Resistance to a statute, when levying war.

**§ 37. Treason against the state defined.**—Treason against the people of the state consists in

1. Levying war against the people of the state, within this state; or

2. A combination of two or more persons by force to usurp the

government of the state, or to overturn the same, shown by a forcible attempt, made within the state, to accomplish that purpose; or

3. Adhering to the enemies of the state, while separately engaged in war with a foreign enemy, in a case prescribed in the constitution of the United States, or giving to such enemies aid and comfort within the state or elsewhere.

**What is not.**—Adhering and giving aid and comfort to the enemies of the United States do not constitute treason against the state, nor are they cognizable in the state courts. *People v. Lynch*, 11 Johns., 549.

Bare conspiracy is not treason. *United States v. Mitchell*, 2 Dall., 348.

**What is.**—Insurrection to prevent by force, etc., execution of act of Congress is treason. *United States v. Mitchell*, 2 Dall., 348; *Same v. Hannay*, 2 Wall., Jr., 189.

Delivering up prisoners and deserters to the enemy. *United States v. Hodges*, 2 Wheeler, C. C., 477.

Entering service of enemies. *Respublica v. McCarty*, 2 Dall., 86; *Robert's case*, 1 id., 89.

**§38. Treason, how punished.**—Treason is punishable by death.

See sections 896, 897, 814 and 826 of Code of Criminal Procedure; section 5, Art. 4 of State Constitution; section 3, Art. 3, of Federal Constitution.

**§ 39. Levying war defined.**—To constitute levying war against the people of this state, an actual act of war must be committed. To conspire to levy war is not enough.

To constitute "levying of war," there must be an assemblage for effecting by force a treasonable purpose. *Ex parte Bollman*, 4 Cranch, 75; *United States v. Burr*, id., 469. See *United States v. Greathouse*, 2 Abb., 364; *Same v. Hoxie*, 1 Paine, 265; *Same v. Poyer*, 3 Wash. C. C., 284.

**§ 40. Resistance to a statute, when levying war.**—Where persons rise in insurrection with intent to prevent in general by force and intimidation, the execution of a statute of this state, or to force its repeal, they are guilty of levying war. But an endeavor, although by numbers and force of arms, to resist the execution of a law in a single instance, and for a private purpose, is not levying war.

See notes under last three preceding sections.

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## TITLE V.

### OF CRIMES AGAINST THE ELECTIVE FRANCHISE.

**SECTION 41. Misdemeanors at political caucuses and conventions.**

41a. False registration.

41b. Mutilation, destruction or loss of registry list.

41c. Misconduct of registry officers.

41d. Failure of house dweller to answer inquiries.

41e. Removal, mutilation or destruction of election supplies, poll-lists or cards of instruction.

41f. Refusal to permit employes to attend election.

- SECTION 41g. Misconduct in relation to certificates of nomination and official ballots.**
- 41h. Failure to deliver official ballots.
  - 41i. Misconduct of election officers and watchers.
  - 41j. Violation of election law by public officer.
  - 41k. Misdemeanors in relation to elections.
  - 41l. Voting after conviction of infamous crime.
  - 41m. Voting by inhabitant of another state or country.
  - 41n. False returns.
  - 41o. Furnishing money or entertainment to induce attendance at polls.
  - 41p. Giving considerations for franchise.
  - 41q. Receiving consideration for franchise.
  - 41r. Testimony upon prosecution.
  - 41s. Bribery or intimidation of elector in military service of United States.
  - 41t. Duress and intimidation\* of voters.
  - 41u. Political assessment.
  - 41v. Political assessments.
  - 41w. Corrupt use of position or authority.
  - 41x. Failure to file candidates' statement of expenses.
  - 41x. Procuring fraudulent certificates in order to vote.
  - 41y. Presenting fraudulent certificates to registry boards to procure registration.

Title 5 was amended by chap. 94 of 1890, which added sections 41 to 41g, inclusive.

**§ 41. Misdemeanor at, or in connection with political caucuses, primary elections, enrollment in political parties, committees and conventions.** Any person who

1. At a political caucus, or at a primary election of a party wilfully votes, or attempts to vote, without being entitled to do so, or votes, or attempts to vote, on any name other than his own, or on the same day more than once on his own name; or

2. Votes, or offers to vote, at a political caucus, or primary election of a party, having voted at the political caucus or primary election of any other political party on the same day, or being at the time enrolled in a party other than the party at whose primary he votes or offers to vote; or, who causes his name to be placed upon the rolls of a party organization of one party while his name is by his consent or procurement upon the rolls of a party organization of another party; or,

Am'd by chap. 623, Laws 1905. Took effect May 26, 1905.

3. At a political caucus, or at a primary election, for the purpose of affecting the result thereof, votes or attempts to vote two or more ballots, or adds, or attempts to add any ballot to those lawfully cast, by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted, or who adds or mixes with or attempts to add to or mix with, the ballots lawfully cast, another ballot or other ballots before the votes have been counted or canvassed, or while the votes are being counted or canvassed; or at any time abstracts any ballots lawfully cast, with intent to change the result of such election or to change the count thereat in favor of or against any person voted for at such election, or to prevent the ballots being recounted or used as evidence; or carries away, destroys, loses, conceals, de-

tains, secrets, or mutilates, or attempts to carry away, destroy, conceal, detain, secrete, or mutilate, any tally lists, ballots, ballot boxes, enrollment books, certificates of return, or any official documents provided for by the primary election law or otherwise by law, for the purpose of affecting or invalidating the result of such election, or of destroying evidence; or in any manner interferes with the officers holding any primary election or conducting the canvass of the votes cast thereat, or with voters lawfully exercising, or seeking to exercise, their right of voting at such primary election; or

4. For the purpose of securing enrollment as a member of a political party, or for the purpose of being allowed to vote at a primary election as a member of a political party, makes and deposits or files, or makes or deposits or files with a board of primary inspectors, or with any public officer or board, a false declaration of party affiliation or willfully make a false declaration of residence, either by an enrollment blank or otherwise, or falsely answers any pertinent question asked him by the board of primary inspectors, or the board of election inspectors, or by a member thereof; or knowingly, on any day of registration or in the interval between any such day and the next ensuing day of general election, reveals or discloses the names or number of the enrolled electors of any party, or makes, publishes, or circulates a list of such names, or of any thereof, or does or permits any act by which the name of the party with which an elector has enrolled, or the number of electors enrolled with a party, may be disclosed; or

5. Fraudulently or wrongfully does any act tending to affect the result of any election at a political caucus or of any primary election or convention; or

6. Induces or attempts to induce any officer, teller, canvasser, poll clerk, primary election inspector, election inspector, custodian of primary records, or clerk or employee of or in the office of a custodian of primary records at a political caucus, or primary election, or convention, or while discharging any duty or performing any act required or made necessary by the primary election law, to do any act in violation of his duty, or in violation of the primary election law; or

Am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

7. Directly or indirectly, by himself, or through any other person, pays, or offers to pay, money or other valuable thing, or promises a place or position, or offers any other consideration or makes any other promise, to any person, to induce any voter or voters to vote, or refrain from voting, at a political caucus, primary election, or convention, for or against any particular person or persons; or does or offers to do, anything to hinder or delay any elector from taking part in, or voting at, a political caucus, or at a primary election; or

8. By menace or other unlawful or corrupt means, directly or indirectly, influences or attempts to influence, the vote of any person entitled to vote at a political caucus, primary election, or convention, or obstructs such person in voting or prevents him from voting thereat; or

9. Directly or indirectly, by himself or through any other person receives money or other valuable thing, or a promise of a place or position, before, at, or after any political caucus, primary, election, or convention, for voting or refraining from voting for or against any person, or for voting or refraining from voting at a political caucus, primary, election, or convention; or

10. Being an officer, teller, canvasser, primary inspector, at a political caucus, or at a primary election, knowingly permits any fraudulent vote to be cast, or knowingly receives and deposits in the ballot box any ballots offered by any person not qualified to vote; or permits the removal of

ballots from the polling place before the close of the polls, or refuses to receive ballots intended for the electors of the district, or refuses to deliver to any elector ballots intended for the electors of the district which have been delivered to the board of inspectors, or permits electioneering within the polling place, or within one hundred feet therefrom, or fails to keep order within the polling place, or permits any person other than the inspectors to accompany an elector into a voting booth, or enters the voting booth with any elector, except one entitled to receive assistance in the preparation of his ballot, or permits any person other than a voter, who has not voted, or watcher, to come within the guardrail or removes or permits another to remove any mark placed upon a ballot for its identification, or

Amended by chap. 371 of 1901. In effect April 17, 1901.

11. Being an officer, custodian of primary records, clerk or employee of or in the office of a custodian of primary records, election inspector, primary inspector, or poll clerk, knowingly puts opposits the name of an elector in an enrollment book any enrollment number other than the number opposite such name on the registration books of such district, or knowingly delivers to or receives from any elector on any day of registration an enrollment blank or envelope on which is any other enrollment number than that so opposite his name on such books of registration, or knowingly transcribes from an enrollment blank to the enrollment books any refusal to enroll or enrollment not indicated on the enrollment blank of the elector of such district whose enrollment number appears on the same, or refuses or willfully neglects to transcribe from any enrollment blank to the proper enrollment books any refusal to enroll or enrollment indicated on the enrollment blank of such an elector, enrolls or attempts to enroll as a member of a political party, upon any of the enrollment books, any person not qualified to enroll as such, or fraudulently enters thereupon the name of any person who has not enrolled as a member of any political party, or refuses or willfully neglects to enroll upon any of the enrollment books the name of any qualified person who has demanded to be enrolled as a member of a political party, or at any time strikes from any of the enrollment books the name of any person duly enrolled, or at any time adds to any of the enrollment books the name of any person not qualified to be enrolled as a member of a political party, or the name of any person who in fact has not enrolled as such; or makes marks upon, mutilates, carries away, conceals, alters, or destroys any enrollment blank or enrollment envelope used or deposited by an elector on a day of registration for the purpose of enrolling or refusing to enroll himself as a member of a political party; or mutilates, carries away, conceals, alters, or destroys, any statement or declaration made by a qualified voter for the purpose of enrolling as a member of a party; or, prior to the close of the last meeting for registration in any year, mutilates, carries away, conceals, alters, or destroys any enrollment blanks or enrollment envelopes not then delivered to electors; or

12. Being an officer, teller, canvasser, election inspector, primary inspector, custodian of primary records, clerk or employee of or in the office of a custodian of primary records, or any officer of a political committee or a convention, willfully omits, refuses or neglects to do any act required by the primary election law or otherwise by law, or violates any of the provisions of the primary election law, or makes or attempts to make any false canvass of the ballots cast at a political caucus, primary election, or convention, or a false statement of the result of a canvass of the ballots cast thereat; or

13. Being a custodian of primary records, or an officer of a political committee, or of a convention, who is charged with, or assumes, the duty of making up the preliminary roll of any convention, willfully includes in such roll the name of any person not certified to be elected thereto in accordance with the provisions of law, or who willfully omits from such roll the name of any person who is so certified to be a delegate to such convention:

Is guilty of a misdemeanor.

Amended by chap. 530 of 1899. In effect May 5, 1899.

**§ 41a. False registration.**—Any person who:

1. Causes or attempts to cause his name to be placed upon any list or register of voters in more than one election district for the same election, or more than once in the same election district; or

2. Who causes or attempts to cause his name to be placed upon a list or register of voters knowing that he, will not be a qualified voter in the district at the election for which such list or register is made; or

3. Who registers or attempts to register as an elector under any other name than his own; or

4. Who knowingly gives a false residence within the election district when registering as an elector; or

5. Who knowingly permits, aids, assists, abets, procures, commands or advises another to commit any such act is guilty of a felony, punishable by (1) imprisonment in a state prison for not more than five years.

Am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

**§ 41aa. Misconduct of registry officers.**—Any member or clerk of a registry board who wilfully violates any provision of the election law relative to the registration of electors or wilfully neglects or refuses to perform any duty imposed on him by law, or is guilty of any fraud in the execution of the duties of his office, is guilty of a felony, punishable by imprisonment for not more than ten years.

Numbering changed from 41c to 41aa by chap. 625, Laws 1905. Took effect May 26, 1905.

**§ 41b. Mutilation, destruction or loss of registry list.**—Any person who wilfully loses, alters, destroys or mutilates the list or register of voters in any election district, or a certified copy thereof, or removes from the place of registration the public copy of such registration, after the making of the same and before the closing of the polls of the election for which the same is made, is guilty of a misdemeanor.

Am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

**§ 41d. Failure of householder to answer inquiries.**—Any person dwelling in a building in a city who wilfully refuses to truly answer any question or who shall give false answers to any questions asked by any elector of such city, between the first meeting of the boards of registry therein for any election and the closing of the polls at such election, relating to the residence and qualifications as a voter of any person dwelling in such building, or of any person who appears upon the list or registry of voters made by a board of registry as residing at such building, or who knowingly harbors or conceals any person who has falsely registered as a voter, or who shall rent any room or rooms, bed or beds to any person to be used by such person for himself or any other person for the purpose of unlawfully registering or voting therefrom is guilty of a misdemeanor.

Am'd by chap. 692, Laws 1893. Re-enacted by chap. 625, Laws 1905. Took effect May 26, 1905.

The former section was transferred to section 41t, *post* and the present section added, by chap. 693 of 1892.

Am'd by chap. 692 of 1893.

Am'd by chap. 271 of 1901. In effect April 17, 1901.

**§ 41e. Removal, mutilation or destruction of election booths, supplies, poll-lists or cards of instruction.**—Any person who:

1. During an election or town meeting, wilfully defaces or injures a voting booth or compartment, or wilfully removes or destroys any of the supplies or other conveniences placed in the voting booths or compartments in pursuance of law; or,

2. Before the closing of the polls, wilfully defaces or destroys any list of candidates to be voted for at such election or town meeting, posted in accordance with the election law; or,

3. During an election or town meeting, wilfully removes or defaces the cards for the instruction of voters, posted in accordance with the election law, is guilty of a misdemeanor.



**§ 41f. Refusal to permit employes to attend election.—**A person or corporation who refuses to an employe entitled to vote at an election or town meeting, the privilege of attending thereat, as provided by the election law, or subjects such employe to a penalty or reduction of wages because of the exercise of such privilege, is guilty of a misdemeanor.

The former section was omitted, and the present one added, by chap. 693 of 1892.

**§ 41g. Misconduct in relation to certificates of nomination and official ballots.—**A person who,

1. Falsely makes or makes oath to, or fraudulently defaces or destroys, a certificate of nomination or any part thereof; or
2. Files or receives for filing a certificate of nomination knowing that any part thereof was falsely made; or
3. Suppresses a certificate of nomination which has been duly filed, or any part thereof; or
4. Forges or falsely makes the official indorsement of any ballot; or
5. Having charge of official ballots, destroys, conceals or suppresses them, except as provided by law,

Is punishable by imprisonment for not more than five years.

The former section was omitted, and the present one substituted, by chap. 693 of 1892.

Chap. 693, Laws 1892, am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

**§ 41h. Failure to deliver official ballots.—**Any person who has undertaken to deliver official ballots to any city, town or village clerk, or inspector, as authorized by the election law, and neglects or refuses to do so, is guilty of a misdemeanor.

New, and added by chap. 693 of 1892.

**§ 41i. Misconduct of election officers and watchers.—**Any election officer or watcher who,

1. Reveals to another person the name of any candidate for whom a voter has voted; or
2. Communicates to another person his opinion, belief or impression as to how or for whom a voter has voted; or
3. Places a mark upon a ballot, or does any other act by which one ballot can be distinguished from another, or can be identified; or,
4. Before the closing of the polls, unfolds a ballot which a voter has prepared for voting, is guilty of a misdemeanor.

Am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

**§ 41j. Violation of election law by public officer.—**A public officer who omits, refuses or neglects to perform any act required of him by the election law, or refuses to permit the doing of any act authorized thereby, is, if not otherwise provided by law, punishable by imprisonment for not more than three years, or by a fine of not more than three thousand dollars, or both.

New, and added by chap. 693 of 1892.

**§ 41k. Misdemeanors in relation to elections.**—Any person who:

1. Acts as an inspector of election, poll clerk or ballot clerk, without being able to read and write the English language, or without being otherwise qualified to hold such office; or,

2. Being an inspector of election, knowingly and willfully permits or suffers any person to vote who is not entitled to vote thereat; or,

3. Willfully and unlawfully obstructs, hinders or delays, or aids or assists in obstructing or delaying any elector on his way to a registration or polling place, or while he is attempting to register or vote; or,

4. Electioneers on election day within a polling place, or in any public street or in a building or room, unless such building or room has been maintained for such purpose for at least six months previous to said election day, or in any public manner within one hundred feet of a polling place: or displays any political poster or placard, except those lawfully provided, in or upon any building used for registration or election purposes during any day for registration or election: or,

Am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

Am'd by chap. 549 of 1896. In effect, May 12, 1896.

5. Removes any official ballot from a polling place before the closing of the polls: or,

6. Unlawfully goes within the guard rail of any polling place or unlawfully remains within such guard rail after having been commanded to remove therefrom by any inspector of election; or,

7. Enters a voting booth with any voter or remains in a voting booth while it is occupied by any voter, or opens the door of a voting booth when the same is occupied by a voter, with the intent to watch such voter while engaged in the preparation of his ballot, except as authorized by the election law; or,

8. Being or claiming to be a voter, permits any other person to be in a voting booth with him while engaged in the preparation of his ballot, except as authorized by the election law, without openly protesting against and asking that such person be ejected; or,

9. Having lawfully entered a voting booth with a voter, requests, persuades or induces such voter to vote any particular ballot or for any particular candidate, or, directly or indirectly, reveals to another the name of any candidate voted for by such voter, or anything occurring within such voting booth; or,

10. Shows his ballot after it is prepared for voting, to any person so as to reveal the contents, or solicits a voter to show the same: or,

11. Places any mark upon his ballot, or does any other act in connection with his ballot with the intent that it may be identified as the one voted by him; or,

12. Places any mark upon, or does any other act in connection with, a ballot or paster ballot, with the intent that it may afterward be identified as having been voted by any particular person; or,

13. Receives an official ballot from any person other than one of the ballot clerks having charge of the ballots; or,

14. Not being a ballot clerk, delivers an official ballot to a voter; or,

15. Not being an inspector of election, receives from any voter a ballot prepared for voting; or,

16. Fails to return to the ballot clerks, before leaving the polling place or going outside the guard rail, each ballot not voted by him; or,



17. Willfully defaces, injures, mutilates, destroys or secretes any voting machine which belongs to any municipality for use at elections, and any person who commits or attempts to commit a fraud in the use of any such voting machine during an election; or,

Added by chap. 265 of 1899. In effect Sept. 1, 1899.

18. Willfully disobeys any lawful command of the board of inspectors, or any member thereof, is guilty of a misdemeanor. This section shall apply to general and special elections, municipal elections and town meetings, but nothing therein shall prevent any person from receiving or delivering an unofficial sample ballot, or from receiving, delivering and voting an unofficial ballot as authorized by the election law.

**§ 41 l. Illegal voting.**—Any person who:

1. Knowingly votes or offers or attempts to vote at any election, or town meeting, when not qualified; or

2. Procures, aids, assists, counsels or advises any person to go or come into any town, ward or election district, for the purpose of voting at any election, or town meeting, knowing that such person is not qualified; or

3. Votes or offers or attempts to vote at an election, or town meeting more than once; or votes or offers or attempts to vote at an election, or town meeting under any other name than his own; or votes or offers or attempts to vote at an election, or town meeting in an election district or from a place where he does not reside; or

4. Procures, aids, assists, commands or advises another to vote or offer or attempts to vote at an election, or town meeting, knowing that such person is not qualified to vote thereat; or

5. Being an inhabitant of another state or county, votes or offers or attempts to vote at an election, or town meeting in this state or permits, aids, assists, abets, procures, commands or advises another to commit or attempt any act named in this section is guilty of felony, punishable by imprisonment in a state prison not more than five years.

6. An offer or attempt under this section shall be deemed to be the doing of any act made necessary by the election law preliminary to the delivery of a ballot to an elector or the deposit of the ballot in the ballot box.

Am'd by chap. 371 of 1901, which repeals the present 41 l and designates 41 m as 41 l, and takes effect April 17, 1901.

Am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

**§ 41 m. False returns.**—An inspector or poll clerk of an election or town meeting, who intentionally makes, or attempts to make, a false canvass of the ballots cast thereat, or any false statement of the result of a canvass, though not signed by a majority of the inspectors, or any person who induces or attempts to induce any such inspector or clerk so to do, is guilty of a felony.

[Amended by chap. 371 of 1901, changing its number from 41 n to 41 m, to take effect April 17, 1901.]

**§ 41 n. Furnishing money or entertainment to induce attendance at polls.**—Any person who, with the intent to promote the election of a person to an elective office;

1. Furnishes entertainment to the electors before or during an election or town meeting at which such person is a candidate; or

2. Pays for, procures, or engages to pay for such entertainment; or

3. Furnishes money or other property, or engages to compensate any person, for procuring the attendance of voters at the polls of such election or town meeting; or

4. Contributes money for any other purposes than the printing and circulating of hand bills, books and other papers previous to an election or

town meeting, or conveying electors to the polls, or music, or rent of halls, is guilty of a misdemeanor.

[41o changed to 41n by chap. 871 of L. 1901, to take effect April 17, 1901.]

**§ 41o. Giving consideration for franchise.**—Any person who directly or indirectly, by himself or through any other person:

1. Pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration to or for any voter, or to or for any other person, to induce such voter or other person to vote or refrain from voting at any election, or to induce any voter or other person to vote or refrain from voting at such election for any particular person or persons, or for or against any particular proposition submitted to voters, or to induce such voter to come to the polls or remain away from the polls at such election, or to induce such voter or other person to place or cause to be placed or refrain from placing or causing to be placed his name upon a registry of voters, or on account of such voter or other person having voted or refrained from voting or having voted or refrained from voting for or against any particular person or for or against any proposition submitted to voters, or having come to the polls or remained away from the polls at such election, or having placed or caused to be placed or refrained from placing or causing to be placed his or any other name upon the registry of voters; or

2. Gives, offers or promises any office, place or employment, or promises to procure or endeavor to procure any office, place or employment to or for any voter, or to or for any other person, in order to induce such voter or other person to vote or refrain from voting at any election, or to induce any voter or other person to vote or refrain from voting at such election, for or against any particular person or persons, or for or against any proposition submitted to voters, or to induce any voter or other person to place or cause to be placed or refrain from placing or causing to be placed his or any other name upon a registry of voters; or

3. Gives, offers or promises any office, place, employment or valuable thing as an inducement for any voter or other person to procure or aid in procuring either a large or a small vote, plurality or majority at any election district or other political division of the state, for a candidate or candidates to be voted for at an election; or to cause a larger or smaller vote, plurality or majority to be cast or given for any candidate or candidates in one such district or political division than in another; or

4. Makes any gift, loan, promise, offer, procurement or agreement as aforesaid to, for or with any person to induce such person to procure or endeavor to procure the election of any person or the vote of any voter at any election; or

5. Procures or engages or promises or endeavors to procure, in consequence of any such gift, loan, offer, promise, procurement or agreement the election of any person, or the vote of any voter, at such election; or

6. Advances or pays or causes to be paid, any money or other valuable thing, to or for the use of any other person with the intent that the same, or any part thereof, shall be used in bribery at any election, or knowingly pays or causes to be paid any money or other valuable thing to any person in discharge or repayment of any money, wholly or in part expended in bribery at any election, is guilty of a felony, punishable by imprisonment for not more than five years, and in addition forfeits any office to which he may have been elected at the election with reference to which such offense was committed, and becomes incapable of holding any public office under the constitution and laws of the state for a period of five years after such conviction.

Am'd by chap. 371 of 1901, and changes 41p to 41o, to take effect April 17, 1901.

Again am'd by chap. 625, Laws 1905. Takes effect May 26, 1905, so as to cut out the one year minimum punishment.

**§ 41p. Receiving consideration for franchise.**—Any person who, directly or indirectly, by himself or through any other person:

1. Receives, agrees or contracts for, before or during an election, any money, gift, loan or other valuable consideration, office, place or employment for himself or any other person, for voting or agreeing to vote, or for coming or agreeing to come to the polls, or for remaining away or agreeing to remain away from the polls, or for refraining or agreeing to refrain from registering as a voter, or for refraining or agreeing to refrain from voting, or for voting or agreeing to vote, or for refraining or agreeing to refrain from voting for or against any particular person or persons at any election, or for or against any proposition submitted to voters at such election; or,

2. Receives any money or other valuable thing during or after an election on account of himself or any other person having voted or refrained from voting at such an election, or having registered or refrained from registering as a voter, or on account of himself or any other person having voted or refrained from voting for or against any particular person at such election, or for or against any proposition submitted to voters at such election, or on account of himself or any other person having come to the polls or remained away from the polls at such election, or having registered or refrained from registering as a voter, or on account of having induced any other person to vote or refrain from voting for or against any particular person or persons at such election, or for or against any proposition submitted to voters at such election is guilty of (1) a felony, and in addition shall be excluded from the right of suffrage for five years after such conviction, and the county clerk of the county in which such person is convicted shall transmit a certified copy of the record of conviction to the clerk of each county of the state, within ten days thereafter, which copy shall be filed in his office by each of said clerks.

Am'd by chap. 371 of 1901, which changes 41q to 41p. Took effect April 17, 1901.

Again am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

**§ 41q. Testimony on prosecution.**—A person offending against any section of this title is a competent witness against another person so offending and may be compelled to attend and testify on any trial, hearing or proceeding or investigation in the same manner as any other person. The testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person testifying. Any such person testifying shall not thereafter be liable to indictment, prosecution or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution.

Am'd by chap. 371 of 1901, which changes 41r to 41q. Took effect April 17, 1901.

**§ 41r. Bribery or intimidation of elector in military service of United States.**— Any person who, directly or indirectly, by bribery, menace or other corrupt means, controls or attempts to control an elector of this state enlisted in the military service of the United States, in the exercise of his rights under the election law, or annoys, injures or punishes him for the manner in which he exercises such right, is guilty of a misdemeanor for which he may be tried at any future time when he may be found within this state; and upon conviction thereof shall thereafter be ineligible to any office therein.

Am'd by chap. 371 of 1901, by changing 41s to 41r. Took effect April 17, 1901.

**§ 41s. Duress and intimidation of voters.**— Any person or corporation who directly or indirectly:

1. Uses or threatens to use any force, violence or restraint, or inflicts or threatens to inflict any injury, damage, harm or loss, or in any other manner practices intimidation upon or against any person in order to induce or compel such person to vote or refrain from voting at any election or to vote or refrain from voting for or against any particular person or persons or for or against any proposition submitted to voters at such election, or to place or cause to be placed or refrain from placing or causing to be placed, his name upon a registry of voters, or on account of such person having voted or refrained from voting at such election, or having voted or refrained from voting for or against any particular person or persons, or for or against any proposition submitted to voters at such election, or having registered or refrained from registering as a voter; or

2. By abduction, duress, or any forcible or fraudulent device or contrivance whatever impedes, prevents or otherwise interferes with the free exercise of the elective franchise by any voter, or compels, induces or prevails upon any voter to give or refrain from giving his vote for or against any particular person at any election; or

3. Being an employer pays his employes the salary or wages due in "pay envelopes," upon which there is written or printed any political motto, device or argument containing threats, express or implied, intended or calculated to influence the political opinions or actions of such employes, or, within ninety days of a general election puts or otherwise exhibits in the establishment or place where his employes are engaged in labor, any hand bill or placard containing any threat, notice or information that if any particular ticket or candidate is elected or defeated, work in his place or establishment will cease, in whole or in part, his establishment be closed up, or the wages of his employes reduced, or other threats, express or implied, intended or calculated to influence the political opinions or actions of his employes, is guilty of misdemeanor, and if a corporation shall in addition forfeit its charter.

j Am'd by chap. 371 of 1901, changing 41t to 41s.

**§ 41t. Conspiracy to promote or prevent election.**—Any two or more persons who conspire to promote or prevent the election of any person or persons to a public office by the use of any means which are prohibited by law, shall be punishable by imprisonment for not more than one year; provided any act besides such agreement be done to effect the object thereof by one or more of the parties to such conspiracy.

Am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

**§ 41u. Political assessments** —Any person who, .

1. Being an officer or employe of the state, or of a political subdivision thereof, directly or indirectly, uses his authority or official influence to compel or induce any other officer or employe of the state or a political subdivision thereof, to pay or promise to pay any political assessments; or

2. Being an officer or employe of the state, or of a political subdivision thereof, directly or indirectly, gives, pays or hands over to any other such officer or employe any money or other valuable thing on account of or to be applied to the promotion of his election, appointment or retention in office, or makes any promise, or gives any subscription to such officer or employe to pay or contribute any money or other valuable thing for any such purpose or object; or

3. Being such an officer or employe and having charge or control of any building, office or room occupied for any purpose of the state or of a political subdivision thereof, consents that any person enter the same for the purpose of making, collecting, receiving or giving notice of any political assessment; or

4. Enters or remains in any such office, building or room, or sends or directs any letter or other writing thereto, for the purpose of giving notice of demanding or collecting, or being therein, gives notice of, demands, collects or receives, any political assessment; or

5. Prepares or makes out, or takes any part in preparing or making out, any political assessment, subscription or contribution, with the intent that the same shall be sent or presented to or collected of any such officer or employe; or

6. Sends or presents any political assessment, subscription, or contribution to, or requests its payment of, any such officer or employe,

Is guilty of a misdemeanor.

Am'd by chap. 371 of 1901, changing 41v to 41u.

**§ 41v. Corrupt use of position or authority.**—Any person who,

1. While holding a public office, or being nominated or seeking a nomination or appointment therefor, corruptly uses or promises to use, directly or indirectly, any official authority or influence possessed or anticipated, in the way of conferring upon any person, or in order to secure, or aid any person in securing, any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon consideration that the vote or political influence or action of the person so to be benefited or,

of any other person, shall be given or used in behalf of any candidate, officer or party or upon any other corrupt condition or consideration; or

2. Being a public officer or employe of the state or a political subdivision having, or claiming to have, any authority or influence affecting the nomination, public employment, confirmation, promotion, removal, or increase or decrease of salary of any public officer or employe, or promises or threatens to use, any such authority or influence, directly or indirectly to affect the vote or political action of any such public officer or employe, or on account of the vote or political action of such officer or employe; or

3. Makes, tenders or offers to procure, or cause any nomination or appointment for any public office or place, or accepts or requests any such nomination or appointment, upon the payment or contribution of any valuable consideration, or upon an understanding or promise thereof, or

4. Makes any gift, promise or contribution to any person, upon the condition or consideration of receiving an appointment or election to a public office or a position of public employment, or for receiving or retaining any such office or position, or promotion, privilege, increase of salary or compensation therein or exemption from removal or discharge therefrom is punishable by imprisonment for not more than two years or by a fine of not more than three thousand dollars or both.

Am'd by chap. 371 of 1901, changing 4lw to 4lv.

§ 41x. **Failure to file candidate's statement of expenses.**—Every candidate who is voted for at any public election held within this state shall, within ten days after such election, file as hereinafter provided an itemized statement showing in detail all the moneys contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election. Such statement shall give the names of the various persons who received such moneys, the specific nature of each item, and the purpose for which it was expended or contributed. There shall be attached to such statement an affidavit subscribed and sworn to by such candidate, setting forth in substance that the statement thus made is in all respects true, and that the same is a full and detailed statement of all moneys so contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election. Candidates for offices to be filled by the electors of the entire state, or any division or district thereof greater than a county, shall file their statements in the office of secretary of state. The candidates for town, village and city offices, excepting in the city of New York, shall file their statements in the office of the town, village or city clerk, respectively, and in cities wherein there is no city clerk, with the clerk of the common council of the city wherein the election occurs. Candidates for all other offices, including all officers in the city and county of New York, shall file their statements in the office of the clerk of the county wherein the election occurs. Any candidate for office who refuses or neglects to file a statement as prescribed in this section shall be guilty of a misdemeanor, and shall also forfeit his office.

Am'd by chap. 371 of 1901, changing 41x to 4lw.

§ 41x. **Procuring fraudulent certificates in order to vote.**—Any person who knowingly and willfully procures from any court, judge, clerk or other officer, a certificate of naturalization, which has been allowed, issued, signed or sealed in violation of the laws of the United States or of this state, with intent to enable himself or any other person to vote at any election when he or such person is not entitled by the laws of the United States to become a citizen or to exercise the elective franchise, is guilty of a felony.

This section was added by chap. 692 of 1893.

§ 41y. **Presenting fraudulent certificates to registry boards to procure registration.**—A person who knowingly and willfully presents to any board of officers, for the purpose of having himself or any other person placed upon any list or registry of voters, or to any board of officers for the purpose of enabling himself or any other person to vote at any election, any certificate



of naturalization which has been allowed or issued by or procured from any judicial officer, clerk of a court, or other ministerial officer of a court, by any false statement, oath or representation, or in violation of the laws of the United States or of this state, with intent to enable any person to vote at any election, when such person is not entitled by the laws of the United States to become a citizen, or of this state, to exercise the elective franchise, is guilty of a felony.

This section was added by chap. 692 of 1893.

§ 41z. Any person who solicits from a candidate for an elective office money or other property, or who seeks to induce such candidate who has been placed in nomination to purchase any ticket, card or other evidence of admission to any ball, picnic, fair or entertainment of any kind, is guilty of a misdemeanor; but this section shall not apply to a request for a contribution of money by an authorized representative of the political party, organization or association to which such candidate belongs. [Added by chap. 155 of 1895; to take effect Sept. 1, 1895.]

§ 41aa. **Misdemeanors concerning police commissioners or officers or members of any police force.**—Any person who, being a police commissioner or an officer or member of any police force in this state, either

1. Uses or threatens or attempts to use his official power or authority, in any manner, directly or indirectly, in aid of or against any political party, organization, association or society, or to control, affect, influence, reward or punish, the political adherence, affiliation, action, expression or opinion of any citizen; or

2. Appoints, promotes, transfers, retires or punishes an officer or member of a police force, or asks for or aids in the promotion, transfer, retirement or punishment of an officer or member of a police force, because of the party adherence or affiliation of such officer or member, or for or on the request, direct or indirect, of any political party, organization, association or society, or of any officer, member of committee or representative official or otherwise of any political party, organization, association or society; or

3. Contributes any money, directly or indirectly, to, or solicits, collects or receives any money for, any political fund, or joins or becomes a member of any political club, association, society or committee;

Is guilty of a misdemeanor.

New. Added by chap. 529 of 1899. In effect May 5, 1899

§ 41bb. Any person who solicits from a candidate for an elective office money or other property as a consideration for a newspaper or other publication supporting any candidate for an elective office, is guilty of a misdemeanor.

Added by chap. 70 of 1900. In effect September 1, 1900.

§ 41zz. **Punishment; first offense.**—Any person convicted of a misdemeanor under this title shall for a first offense be punished by imprisonment for not more than one year, and by a fine of not more than five hundred dollars. Any person convicted of a misdemeanor under this title for a second or a subsequent offense shall be deemed guilty of a felony.

Added by L. 1901, chap. 371, to take effect April 17, 1901.

Am'd by chap. 625, Laws 1905. Took effect May 26, 1905.

## TITLE VI.

### OF CRIMES BY AND AGAINST THE EXECUTIVE POWER OF THE STATE.

- SECTION 42.** Acting in a public office without having qualified.
43. Acts of officer *de facto*, not affected.
44. Giving or offering bribes.
45. Asking or receiving bribes.
46. Attempting to prevent officers from performing duty.
47. Resisting officers.
48. Taking, etc., unlawful fees or reward for performing or omitting official acts, etc., felony. Punishment.
- 48a. Comptroller not to be interested in tax sales.
- 48b. Prison officers not to be interested in prison contracts.
- 48c. Appraiser taking fee or reward.
49. Asking or taking reward for omitting or delaying official acts.
50. Taking fees for services not rendered.
51. Taking unlawful reward as fee in extradition cases.
52. Corrupt bargain for appointments, etc.
53. Same.
54. Selling right to official powers.

- SECTION 55.** Such appointment avoided by conviction.  
**56.** Intrusion into public office.  
**57.** Officer refusing to surrender to successor.  
**58.** Administrative officers.

This title relates to crimes against the executive power of the state, and prescribes the punishment for giving and offering bribes, or for asking or receiving of bribes by executive and administrative officers. *People v. Jaehne*, 3 St. Rep., 11; 103 N. Y., 190; 4 N. Y. Cr., 478.

**§ 42. Acting in a public office without having qualified.**

—A person who executes any of the functions of a public office without having taken and duly filed the required oath of office, or without having executed and duly filed the required security, is guilty of a misdemeanor, as prescribed by law.

Amended by chap. 692 of 1893.

This amendment substituted for the words, "and in addition to the punishment prescribed therefor, he forfeits his right to the office," the words, "as prescribed by law."

**De facto.**—The omission of a duly elected commissioner of highways to execute and file an official bond, does not render his official acts void in such a sense as to make him liable as a trespasser therefor. *Foot v. Stiles*, 57 N. Y., 399. Until, in and by a direct judicial or other authorized proceeding, the forfeiture is judicially declared, he is rightfully in office, at least so far as the rights of third parties are concerned, and the question cannot be raised collaterally. *Id.*

In *People ex rel. Bush v. Thornton*, 25 Hun, 456, it was held that the inability of a person, receiving the certificate of election, to take truthfully the oath of office does not disqualify him from holding it.

An officer *de facto* indicted for malfeasance in office is estopped from objecting that he is not such *de jure*. *People v. Church*, 3 N. Y. Cr., 57; 1 How., N. S., 366.

**Failure to take oath.**—A failure to take the oath does not create a vacancy, but only furnishes a cause for forfeiture to be declared in a proper proceeding. *People ex rel. Willson v. Trustees, etc.*, 59 Hun, 204; 36 St. Rep., 318; 13 N. Y. Supp., 447; *aff'd*, without opinion in 128 N. Y., 657.

**Removal upon conviction.**—There are a number of cases specified in the Penal Code, where removal from office follows a conviction of a public officer for a crime. *People v. Meakin*, 44 St. Rep., 751; 8 N. Y. Cr., 410; 133 N. Y., 221; *aff'g* 61 Hun, 327; 40 St. Rep., 686. See further sections 45, 53, 54, 72, 707 and 708, *post*.

**§ 43. Acts of officer de facto not affected.**—The last section must not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact, where other persons than himself are interested in maintaining the validity of such acts.

**Who a de facto officer.**—A person elected to an office who neglects to give security and take the official oath is, nevertheless, a *de facto* officer. *Greenleaf v. Low*, 4 Denio, 168.

To constitute a person an officer *de facto*, a mere claim to be such officer and exercising the duties of the office are not sufficient. *Rochester & Genesee Valley Railroad v. Clarke National Bank*, 60 Barb., 234. He is one who exercises the duties of an office under color of right, by virtue of an appointment or election to such office. *Id.* There must be at least a presumption that he is rightfully in office. *Id.*

One who receives an appointment to office from a proper authority is an officer *de facto*, though his appointment is informal. *Hamlin v. Dingman*, 5 Lans., 61.



In order that there may be an officer *de facto*, there must actually exist the office into which he can intrude. *People ex rel. Sinkler v. Terry*, 42 Hun, 273; 5 St. Rep., 120; rev'd, 108 N. Y. 1; 12 St. Rep., 773.

The facts in *People ex rel. Sinkler v. Terry*, 108 N. Y., 1; 12 St. Rep., 773, were held to sufficiently establish that the person acting as a magistrate was an officer *de facto*.

**Acts of such officers.**—The general rule with respect to *de facto* officers is that the office is so far void as to prevent the officer from asserting it to his own advantage at the expense or to the injury of another, but is valid so far as to protect third parties from injury. *Adams v. Tator*, 6 St. Rep., 359; 42 Hun, 384; *People ex rel. Hopson v. Hopson*, 1 Denio, 574; *Weeks v. Ellis*, 2 Barb. 320; *Matter of Kendall*, 85 N. Y., 302. In other words, the office is void as to himself, but valid as to strangers. *Id.*

An officer *de facto* cannot sue as such, but to maintain an action he must also be an officer *de jure*. *Horton v. Parsons*, 37 Hun, 42; aff'g *Horton v. Carrington*, 1 How. N. S., 124; *People v. Nostrand*, 46 N. Y., 875.

Village trustees *de facto* are capable of levying an assessment. *Dows v. Irvington*, 13 Abb. N. C., 162.

The validity of contracts, made by a *de facto* trustee of a school district, cannot be disputed by his successor in office on the ground that his predecessor was disqualified. *Morrison v. Sayre*, 40 Hun, 465.

The acts of a mere officer *de facto*, though his office affords no protection to himself, are valid as to the public and third persons. *Hamlin v. Dingman*, 5 Lans., 61.

In proceedings by mandamus to compel a highway commissioner to lay out a road, the fact that the original defendant was not a commissioner *de jure*, but only *de facto*, will not defeat the proceeding, where there is no question as to the title of the substituted defendant. *People ex rel. Wells v. Brown*, 47 Hun, 459; 14 St. Rep., 457.

**Strict proof.**—Where a criminal endeavors to escape punishment on the allegation that the person acting as a magistrate was not elected because of some alleged technical defect in the ballots, though he received a majority of all the votes, he should be held to strict proof of all the material facts. *People ex rel. Sinkler v. Terry*, 108 N. Y., 1; 12 St. Rep., 773.

See further *Merritt v. Village of Portchester*, 71 N. Y., 309; *Matter of Kendall*, 85 id., 302.

**§ 44. Giving or offering bribes.**—A person who gives or offers a bribe to any executive officer of this state with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or by both.

This section relates to the bribery of an executive officer. *People v. Sharp*, 12 St. Rep., 217; 107 N. Y., 439; 5 N. Y. Cr., 572.

**§ 45. Asking or receiving bribes.**—An executive officer, or person elected or appointed to an executive office, who asks, receives or agrees to receive any bribe, upon an agreement or understanding that his vote, opinion or action upon any matter then pending or which may by law be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or by both; and, in addition thereto, forfeits his office and is forever disqualified from holding any public office under this state.

See notes under section 42, *ante*.

*People v. Meakim*, 133 N. Y., 221; 44 St. Rep., 751; 8 N. Y., Cr., 410; aff'g 61 Hun, 327; 40 St. Rep., 686.

**§ 46. Attempting to prevent officers from performing duty.**—A person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, is guilty of a misdemeanor.

See sections 61, 62, 63 and 127 *post*.

The reference to this section in *People v. Palmer*, 5 N. Y. Cr., 110, should be to section 36, *ante*.

The crime of intimidating an officer involves the question of intent. *Smith v. Botens*, 36 St. Rep., 55; 13 N. Y. Supp., 228. The word "intent" is clearly implied in this section. *Id*.

See *People v. Hall*, 31 Hun, 404; 2 N. Y. Cr., 134.

**§ 47. Resisting officers.**—A person who knowingly resists by the use of force or violence, any executive officer, in the performance of his duty, is guilty of a misdemeanor.

See section 124, *post*.

**§ 48. Taking, etc., unlawful fees or reward for performing or omitting official acts, etc., felony. Punishment.**—A public officer, or a deputy, clerk, assistant or other subordinate of a public officer, or any person appointed or employed by or in the office of a public officer, who shall in any manner act for or in behalf of any such officer, who asks or receives, or consents or agrees to receive, any emolument, gratuity or reward, or any promise of emolument, gratuity or reward, or any money, property or thing of value or of personal advantage, except such as may be authorized by law for doing or omitting to do any official act, or for performing or omitting to perform, or for having performed or omitted to perform any act whatsoever directly or indirectly related to any matter in respect to which any duty or discretion is by or in pursuance of law imposed upon or vested in him, or may be exercised by him by virtue of his office, or appointment or employment, or his actual relation to the matter, shall be guilty of a felony, punishable by imprisonment for not more than ten years, or by a fine of not more than four thousand dollars, or both.

Am'd by chap. 886 of 1890.

This amendment substituted the present, for the original, section, upon the same subject.

See section 557, *post*; section 1122 of Code of Civil Procedure.

A constable, who takes fees beyond the amount allowed by law, is indictable as for a misdemeanor. *Parker v. Newland*, 1 Hill, 87.

**§ 48a. Comptroller not to be interested in tax sales.**—The comptroller, or any person employed in his office, who shall be directly or indirectly interested in any tax sale made by such

comptroller, or in the title acquired by such sale, or in any money paid or to be paid for the redemption of any lands sold for taxes or on the cancellation of any tax sale; or any person who shall pay or give to the state comptroller, or to any employe in his office, any compensation, reward or promise thereof for any service or services performed or to be performed in regard to such sale, redemption, cancellation or such tax title, is guilty of a misdemeanor. A sale in violation of this section is void.

This section was added by chap. 672 of 1893.

**§ 48b. Prison officers not to be interested in prison contracts.**—A superintendent of state prisons, or agent, warden or other officer, keeper or guard, employed at either of the prisons, who

1. Shall be directly or indirectly interested in any contract, purchase or sale, for, by, or on account of such prison; or

2. Accepts a present from a contractor or contractor's agent, directly or indirectly, or employs the labor of a convict or another person employed in such prison on any work for the private benefit of such superintendent, officer, keeper or guard, is guilty of a misdemeanor, except that the agent and warden shall be entitled to employ prisoners for necessary household service.

This section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

**§ 48c. Appraiser taking fee or reward.**—An appraiser appointed by virtue of the taxable transfers law, who takes any fee or reward from an executor, administrator, trustee, legatee, next of kin, or heir of any decedent, or from any other person liable to pay such tax, or any portion thereof, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

**§ 49. Taking reward for omitting or delaying official acts.**—An executive officer who asks or receives any emolument, gratuity or reward, or any promise of any emolument, gratuity or reward, for omitting or deferring the performance of any official duty, is guilty of a misdemeanor.

**§ 50. Taking fees for services not rendered**—An executive officer who asks or receives any fee or compensation for any official service which has not been actually rendered, except in cases of charges for prospective costs, or of fees demandable in advance in the cases allowed by law, is guilty of a misdemeanor.

See section 48, *ante*.

**§ 51. Taking unlawful reward as fee in extradition cases.**—An officer of this state who asks or receives any fee or compensation of any kind for any service rendered or expense in-

incurred in procuring from the governor of this state a demand upon the executive authority of a state or territory of the United States, or of a foreign government, for the surrender of a fugitive from justice; or for any service rendered or expense incurred in procuring the surrender of such fugitive, or of conveying him to this state or for detaining him therein, except upon an employment by the governor of this state, is guilty of a misdemeanor.

Amended by chap. 384 of 1882.

This amendment was made before the Code took effect.

See sections 836 and 837 of Code of Criminal Procedure.

The case of *People ex rel. Gardenier v. Board of Supervisors*, 17 St. Rep., 987; 2 N. Y. Supp., 351, was reversed in 56 Hun, 20; 29 St. Rep., 457; 8 N. Y. Supp., 752.

**Object.**—The purpose of this section, evidently, was to prevent abuses by officers of the state in seeking requisitions from the governor and in extradition proceedings instituted by it. *People ex rel. Gardenier v. Board, etc.*, 134 N. Y., 1; 45 St. Rep., 316; aff'g 56 Hun, 20; 29 St. Rep., 457; 8 N. Y. Supp., 752.

A district attorney is forbidden from taking compensation for anything done in procuring from the governor a demand for the return of a fugitive. *People ex rel. Gardenier v. Board, etc.*, 56 Hun, 20; 29 St. Rep., 457; 8 N. Y. Supp., 752; rev'g 2 id., 353; 17 St. Rep., 987, and aff'd in 134 N. Y., 1; 45 St. Rep., 317.

**Application.**—This section, so far as it relates to procuring from the governor a demand upon other executive authority for the surrender of fugitives from justice, has reference legitimately to interstate extradition only. *People ex rel. Gardenier v. Board, etc.*, 134 N. Y., 1; 45 St. Rep., 316; aff'g 56 Hun, 20; 29 St. Rep., 457; 8 N. Y. Supp., 752.

By the repeal of sections 836 and 837 of the Code of Criminal Procedure, and the substitution of the provisions of this section, the inhibition, in respect to incurring expense seems still to be confined to cases in which the demand for the surrender of the fugitive may be and is made by the governor, and to expenses incurred in the proceeding in that manner instituted. *Id.*

**§ 52. Offering reward for appointments, etc.**—A person who gives or offers to give, any gratuity or reward, in consideration that himself or any other person shall be appointed to a public office, or to a clerkship, deputation, or other subordinate position, in such an office, or shall be permitted to exercise, perform or discharge any prerogatives or duties, or to receive any emoluments, of such an office, is guilty of a misdemeanor.

**Deputy sheriff.**—An agreement by a deputy sheriff to allow to his principal a sum in gross not payable out of the profits of the office, and which may, therefore, exceed such profits, is a violation of the statute. *Tappan v. Brown*, 9 Wend., 175; *Becker v. Ten Eyck*, 6 Paige, 68.

When the sheriff, on appointing a deputy, takes an agreement for the payment of a gross sum, which is not to come out of the profits of the office, the contract is void. *Mott v. Robbins*, 1 Hill, 21; *Becker v. Ten Eyck*, 6 Paige, 68. But where he reserves a part of the fees of the office, or a sum certain, which is to come out of the profits, the contract is valid. *Id.*

But where a deputy, who is by law entitled to certain fees by virtue of his office, agrees to give a portion of such fees to the principal, it is a purchase of the office. *Becker v. Ten Eyck*, 6 Paige, 68; *Tappan v. Brown*, 9 Wend., 175.

**Rival candidates.**—Where two persons, who have applied for appointment for the same office, agree that, in consideration of the withdrawal and aid by one in procuring the appointment of the other, the fees and emoluments

of the office shall be divided between them, such contract is illegal and void. *Gray v. Hook*, 4 N. Y., 449. All agreements by which one person engages to pay another for his aid or influence in procuring an appointment to office, are, *it seems*, void. *Id.*

An agreement made between rival candidates for the same office, whereby one was to withdraw and run for another office, and the other was to pay all his past and future expenses, is illegal and void. *Robinson v. Kalbfleisch*, 5 T. & C., 212. A subsequent direction by the latter to expend money in furtherance of such candidacy, and a promise to pay therefor, are also void. *Id.*

**§ 53. Corrupt bargain for appointments, etc.**—A person who asks or receives, or agrees to receive, any gratuity or reward, or any promise thereof, for appointing another person, or procuring for another person an appointment, to a public office or to a clerkship, deputation, or other subordinate position in such an office, is guilty of a misdemeanor. If the person so offending is a public officer, a conviction also forfeits his office.

See notes under preceding section.

See notes under section 42, *ante*

See *People v. Meakim*, 133 N. Y., 221; 44 St. Rep., 752; 8 N. Y. Cr., 420; *aff'g* 61 Hun, 327; 40 St. Rep., 688; 15 N. Y. Supp., 918.

**§ 54. Selling right to official powers.**—A public officer who, for any reward, consideration or gratuity, paid or agreed to be paid, directly or indirectly, grants to another the right or authority to discharge any functions of his office, or permits another to make appointments or perform any of its duties, is guilty of a misdemeanor, and a conviction for the same forfeits his office and disqualifies him forever from holding any office whatever under this state.

See notes under sections 42 and 52, *ante*.

See *People v. Meakim*, 133 N. Y., 221; 44 St. Rep., 752; 8 N. Y. Cr., 420; *aff'g* 61 Hun, 327; 40 St. Rep., 688; 15 N. Y. Supp., 918.

**§ 55. Such appointment avoided by conviction.**—A grant, appointment, or deputation, made contrary to the provisions of either of the last two sections, is avoided and annulled by a conviction for the violation of either of those sections, in respect to such grant, appointment, or deputation; but any official act done before conviction, is unaffected by the conviction.

**§ 56. Intrusion into public office.**—A person who willfully intrudes himself into a public office, to which he has not been duly elected or appointed, or who, having been an executive or administrative officer, willfully exercises any of the functions of his office, after his right to do so has ceased, is guilty of a misdemeanor.

See section 1498 of Code of Civil Procedure.

The reference to section 56 in *People v. Maschke*, 2 N. Y. Cr., 806, *note*, should be to same section of Code of Criminal Procedure.

**§ 57. Officer refusing to surrender to successor.**—A person who, having been an executive or administrative officer,

wrongfully refuses to surrender the official seal, or any books or papers appertaining to his office, upon the demand of his lawful successor, is guilty of a misdemeanor.

**Revised Statutes.**—The Revised Statutes applied only to those cases where there was no dispute as to the title grounded upon any reasonable foundation. *People ex rel. Smith v. Barrett*, 29 St. Rep., 159; 8 N. Y. Supp., 677. Its operation could not be defeated by a party alleging that there was a dispute, and even fortifying his claim by the opinion of counsel. *Id.*

Where a person, after the legal appointment of his successor, refused to deliver up the official books and papers, a proper case, under the Revised Statutes, was made out for the issuing of a warrant. *Matter of Whiting*, 2 Barb., 518.

The delivery of official books and papers should not be compelled, unless the applicant's title to the office is clear and free from reasonable doubt. *People v. Stevens*, 5 Hill, 616.

**§ 58. Administrative officers.**—The various provisions of this chapter which relate to executive officers apply to administrative officers, in the same manner as if administrative and executive officers were both mentioned.

## TITLE VII.

### OF CRIMES AGAINST THE LEGISLATIVE POWER.

**SECTION 59.** Preventing the meeting or organization of either branch of the legislature.

- 60. Disturbing the legislature while in session.
- 61. Compelling adjournment.
- 62. Intimidating a member of the legislature.
- 63. Compelling either house to perform or omit any official act.
- 64. Altering draft of bill.
- 65. Altering engrossed copy.
- 66. Bribery of members of legislature.
- 67. Receiving bribes by members of legislature.
- 68. Witnesses refusing to attend before the legislature or legislative committees.
- 69. Refusing to testify.
- 70. Members of the legislature liable to forfeiture of office.

This title relates to crimes against the legislative power of the state, and contains provisions for the punishment of bribery of members of the legislature. *People v. Jaehne*, 3 St. Rep., 11; 103 N. Y., 190; 4 N. Y. Cr., 478.

**§ 59. Preventing meeting or organization of either branch of the legislature.**—A person who willfully and by force or fraud prevents the legislature of this state, or either of the houses composing it, or any of the members thereof, from meeting or organizing, is punishable by imprisonment in a state prison not less than five years nor more than ten years, or by a fine of not less than five hundred dollars nor more than two thousand dollars, or by both.

**§ 60. Disturbing legislature while in session.**—A person who willfully disturbs the legislature of this state, or either of the houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence of either



house of the legislature, tending to interrupt its proceedings or impair the respect due to its authority. is guilty of a misdemeanor.

**§ 61. Compelling adjournment.**—A person who willfully and by force or fraud compels or attempts to compel the legislature of this state, or either of the houses composing it, to adjourn or disperse, is punishable by imprisonment in a state prison not less than five nor more than ten years, or by a fine of not less than five hundred dollars, nor more than two thousand dollars, or by both.

**§ 62. Intimidating a member of the legislature.**—A person who willfully, by intimidation or otherwise, prevents any member of the legislature of this state, from attending any session of the house of which he is a member, or of any committee thereof, or from giving his vote upon any question which may come before such house, or from performing any other official act, is guilty of a misdemeanor.

**§ 63. Compelling either house to perform or omit any official act.**—A person who willfully compels or attempts to compel either of the houses composing the legislature of this state to pass, amend, or reject any bill, or resolution, or to grant or refuse any petition, or to perform or omit to perform any other official act, is punishable by imprisonment in a state prison not less than five nor more than ten years, or by a fine of not less than five hundred dollars nor more than two thousand dollars, or by both.

**§ 64. Altering draft of bill.**—A person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the legislature, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of felony.

**§ 65. Altering engrossed copy.**—A person who fraudulently alters the engrossed copy or enrollment of any bill which has been passed by the legislature of this state, with intent to procure it to be approved by the governor or certified by the secretary of state, or printed or published by the printer of the statutes in language different from that in which it was passed by the legislature, is guilty of a felony.

**§ 66. Bribery of members of the legislature.**—A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a member of the legislature, or attempts, directly or indirectly, by menace, deceit, suppression of truth, or

other corrupt means, to influence a member to give or withhold his vote, or to absent himself from the house of which he is a member, or from any committee thereof, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

See sections 1, 2 and 3, Art. 15 of State Constitution.

This section relates to the bribery of members of the legislature. *People v. Sharp*, 107 N. Y., 439; 5 N. Y. Cr., 572; 12 St. Rep., 217.

**§ 67. Receiving bribes by members of legislature.**—A member of either of the houses composing the legislature of this state, who asks, receives, or agrees to receive any bribe upon any understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or who gives or offers or promises to give any official vote in consideration that another member of the legislature shall give any such vote, either upon the same or another question, is punishable by imprisonment in a state prison not exceeding ten years, or by fine not exceeding five thousand dollars, or both.

See sections 1, 2 and 3, Art. 15 of State Constitution.

**§ 68. Witnesses refusing to attend before the legislature or legislative committees.**—A person who, being duly summoned to attend as a witness before either house of the legislature, or any committee thereof, authorized to summon witnesses, refuses or neglects without lawful excuse to attend pursuant to such summons, is guilty of a misdemeanor.

The case of *People v. Sharp*, 45 Hun, 491; 10 St. Rep., 522, was reversed in 107 N. Y., 427; 12 St. Rep., 217.

This section is a re-enactment of the common law. *People v. Sharp*, 9 St. Rep., 162.

This and the following section does not exclude the operation of section 79, *post.* *People v. Sharp*, 107 N. Y., 439; 5 N. Y. Cr., 569; 12 St. Rep., 217.

To refuse to attend before a legislative committee renders the witness guilty of a misdemeanor. *People v. Sharp*, 107 N. Y., 439; 5 N. Y. Cr., 580; 12 St. Rep., 217.

**§ 69. Refusing to testify.**—A person who being present before either house of the legislature or any committee thereof authorized to summon witnesses, willfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice, any material and proper books, papers or documents in his possession or under his control, is guilty of a misdemeanor.

The case of *People v. Sharp*, 5 N. Y. Cr., 465; 45 Hun, 491; 10 St. Rep., 522, was reversed in 107 N. Y., 439; 5 N. Y. Cr., 569; 12 St. Rep., 207.

The case of *Matter of McDonald*, 2 N. Y. Cr., 82, was reversed in *People ex rel. McDonald v. Keeler*, 2 N. Y. Cr., 141, which was itself reversed, on appeal to the court of appeals, in 99 N. Y., 474; 3 N. Y. Cr., 348.



**Re enactment.**—This section re-enacts the common law. *People v. Sharp*, 9 St. Rep., 162.

**Contempt.**—The Penal Code has not taken from the legislature all power to punish for contempt. *Matter of McDonald*, 32 Hun, 589, note; 2 N. Y. Cr., 82. This case, under the name of *People ex rel. McDonald v. Keeler*, was reversed in 82 Hun, 563. The court of appeals reversed the general term decision and affirmed the order of the court of oyer and terminer, except in so far as it remanded the relator to the custody of the sheriff.

A refusal to testify before a legislative committee renders a witness guilty of a misdemeanor. *People v. Sharp*, 107 N. Y., 439; 5 N. Y. Cr., 580; 12 St. Rep., 217; rev'g, 10 St. Rep., 522.

The provisions of the Revised Statutes relative to contumacious witnesses were not superseded nor abrogated by the Penal Code. *People ex rel. McDonald v. Keeler*, 99 N. Y., 474; 3 N. Y. Cr., 353.

Where the testimony of the witness is sought to be taken in a proper case, and if the inquiry does not relate to privileged matter, and is called for by a proper subpoena *duces tecum*, he is bound to answer, and the legislative committee, before which he is summoned, may enforce obedience to its order by proceedings for contempt. *People ex rel. Sabold v. Webb*, 23 St. Rep., 324; 5 N. Y. Supp., 855.

**§ 70. Members of the legislature to forfeit office.**—The conviction of a member of the legislature of either of the crimes defined in this chapter, involves as a consequence in addition to the punishment prescribed by this Code, a forfeiture of his office; and disqualifies him from ever afterwards holding any office under this state.

## TITLE VIII.

### OF CRIMES AGAINST PUBLIC JUSTICE.

- CHAPTER**
- I. Bribery and corruption.
  - II. Rescues.
  - III. Escapes and aiding therein.
  - IV. Forging, stealing, mutilating and falsifying judicial and public records and documents.
  - V. Perjury and subornation of perjury.
  - VI. Falsifying evidence.
  - VII. Other offenses against public justice.
  - VIII. Conspiracy.

## CHAPTER I.

### *Bribery and Corruption.*

- SECTION**
- 71. Bribery of a judicial officer.
  - 72. Officer accepting bribe.
  - 73. Juror, etc., promising verdict.
  - 74. Juror, etc., accepting bribes.
  - 75. Embracery.
  - 76. Misconduct of officers at drawing of jurors.
  - 77. Misconduct of officer having charge of jurors.
  - 78. Certain punishments.
  - 79. Offender a competent witness, etc.
  - 80. Bribery of witnesses.
  - 81. Definition of "jurors."

**§ 71. Bribery of a judicial officer.**—A person who gives or offers, or causes to be given or offered, a bribe, or any money,

property, or value of any kind, or any promise or agreement therefor, to a judicial officer, juror, referee, arbitrator, appraiser, or assessor, or other person authorized by law to hear or determine any question, matter, cause, proceeding, or controversy, with intent to influence his action, vote, opinion, or decision thereupon, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

**Object.**—This section relates to the bribery of a judicial officer. *People v. Sharp*, 12 St. Rep., 217; 107 N. Y., 439; 5 N. Y. Cr., 572.

This section prescribes the offense of giving or offering a bribe to a judicial officer and certain other persons enumerated, connected either with the administration of justice, or who exercises *quasi* judicial functions. *People v. Jaehne*, 3 St. Rep., 11; 103 N. Y., 190; 4 N. Y. Cr., 478.

**§ 72. Officer accepting bribe.**—A judicial officer, a person who executes any of the functions of a public office not designated in Titles VI and VII of this Code, or a person employed by or acting for the state, or for any public officer in the business of the state, who asks, receives, or agrees to receive a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceeding, shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years, or by fine of not more than five thousand dollars, or both. A conviction also forfeits any office held by the offender, and forever disqualifies him from holding any public office under the state.

See notes under section 42, *ante*.

**Application.**—This section relates to the accepting of a bribe by a judicial officer. *People v. Sharp*, 107 N. Y., 439; 5 N. Y. Cr., 572; 12 St. Rep., 217.

This section supersedes section 58 of the Consolidation Act. *Jaehne v. People*, 6 N. Y. Cr., 240; 3 St. Rep., 11; *People v. O'Neil*, 109 N. Y., 262; 6 N. Y. Cr., 51; 14 St. Rep., 829.

Section 58 of the Consolidation Act is superseded by this section. *People v. Jaehne*, 3 St. Rep., 11; 103 N. Y., 188; 4 N. Y. Cr., 478.

This section repealed section 100 of the New York City Charter of 1873. *People v. O'Neil*, 109 N. Y., 261; 6 N. Y. Cr., 51; 14 St. Rep., 829.

The section applies in general to the offense of bribery committed by municipal officers. *People v. Jaehne*, 103 N. Y., 192; 4 N. Y. Cr., 526; 3 St. Rep., 11.

The specification of judicial officers in this section is followed by words of the most comprehensive meaning, intended apparently to include, in this final provision all public officers within this state, of whatever character or grade, not included within the previous titles. *Id.*

The crime of bribery committed by a member of the common council of the city of New York, is defined and made punishable by this section. *Id.*

This section is not retrospective in its terms, and is to be construed as prospective only. *People v. O'Neil*, 109 N. Y., 261; 6 N. Y. Cr., 51; 14 St. Rep., 829.

This section is prospective merely, and can operate only upon the crime of bribery committed after the Penal Code took effect. *Jaehne v. People*, 6 N. Y. Cr., 240; 3 St. Rep., 11.

See *People v. Meakim*, 133 N. Y., 221; 44 St. Rep., 752; 8 N. Y. Cr., 420; *aff'g* 61 Hun, 327; 40 St. Rep., 688; 15 N. Y. Supp., 918; *People v. Richmond*, 5 N. Y. Cr., 97.

**§ 73. Juror, etc., promising verdict.**—A juror, or a person drawn or summoned to attend as a juror, or a person chosen arbitrator, or appointed referee, who either,

1. Makes any promise or agreement to give a verdict, judgment, report, award, or decision, for or against any party; or

2. Willfully receives any communication, book, paper, instrument, or information, relating to a cause or matter pending before him, except according to the regular course of proceeding upon the trial or hearing of that cause or matter;

Is guilty of a misdemeanor.

A violation, by a juror, of the restraints provided in this section does not constitute a contempt of court. *People ex rel. Munsell v. Court, etc.* 3 N. Y. Cr., 215; 36 Hun, 279.

Outside of the criminal contempts enumerated in section 143, *post*, there are very many offenses of a general character which could not be so punished, but were reached by making them misdemeanors and giving the culprit a trial before a jury. *People ex rel. Munsell v. Court, etc.*, 101 N. Y., 245; 4 N. Y. Cr., 75.

**§ 74. Juror, etc., accepting bribes.**—A juror, referee, arbitrator, appraiser, or assessor or other person, authorized by law to hear or determine any question, matter, cause, controversy or proceeding, who asks, receives, or agrees to receive, any money property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, action, judgment or decision, shall be influenced thereby, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

See section 1193 of Code of Civil Procedure.

This section relates to bribing a juror. *People v. Sharp*, 107 N. Y., 439; N. Y. Cr., 572; 12 St. Rep., 217.

**§ 75. Embracery.**—A person who influences or attempts to influence improperly, a juror in a civil or criminal action or proceeding, or one drawn or summoned to attend as such a juror, or one chosen an arbitrator, or appointed a referee, in respect to his verdict, judgment, report, award or decision in any cause or matter pending, or about to be brought before him, in any case, or in any manner not included in the last two sections, is guilty of a misdemeanor.

See section 1122 of Code of Civil Procedure.

See *People v. Sellick*, 4 N. Y. Cr., 331.

**§ 76. Misconduct of officers at drawing of jurors and the formation of a jury.**—A person authorized by law to assist at the drawing or empaneling of grand or trial jurors to attend a court, or a term of a court, or to try any cause or issue, or to assist in the formation of a jury, who either

1. Designedly puts, or consents to the putting, upon a list of

jurors as having been drawn, any name which was not lawfully drawn for that purpose; or

2. Designedly omits to place on such a list any name which was lawfully drawn; or

3. Designedly signs or certifies a list of such jurors as having been drawn which was not lawfully drawn; or

4. Designedly withdraws from the box, or other receptacle for the ballots containing the names of such jurors, any paper or ballot lawfully placed or belonging there and containing the name of a juror, or omits to place in such box or receptacle any name lawfully drawn or designated, or places in such box or receptacle a paper or ballot containing the name of a person not lawfully drawn and designated as a juror; or

5. In the drawing of such jurors, does any act which is unfair, partial or improper in any other respect; or

6. Who violates any of the provisions of section eleven hundred and sixty-three, eleven hundred and sixty-four, or eleven hundred and sixty-five of the code of civil procedure;

Is guilty of a misdemeanor.

Am'd ch. 692, Laws 1905. Took effect June 2, 1905.

See section 1122 of Code of Civil Procedure.

**§ 77. Misconduct of officers having charge of juries.—**

An officer to whose charge any jury are committed by a court or magistrate, who negligently or willfully permits them, or any of them, without leave of the court or magistrate,

1. To receive any communication from any person;

2. To make any communication to any person;

3. To obtain or receive any book or paper, or refreshment; or,

4. To leave the jury room;

Is guilty of a misdemeanor.

**§ 78. Certain punishments.—**A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a person executing any of the functions of a public officer, other than one of the officers or persons designated in Title VI, Title VII, and section 71 of Title VIII of this Code, with intent to influence him in respect to any act, decision, vote, or other proceeding, in the exercise of his powers or functions, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

See notes under next section.

See section 418, *post*.

**Object.**—This section supplements section 72, *ante*, and prescribes the offense of giving or offering a bribe to a person executing the functions of a public office. *People v. Jaehne*, 103 N. Y., 191; 4 N. Y. Cr., 478; 3 St. Rep., 11.

The provisions of this section are so modified by section 712, *post*, as not to forbid such evidence from being proved against the witness upon any charge of perjury committed on such examination. *People v. Sharp*, 107 N. Y., 439, 5 N. Y. Cr., 512; 12 St. Rep., 217.

See *People v. Richmond*, 5 N. Y. Cr., 97.

**§ 79. Offender a competent witness, etc.**—A person offending against any provision of any foregoing sections of this Code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted, shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution.

See section 712, *post*.

The case of *People v. Sharp*, 45 Hun, 487, 489, 491; 10 St. Rep., 522, was reversed in 107 N. Y., 427; 5 N. Y. Cr., 569; 12 St. Rep., 217.

See note in *People v. Everhardt*, 2 Silv. (Ct. App.), 526.

**Constitutional.**—This section is not unconstitutional in its compulsory provisions. *People v. Sharp*, 107 N. Y., 439; 5 N. Y. Cr., 569; 12 St. Rep., 217.

**Legislative committee.**—Under this section, every question may be asked in an investigation before a senate committee, which is pertinent to the subject matter. *Id.* Its operation is not excluded by the provisions of sections 68 and 69, *ante.* *Id.*

The appearance and testimony of a witness before a legislative committee are compulsory. *Id.*

This section embraces investigations as to corporations or boards, etc., before a legislative committee. *Id.*

Testimony given before senate committee is privileged and cannot be used against the witness on the trial of an indictment for bribery. *Id.*

This section includes witnesses giving testimony on the subject of bribery before the legislature or a legislative committee. *People v. Sharp*, 9 St. Rep., 165.

**Grand jury.**—Where the defendant was subpoenaed and testified before the grand jury, his testimony cannot be used in finding an indictment against him. *People v. Spencer*, 48 St. Rep., 804; 66 Hun, 150, 1; 21 N. Y. Supp., 33.

**§ 80. Bribery of witnesses.**—A person who is, or is about to be, a witness upon a trial, hearing, or other proceeding, before any court or any officer authorized to hear evidence or take testimony, who receives, or agrees or offers to receive, a bribe, upon any agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing or other proceeding, is guilty of a felony.

See section 113, *post*.

**§ 81. Definition of “jurors.”**—The word “juror,” as used in this chapter includes a talesman, and extends to jurors in all courts whether of record or not of record, and in special proceedings, and before any officer authorized to impanel a jury in any case or proceeding.

## CHAPTER II.

*Rescues.*

SECTION 82. Rescue of prisoner.

83. Taking, etc., property in officer's custody.

**SECTION 82. Rescue of prisoner.**—A person who, by force or fraud, rescues a prisoner from lawful custody, or from an officer or other person having him in lawful custody, is guilty of a felony, if the prisoner was held upon a charge, commitment, arrest, conviction, or sentence of felony; and if the prisoner was held upon a charge, arrest, commitment, conviction, or sentence for misdemeanor, the rescuer is guilty of a misdemeanor.

See subd. 4 of section 14, and section 587 of Code of Civil Procedure.

A defendant was not indictable under the former statute, where it did not appear that the prisoner was committed under any distinct and certain charge of felony. *People v. Washburn*, 10 John., 160.

In *People v. Tompkins*, 9 Johns., 70, it was held that lying in wait near a jail, by agreement with a prisoner, and carrying him away, was not an offense against the former statute, but a misdemeanor at common law. Whether such offense is within this section, *quære*. So, it was held, in *People v. Rose*, 12 John., 339, that a person confined in jail, who attempted to escape, by breaking the prison, in consequence of which a fellow prisoner, confined for felony, escaped from jail, was guilty of an offense against the former statute, and might be punished with imprisonment in state prison.

**§ 83. Taking, etc., property in officer's custody.**—A person who takes from the custody of an officer or other person, personal property, in charge of the latter, under any process of law, or who willfully injures or destroys such property, is guilty of a misdemeanor.

See subd. 4 of section 14 and section 587 of Code of Civil Procedure.

## CHAPTER III.

*Escapes, and Aiding Therein.*

SECTION 84. Escaping prisoner may be recaptured.

85. Prisoner escaping.

86. Attempt to escape from state prison.

87. Aiding escape.

88. Same.

89. Officer suffering escape.

90. Id., forfeits office.

91. Concealing escaped prisoner.

92. Definition of prison.

93. Definition of prisoner.

**§ 84. Escaping prisoner may be recaptured.**—A prisoner, in custody under sentence of imprisonment for any crime, who escapes from custody, may be recaptured and imprisoned for a term equal to that portion of his original term of imprisonment which remained unexpired upon the day of his escape.

See section 186 of Code of Criminal Procedure.



In cases where, before the expiration of a term of imprisonment, the prisoner escapes, no new award of execution is necessary. *Haggerty v. People*, 53 N. Y., 478. He may be retaken at any time, and confined under the authority of the original judgment until his term has been accomplished. *Id.*

**§ 85. Prisoner escaping.**—A prisoner who, being confined in a prison, or being in lawful custody of an officer or other person, by force or fraud escapes from such prison or custody, is guilty of felony if such custody or confinement is upon a charge, arrest, commitment, or conviction for a felony; and of a misdemeanor if such custody or confinement is upon a charge, arrest, commitment or conviction for a misdemeanor.

See notes under section 92, *post*.

**Rights of escaped prisoner.**—An escaped prisoner cannot take any action before the court. *People v. Genet*, 59 N. Y., 80; *Keenan v. O'Brien*, 23 St. Rep., 478; 53 Hun, 30; *McMonagle v. Conkey*, 14 id., 326; *Matter of O'Byrne*, 55 id., 438; 29 St. Rep., 116.

**Homicide while attempting to escape.**—A charge that the homicide was committed, while the defendant was attempting to escape from jail where he was confined upon a charge of felony, if sustained by proof, renders the killing the crime of murder in the first degree, without regard to the degree of deliberation or premeditation exercised in its commission. *People v. Johnson*, 110 N. Y., 141; 16 St. Rep., 846.

See *People v. Johnson*, 46 Hun, 670; 13 St. Rep., 48.

**§ 86. Attempt to escape from state prison.**—A prisoner confined in a state prison for a term less than for life, who attempts by force or fraud, although unsuccessfully, to escape from such prison, is guilty of felony.

**§ 87. Aiding escape.**—A person who, with intent to effect or facilitate the escape of a prisoner, whether the escape is effected or attempted or not, enters a prison, or conveys to a prisoner any information, or sends into a prison any disguise, instrument, weapon, or other thing, is guilty of felony, if the prisoner is held upon a charge, arrest, commitment, or conviction for a felony; and of a misdemeanor, if the prisoner is held upon a charge, arrest, commitment, or conviction for a misdemeanor.

See notes under section 82, *ante*.

**§ 88. Aiding escape.**—A person who aids or assists a prisoner in escaping, or attempting to escape, from the lawful custody of a sheriff, or other officer or person, is guilty of a misdemeanor, if the prisoner is held under arrest, commitment or conviction for a misdemeanor, or upon a charge thereof; and of a felony, if the prisoner is held under an arrest, commitment, or conviction for a felony, or upon a charge thereof.

See notes under section 82, *ante*.

**§ 89. Officer suffering escape.**—A sheriff, or other officer or person, who allows a prisoner, lawfully in his custody, in any action or proceeding, civil or criminal, or in any prison under his charge or control, to escape or go at large, except as permitted by

law, or connives at or assists such escape, or omits an act or duty whereby such escape is occasioned, or contributed to, or assisted, is

1. If he corruptly and willfully allows, connives at, or assists the escape, guilty of a felony ;
2. In any other case, is guilty of a misdemeanor.

See section 58, *ante*; sections 114 and 115, *post*.

What amounts to an escape from civil process. *Lovell v. Orser*, 1 Bosw., 249; *Littlefield v. Brown*, 1 Wend., 398; *Kellogg v. Gilbert*, 10 John., 220; *Olmstead v. Raymond*, 6 id., 62; *Stone v. Woods*, 5 id., 182.

**§ 90. Officer suffering escape, forfeits office.**—An officer who is convicted of the offense specified in the first subdivision of the last section, forfeits his office, and is forever disqualified, to hold any office, or place of trust, honor or profit, under the constitution or laws of this state.

**§ 91. Concealing escaped prisoner.**—A person who knowingly or willfully conceals, or harbors for the purpose of concealment, a person who has escaped or is escaping from custody, is guilty of a felony if the prisoner is held upon a charge or conviction of felony, and of a misdemeanor if the person is held upon a charge or conviction of misdemeanor.

**§ 92. Definition of prison.**—The term “prison,” as used in this chapter, means any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest.

The common jail is a prison within the meaning of section 85. *ante*. *People v. Johnson*, 13 St. Rep., 48; 7 N. Y. Cr., 402; 27 W. Dig., 519; *aff'd*, 16 St. Rep., 846; 110 N. Y., 134.

**§ 93. Definition of prisoner.**—The term “prisoner,” as used in this chapter, means any person held in custody under process of law, or under lawful arrest.

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## CHAPTER IV.

*Forging, Stealing, Mutilating and Falsifying Judicial and Public Records and Documents.*

**SECTION 94.** Injury, etc., to public record.

95. Offering false or forged instruments to be filed or recorded.

**§ 94; Injury, etc., to public record.**—A person who, willfully and unlawfully removes, mutilates, destroys, conceals or obliterates a record, map, book, paper, document, or other thing, filed or deposited in a public office or with any public officer by authority of law, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars or by both.



**What included.**—This section makes provision for all cases of injury to returns, whether copies or originals. *People v. Wise*, 8 N. Y. Cr., 309; 2 How. N. S., 92.

In order to bring a case within this section, it must appear that the instrument mutilated was filed or deposited with the defendant, as a public officer, by authority of law. *Id.*

The section does not denounce the mutilation of every paper, but only where the paper is filed or deposited "by authority of law." *Id.*

This section does not cover the case of a messenger, who may not, in certain cases, be a public officer, but may be a mere servant or employe of a public officer. *Id.*

This section includes not only papers and documents placed in a public office, or with a public officer, for permanent care and preservation, but also those placed there for temporary use or custody. *People v. Peck*, 22 N. Y. Supp., 576; 67 Hun, 564; 51 St. Rep., 475.

The statistics required to be gathered by the commissioner of labor statistics, including answers to circulars on that subject, are papers deposited with a public officer, by authority of law, within this section. *Id.*

The willful and unlawful destruction of such papers is a violation thereof. *Id.*

Not every paper that comes into a public office in the performance of the duties of the officer, who has charge of the office, is within this section. *People v. Peck*, 52 St. Rep., 913; 138 N. Y., 397. But papers, which a public officer is required to obtain in the discharge of his official duties, which have public importance and are of permanent value and may serve a useful purpose, are, after they have been deposited in his office or with him, under its protection. *Id.*

A defense, upon the trial of an indictment for destroying them, that they are the private papers of the person sending them, or that the information thus communicated was confidentially disclosed, cannot be sustained. *Id.*

**Indictment.**—The indictment under this section need not negative the existence of circumstances under which it would be lawful for the commissioner of statistics to destroy public documents in his possession. *Id.* This is matter of defense, to be established at the trial. *Id.*

**§ 95. Offering false or forged instruments to be filed or recorded.**—A person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this state, which instrument, if genuine, might be filed or registered or recorded under any law of this state or of the United States, is guilty of felony.

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## CHAPTER V.

### *Perjury and Subornation of Perjury.*

#### SECTION 96. Perjury.

97. Irregularities in the mode of administering oaths.
98. Incompetency of witness no defense for perjury.
99. Witness's knowledge of materialty of his testimony not necessary.
100. Making of deposition, etc., when deemed complete.
101. Statement of that which one does not know to be true.
102. Summary committal of witnesses who have committed perjury.
103. Witnesses necessary to prove the perjury, may be bound over to appear.
104. Documents necessary to prove such perjury may be detained.
105. Subornation of perjury defined.
106. Punishment of perjury and subornation.

**§ 96. Perjury.**—A person who swears or affirms that he will truly testify, declare, depose, or certify, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed, is true, in an action, or a special proceeding, or upon any hearing, or inquiry, or on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, or may lawfully be administered, and who in such action or proceeding, or on such hearing, inquiry or other occasion, willfully and knowingly testifies, declares, deposes, or certifies falsely, in any material matter, or states in his testimony, declaration, deposition, affidavit, or certificate, any material matter to be true which he knows to be false, is guilty of perjury.

See sections 842–849, inclusive, of Code of Civil Procedure.

If a person swears falsely in respect to any fact relevant to the issue being tried, he is guilty of perjury, though the case failed from defect of proof of another fact, and though the other fact alleged had no existence. *People v. Grimshaw*, 2 N. Y. Cr., 394; 33 Hun, 509; 20 W. Dig., 116; *Wood v. People*, 59 N. Y., 117.

**Oath without knowledge.**—In order to fasten the guilt of perjury on one who swears to an affidavit of which he does not know the contents, he must have known, at the time he verified it, that he did not know its contents, and he must have willingly made it knowing that he knew nothing about its contents or the facts alleged. *Byrnes v. Byrnes*, 102 N. Y., 9.

An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false. *Kane v. City of Brooklyn*, 24 St. Rep., 539; 114 N. Y., 591; see section 101, *post*.

To justify a conviction of perjury under this section, it must be shown that the falsity of the testimony was known to the witness at the time it was given. *People v. Dishler*, 38 Hun, 179; 4 N. Y. Cr., 190. If he testifies under an honest mistake and belief, he is not guilty of perjury. *Id*.

**Claim against city.**—False statements corruptly made in an affidavit to a claim against a city, which was not used before the common council to procure the audit of the claim, do not constitute the crime of perjury, under this section. *People v. Allen*, 9 St. Rep., 624.

**Credibility.**—Perjury may be assigned upon false testimony, going to the credit of a witness. *People v. Courtney*, 94 N. Y., 494; 1 N. Y. Cr., 585.

**Police commissioners.**—Where the information sought by a question put to a witness is legal and proper to aid the police commissioners in determining the moral fitness of an applicant for a position, a false answer thereto is perjury. *People v. Link*, 6 N. Y. Cr., 185; 4 N. Y. Supp., 435.

**Report.**—Where a report is made under section 279, chapter 409 of 1882, and the defendant knowing such report to be false, willfully and corruptly makes a false affidavit verifying it, this constitutes perjury under this section. *People v. Ostrander*, 45 St. Rep., 557; 64 Hun, 335; 19 N. Y. Supp., 327.

It is not necessary to state the facts sworn to in the affidavit of verification itself. *Id*.

**Sheriff's account.**—An oath can be lawfully administered to verify and sustain a sheriff's account of the names of persons confined in jail and number and time for which they were supported, and when so administered it is a deposition, declaration, affidavit or certificate necessary to the prosecution or defense of a private right. *People v. Bowe*, 3 N. Y. Cr., 149; 34 Hun, 528.

A false oath to such account is perjury. *Id*.

**Tax sale.**—This section is broad enough in its provisions to subject a witness or deponent to the pains and penalties of perjury, for swearing falsely on a hearing or inquiry before the comptroller, on an application to cancel a tax sale, etc. *People ex rel. Ostrander v. Chapin*, 105 N. Y., 317; 7 St. Rep., 109.

### § 97. Irregularities in the mode of administering oaths.

—It is no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner. The term "oath," includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated.

See sections 842–849, inclusive, of Code of Civil Procedure.

**Essentials of valid oath.**—To make a valid oath, for the falsity of which perjury will lie, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant consciously takes upon himself the obligation of an oath. *O'Reiley v. People*, 86 N. Y., 161. The mere delivery of an affidavit, signed by the person presenting it, to the officer for his certificate, is not such an act. *Id.*

The certificate of the officer is not the oath. *O'Reiley v. People*, 86 N. Y., 161. It presupposes an oath already taken, of which fact it but furnishes the evidence. *Id.* It is not conclusive but may be rebutted. *Id.*

There must be proof of the oath taken, independent of the official certificate, signature, seal and jurat. *Case v. People*, 76 N. Y., 242.

Where the officer certifies a signed affidavit, without the appearance of the signer, no perjury is committed. *Id.*

**De facto officer.**—A challenged voter, who swears falsely before a *de facto* board of inspectors, is liable to the same punishment as though the oath had been administered by inspectors *de jure*. *People v. Cook*, 8 N. Y., 89.

### § 98. Incompetency of witness, no defense for perjury.

—It is no defense to a prosecution for perjury that the defendant was not competent to give the testimony, deposition or certificate of which falsehood is alleged. It is sufficient that he actually was permitted to give such testimony or make such deposition or certificate.

**Incompetent as witness.**—A witness, who testifies falsely as to a material fact, is guilty of perjury, though he is not a competent witness in the case, and is especially inadmissible to prove the particular fact to which he testifies. *Chamberlain v. People*, 23 N. Y., 85.

This section was enacted to preserve and maintain the general rule that, though a person is not a legal and competent witness in a case, if he is actually admitted by the court and testifies, he commits perjury when what he testifies to is willfully false. *People v. Bowe*, 34 Hun, 528; 8 N. Y. Cr., 159. It includes not only evidence given in the course of legal proceedings, but oaths taken under due authority of law. *Id.*

Under this section, where an oath may be taken, the party or person who takes it, even though it is not given in the course of legal proceedings, cannot protect himself against criminal accountability, by alleging his incompetency to give the deposition or certificate, of which the falsehood is alleged. *Id.*

See *People v. Trumpbour*, 64 Hun, 347; 45 St. Rep., 563.

### § 99. Witness' knowledge of materiality of his testimony not necessary.

—It is no defense to a prosecution for perjury that the defendant did not know the materiality of the false statement made by him; or that it did not in fact affect the proceeding in or for which it was made. It is sufficient that it was material, and might have affected such proceeding.

See notes under sections 96 and 97, *ante*.

**Failure of case.**—Failure of case supported by perjury is no defense. *Wood v. People*, 59 N. Y., 117.

If a witness swears falsely in respect to any fact or circumstance which is

material as part of the entire issue, he is guilty of perjury, though the case fails from defect of proof of another essential fact. *Id.*

**Materiality.**—It is necessary that the false statement tends directly to prove the issue. *Id.* If circumstantially material, or, if it tends to support and give credit to the witness in respect to the main fact, it is perjury. *Id.*

**§ 100. Making of deposition, etc., when deemed complete.**—The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the defendant to any other person with intent that it be uttered or published as true.

An affidavit, neither required by law, nor necessary for the prosecution or defense of a private right, or for the ends of public justice, is not complete within this section. *People v. Allen*, 9 St. Rep., 625.

See *Kane v. City of Brooklyn*, 114 N. Y., 591; 24 St. Rep., 539.

**§ 101. Statement of that which one does not know to be true.**—An unqualified statement of that which one does not know to be true, is equivalent to a statement of that which he knows to be false.

This provision is new. *People v. Dishler*, 38 Hun, 176; 4 N. Y. Cr., 190.

**Without knowledge.**—It is undoubtedly perjury for one knowingly and willfully to swear to a fact as true about which he knows nothing. *Byrnes v. Byrnes*, 102 N. Y. 9.

In *People v. McKinney*, 8 Park., 510, it was held that a person might commit perjury by testifying to something true in fact, though he did not know whether or not it was true.

**§ 102. Summary committal of witnesses who have committed perjury.**—Where it appears probable to a court of record that a person, who has testified before it in an action or proceeding in that court, has committed perjury in any testimony so given, the court may immediately commit him, by an order or process for that purpose, to prison, or take a recognizance, with sureties, for his appearing and answering to an indictment for perjury.

Where a witness testifies to a palpable untruth, in the presence of the court, the power of the court to order him into custody for perjury, is undoubted. *Lindsay v. People*, 67 Barb., 561. To do so or to direct other proceedings to be taken to punish him for the perjury, is discretionary. *Id.*

**§ 103. Witnesses necessary to prove perjury, may be bound over to appear.**—In a case specified in the last section, the court may bind over witnesses to establish the perjury, to appear at the proper court to testify before a grand jury, and also upon the trial, in case an indictment is found for the perjury. It must cause immediate notice of any such commitment or recognizance, with the names of the witnesses so bound over, to be given to the district attorney of the county.

**Two witnesses.**—Formerly the testimony of two witnesses was requisite to a conviction, but the rule has been relaxed. *People v. Stone*, 32 Hun, 41; 2 N. Y. Cr., 446. What is now required is evidence sufficient to counterbalance the oath of the defendant, and the legal presumption of his innocence. *Id.*

**§ 104. Documents necessary to prove perjury may be detained.**—In such a case, if a paper or document, produced by either party, is deemed by the court necessary to be used in the prosecution for the perjury, the court may detain the same, and direct it to be delivered to the district attorney.

**§ 105. Subornation of perjury defined.**—A person, who willfully procures or induces another to commit perjury, is guilty of subornation of perjury.

See section 291 of Code of Criminal Procedure.

**Indictment.**—Under the provisions of the Revised Statutes, it is not essential to the validity of an indictment for the offense that it should aver that the accused incited or solicited the other person to commit perjury. *Stratton v. People*, 81 N. Y., 629. An averment of an offer of a valuable consideration for the purpose specified is sufficient. *Id.*

**Proof.**—The evidence of the perjured party unsupported is not sufficient to convict the defendant of subornation of perjury. *Stratton v. People*, 81 N. Y., 629; *People v. Moett*, 23 Hun, 63.

**What not.**—An attorney who, for the purpose of procuring depositions of several witnesses, sent money in advance to them, together with false answers to the interrogatories annexed to the commission though he did not know that they were false, was held not to be guilty of subornation of perjury. *Matter of Eldridge*, 82 N. Y., 161; 9 W. Dig., 6.

**§ 106. Perjury and subornation thereof, how punished.** Perjury and subornation of perjury are each punishable as follows:

1. When the perjury is committed upon the trial of an indictment for felony, by imprisonment for a term not exceeding twenty years.

2. In any other case, by imprisonment for a term not exceeding ten years.

Am'd by chap. 662 of 1892.

This amendment fixed a maximum of punishment under each subdivision.

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## CHAPTER VI

### *Falsifying Evidence.*

**SECTION 107.** Offering false evidence.

108. Deceiving a witness.

109. Preparing false evidence.

110. Destroying evidence.

111. Pre-enting or dissuading witnesses from attending.

112. Inducing another to commit perjury.

113. Bribing witnesses.

**§ 107. Offering false evidence.**—A person who, upon any trial, hearing, inquiry, investigation or other proceeding authorized by law, offers or procures to be offered in evidence or to be used on a motion, as genuine, a book, paper, document, record or other instrument in writing, knowing the same to have been forged or fraudulently altered, is guilty of felony.

Am'd by chap. 878 of 1890.

This amendment inserted in the original section, after the word "evidence," the words "or to be used on a motion."

**§ 108. Deceiving a witness.**—A person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token or writing, to any witness or person about to be called as a witness, upon any trial, proceeding, inquiry or investigation whatever, conducted by authority of law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

See notes under section 105, *ante*.

**§ 109. Preparing false evidence.**—A person who fraudulently makes or prepares any false record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced in evidence, or on a motion, as genuine, upon any trial, hearing, investigation, inquiry or other proceeding, authorized by law, is guilty of a felony.

Am'd by chap. 378 of 1890.

This amendment inserted, after the word "evidence" in the original section, the words "or on a motion."

**§ 110. Destroying evidence.**—A person who, knowing that a book, paper, record, instrument in writing, or other matter or thing, is or may be required in evidence, or on a motion, upon any trial, hearing, inquiry, investigation, or other proceeding, authorized by law, willfully destroys the same, with intent thereby to prevent the same from being produced, is guilty of a misdemeanor.

Am'd by chap. 378 of 1890.

This amendment inserted, after the word "evidence" in the original section, the words "or on a motion."

See *Collyer v. Collyer*, 50 Hun, 424; 21 St. Rep., 119; 3 N. Y. Supp., 311.

**§ 111. Preventing or dissuading witnesses from attending.**—A person who willfully prevents or dissuades any person who has been duly summoned or subpoenaed as a witness, from attending, pursuant to the summons or subpoena, is guilty of a misdemeanor.

It is a misdemeanor for a person to prevent or dissuade a witness from attending court. *Morse v. Grimke*, 18 Civ. Pro., 40; 27 St. Rep., 266; 8 N. Y. Supp., 2.

**§ 112. Inducing another to commit perjury.**—A person who, without giving, offering or promising a bribe, incites or attempts to procure another to commit perjury, or to give false testimony as a witness, though no perjury is committed or false testimony given, or to withhold true testimony, is guilty of a misdemeanor.

See notes under section 105, *ante*.



**§ 113. Bribing witnesses.**—A person who gives or offers or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness to give false testimony or to withhold true testimony, is guilty of a felony.

See note under section 80, *ante*.

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## CHAPTER VII

### *Other Offenses against Public Justice.*

- SECTION 114.** Injury to records and misappropriation by ministerial officers.  
**115.** Permitting escapes, and other unlawful acts, committed by ministerial officers.  
**116.** Neglecting or refusing to execute process.  
**117.** General provision as to neglect of public officers.  
**117a.** Neglect of county officer to make report.  
**118.** Delaying to take person arrested for crime before a magistrate.  
**119.** Making arrests, etc., without lawful authority.  
**120.** Misconduct in executing search warrant.  
**121.** Refusing to aid officer in making an arrest.  
**122.** Refusing to make an arrest.  
**123.** Resisting execution of process; places declared in insurrection.  
**124.** Resisting public officer in the discharge of his duty.  
**125.** Compounding crimes.  
**126.** Conviction of primary offender, etc.  
**127.** Intimidating, etc., public officer.  
**128.** Suppressing evidence.  
**129.** Buying lands in suit.  
**130.** Buying pretended titles.  
**131.** Mortgage of lands under adverse possession not prohibited.  
**132.** Common barratry defined.  
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**134.** What proof is required.  
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**136.** Buying demands for suit by an attorney.  
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**138.** Officers inducing suits to be brought.  
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**140.** Receiving claims in what cases allowable.  
**141.** Application of previous sections.  
**142.** Witness' privilege restricted.  
**143.** Criminal contempts.  
**144.** Grand juror acting after challenge has been allowed.  
**145.** Inspection of depositions on examination, to whom allowed.  
**146.** Disclosure of depositions returned by grand jury with presentment.  
**147.** Racing near a court.  
**148.** Misconduct by attorneys.  
**149.** Permitting attorney's name to be used.  
**150.** In what cases lawful.  
**151.** Production of pretended heir.  
**152.** Substituting one child for another.  
**153.** Importing foreign convicts.  
**154.** Omission of duty by public officer.



**SECTION 154a. Falsely making enrolled person exempt.**

- 155. Punishment for commission of prohibited acts.
- 156. Disclosing fact of indictment having been found.
- 157. Grand juror disclosing what transpired before the grand jury.
- 157a. Stenographer disclosing evidence taken before grand jury.
- 158. Instituting suit in false name.
- 159. Maliciously procuring search warrant.
- 160. Unauthorized communications with prisoners prohibited.
- 161. Neglect to return names of constables.
- 162. Falsely certifying, etc., as to deeds.
- 163. Other false certificates.
- 164. Penalty for recording, etc., without acknowledgement.
- 165. False auditing and paying claims.
- 166. False auditing and paying claims.
- 167. False auditing and paying claims

**§ 114. Injury to records and misappropriation by ministerial officers.**—A sheriff, coroner, clerk of a court, constable or other ministerial officer, and every deputy or subordinate of any ministerial officer, who either:

1. Mutilates, destroys, conceals, erases, obliterates or falsifies any record or paper appertaining to his office; or,
  2. Fraudulently appropriates to his own use or to the use of another person, or secretes with intent to appropriate to such use, any money, evidence of debt or other property intrusted to him in virtue of his office,
- Is guilty of felony.

See sections 58 and 94, *ante*; sections 470 and 472, *post*.

The value of the paper, etc., is of no importance. *Ayres v. Covill*, 18 Barb., 263. But it must be a record or paper appertaining to the office.

**§ 115. Permitting escapes and other unlawful acts, committed by ministerial officers.**—A sheriff, coroner, clerk of a court, constable, or other ministerial officer, and every deputy or subordinate of any ministerial officer, who either:

1. Receives any gratuity or reward, or any security or promise of one, to procure, assist, connive at or permit any prisoner in his custody to escape, whether such escape is attempted or not; or,
  2. Commits any unlawful act tending to hinder justice,
- Is guilty of misdemeanor.

See sections 58, 89 and 90, *ante*.

**§ 116. Neglecting or refusing to execute process.**—An officer who, in violation of a duty imposed upon him by law to receive a person into his official custody, or into a prison under his charge, willfully neglects or refuses so to do, is guilty of a misdemeanor.

See section 154, *post*.

See *Smith v. Botens*, 36 St. Rep., 55; 13 N. Y. Supp., 224.

**§ 117. General provision as to neglect, etc.**—A public officer, or person holding a public trust or employment, upon

whom any duty is enjoined by law, who willfully neglects to perform the duty, is guilty of a misdemeanor. This and the preceding section do not apply to cases of official acts or omissions the prevention or punishment of which is otherwise specially provided by statute.

See sections 154, 471 and 684, *post*.

The reference to section 1175 of this Code, in *People ex rel. Wright v. Common Council*, etc., 2 How. N. S., 68; 16 Abb. N. C., 114, is to the above section.

**Otherwise specially provided.**—The prevention or punishment, contemplated in the last clause of this section, must be otherwise specially provided by statute for a particular case. *People v. Meakim*, 44 St. Rep., 752; 8 N. Y. Cr., 409; 133 N. Y., 221; aff'g 61 Hun, 327; 40 St. Rep., 688; 15 N. Y. Supp., 918.

**Bar.**—The remedy provided in section 2090 of the Code of Civil Procedure is no bar to an indictment under this section. *Id.* But the punishment by way of fine, which may be imposed in the former proceeding, would be taken into account by the court in measuring its punishment upon a conviction of the same person for a misdemeanor under this section. *Id.*

A determination made in a civil proceeding to remove a public officer for neglect or malfeasance in office is not, in any proper sense, a conviction of such officer of a crime. *Id.*

**When guilty.**—The refusal of officers, empowered to administer oaths, when requested, subjects them to indictment for misdemeanor. *People v. Brooks*, 1 Denio, 457. The neglect, if intentional, is willful. *Id.*

No public officer has been invested with the discretion to omit to carry into effect a law of the state for the reason that he may not approve of its object or policy, or for any other reason. *People ex rel. Wright v. Common Council*, etc., 2 How. N. S., 68; 16 Abb. N. C., 114.

**When not guilty.**—When board of education not liable for neglect of official duty. *Williams v. People*, 15 W. Dig., 371.

By the excise law of 1892, special provisions are made for the punishment of the commissioners for a willful neglect of duty by them. *People v. Meakim*, 8 N. Y. Cr., 420; 133 N. Y., 221; 44 St. Rep., 752; aff'g 61 Hun, 327; 40 St. Rep., 688; 15 N. Y. Supp., 918.

A refusal of the excise commissioners to act upon a verbal charge against a licensee is not a violation of duty under the new act of 1892. *Id.*

See *People v. Meakim*, 21 N. Y. Supp., 1104.

**§ 117a. Neglect of county officer to make report.**—A county officer of an officer whose salary is paid by the county, who neglects or refuses to make a report under oath to the board of supervisors of such county on any subjects or matters connected with the duties of his office, whenever required by resolution of such board, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

**§ 117b. Neglect of duty by superintendent or overseer of the poor.**—The county superintendents of the poor, or any overseer of the poor, whose duty it shall be to provide for the support of any bastard and the sustenance of its mother, who shall neglect to perform such duty, shall be guilty of a misdemeanor, and shall, on conviction, be liable to a fine of two hundred and fifty dollars, or to imprisonment not exceeding one year, or by both such fine and imprisonment.

Added by chap. 550 of 1896. In effect, September 1, 1896.

**§ 118. Delay to take person arrested for crime before a magistrate.**—A public officer or other person having arrested any person upon a criminal charge, who willfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

See section 556, *post*; section 165 of Code of Criminal Procedure.

**§ 119. Appointment of special deputy sheiffs, peace officers, etc. Exercising functions of such officers and making arrsts, etc., without authority.**—No sheriff of a county, mayor of a city, or officials, or person authorized by law to appoint special deputy sheriffs, special constables, marshals, policemen, or other peace officers in this state, to preserve the public peace or quell public disturbance, shall hereafter, at the instance of any agent, society, association or corporation, or otherwise, appoint as such special deputy, special constable, marshal, policeman, or other peace officer, any person who shall not be a citizen of the United States and a resident of the state of New York, and entitled to vote therein at the time of his appointment, and a resident of the same county as the mayor or sheriff or other official making such appointment; and no person shall assume or exercise the functions, powers, duties or privileges incident and belonging to the office of special deputy sheriff, special constables, marshal or policemen, or other peace officer, without having first received his appointment in writing from the authority lawfully appointing him. Any person or persons who shall, in this state, without due authority, exercise, or attempt to exercise the functions of, or hold himself out to any one as a deputy sheriff, marshal, or policeman, constable or peace officer, or any public officer, or person pretending to be a public officer, who, unlawfully, under the pretense or color of any process, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements without a regular process therefor, or any person who knowingly violates any other provision of this section, is guilty of a misdemeanor. But nothing herein contained shall be deemed to affect, repeal or abridge the powers authorized to be exercised under sections one hundred and two, one hundred and four, one hundred and sixty-nine, one hundred and eighty-three, eight hundred and ninety-five, eight hundred and ninety-six and eight hundred and ninety-seven of the Code of Criminal Procedure; or under chapter three hundred and forty-six of the laws of eighteen hundred and sixty-three, as amended by chapter two hundred and fifty-nine of the laws of eighteen hundred and sixty-six, and chapter one hundred and ninety-three, of the laws of eighteen hundred and seventy-five; or under chapter two hundred and twenty-three of the laws of eighteen hundred and eighty; or under chapter five hundred and twenty-seven of the laws of eighteen hundred and seventy-three; or under chapter two hundred and five of the laws of eighteen hundred and seventy-five; but all places kept for summer resorts and the grounds of racing associations in the counties of New York, Kings and Westchester, are hereby exempted from the provisions of this act.

Amended by chap. 884 of 1882

This amendment was made before Code went into effect.

Amended by chap. 272 of 1892.

This amendment substituted the present for the former section.

See section 556, *post*; section 183 of Code of Criminal Procedure.

**§ 120. Misconduct in executing search warrant.**—An officer, who, in executing a search warrant, willfully exceeds authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

See sections 159 and 556, *post*.

An officer, under a legal warrant to search for stolen goods, may, after demand and refusal, break open the outer or other door. *Bell v. Clapp*, 263.

**§ 121. Refusing to aid officer in making arrest.**—A person, who, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officer, is guilty of a misdemeanor.

**§ 122. Refusing to make an arrest.**—A person, who, after having been lawfully commanded by any magistrate to arrest another person, willfully neglects or refuses so to do, is guilty of a misdemeanor.

**§ 123. Resisting execution of process in places declared in insurrection.**—A person, who, after proclamation issued by the governor declaring a county to be in a state of insurrection, resists or aids in resisting the execution of process in such county, or who aids or attempts the rescue or escape of another from lawful custody or confinement in such county, or who resists or aids in resisting a force ordered out by the governor to quell or suppress an insurrection, is guilty of a felony.

Amended by chap. 384 of 1882.

This amendment was made before Code went into effect.

**§ 124. Resisting public officer in the discharge of duty.**—A person, who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging, or attempting to discharge, a duty of his office, is guilty of a misdemeanor.

See section 47, *ante*.

**§ 125. Compounding crimes.**—A person who takes money or other property, gratuity or reward, or an agreement or promise therefor, upon an agreement or understanding, express or implied, to compound or conceal a crime, or a violation of statute, or to abstain from, discontinue or delay, a prosecution therefor, or to withhold any evidence thereof, except in a case where a compromise is allowed by law, is guilty :

1. Of a felony, punishable by imprisonment in a state prison, for not more than five years, where the agreement or understanding relates to a felony punishable by death, or by imprisonment in a state prison for life;

2. Of a felony, punishable by imprisonment in a state prison for not more than three years, where the agreement or understanding relates to another felony;

3. Of a misdemeanor, punishable by imprisonment in a county jail for not more than one year, or by fine of not more than two hundred and fifty dollars, or both, where the agreement or understanding relates to a misdemeanor, or to a violation of a statute for which a pecuniary penalty or forfeiture is prescribed.

See sections 664–666 of Code of Criminal Procedure.

Compounding a crime is itself criminal. *Devoe v. Davis*, 8 St. Rep., 727.

**Who not guilty.**—There can be no culpability in this respect in a party who does not know that the consideration of the contract, or of the payment of the money, is the compounding of a felony. *Id.*

The person injured by the criminal act of another, in his personal property, may take from the wrongdoer compensation for the wrong. *Conderman v. Trenchard*, 58 Barb., 170.

But he must not enter into any agreement to prevent or stifle a prosecution for the crime. *Id.*

A party defrauded has a right, fairly and without fraud, to state to his debtor that the latter has committed a crime, in order to induce him to pay what he ought, and is able, to pay; and, in case the debtor yields and pays, the transaction does not amount to compounding a felony. *Kissock v. House*, 23 Hun, 36.

The holder of forged paper, for which he has paid value, is under no legal obligation to refuse payment and hold such paper for the benefit of the public prosecutor. *Id.*

**Receiver.**—The offense of compounding a crime is undoubtedly confined to the party receiving the money or property. *Daimouth v. Bennett*, 15 Barb., 542.

It is the taking or receiving, and not the payment, of the money, that constitutes the offense. *Id.*

This section declares the party receiving the money, under such circumstances, the criminal. *Id.*

**Concealment.**—The prohibition of the section extends beyond the mere agreement to prosecute, and subjects to punishment those who conceal the crime, or agree to conceal evidence. *Conderman v. Trenchard*, 58 Barb., 169; 8 C.; *Same v. Hicks*, 3 Lans., 111.

**§ 126. Conviction of primary offender, etc.**—Upon the trial of an indictment for compounding a crime, it is not necessary to prove that any person has been convicted of the crime or violation of statute, in relation to which an agreement or understanding herein prohibited was made.

See section 32, *ante*.

In such case, the acquittal of the person charged with the crime is not a bar to a conviction. *People v. Buckland*, 13 Wend., 592.

**§ 127. Intimidating, etc., public officer.**—A person who directly or indirectly addresses any threat or intimidation to a public officer, or to a juror, referee, arbitrator, appraiser, or asses-

sor, or to any other person, authorized by law to hear and determine any controversy or matter, with intent to induce him, contrary to his duty, to do or make, or to omit or delay, any act, decision or determination, is guilty of a misdemeanor.

See sections 61, 62 and 63, *ante*; section 464, *post*.

It is a misdemeanor to address a threat to a public officer, with intent to induce him, contrary to his duty, to omit any act. *Smith v. Botens*, 36 St. Rep., 54; 13 N. Y. Supp., 223.

The crime of intimidating an officer involves the question of intent. *Id.* The word "intent" is expressly used in this section. *Id.*

Whether this section is intended to apply to executive officers, *quærs*. *Id.*

**§ 128. Suppressing evidence.**—A person who maliciously practices any deceit or fraud, or uses any threat, menace or violence, with intent to prevent any party to an action or proceeding from obtaining or producing therein, any book, paper, or other thing which might be evidence, or from procuring the attendance or testimony of any witness therein, or with intent to prevent any person having in his possession any book, paper, or other thing which might be evidence in such suit or proceeding, or prevent any person being cognizant of any fact material thereto from producing or disclosing the same, is guilty of a misdemeanor.

See sections 110 and 111, *ante*.

**§ 129. Buying lands in suit.**—A person who takes a conveyance of any lands or tenements, or of any interest or estate therein, from any person not being in the possession thereof, while such lands or tenements are the subject of controversy, by suit in any court, knowing the pendency of such suit and that the grantor was not in possession of such lands or tenements, is guilty of a misdemeanor.

**Application.**—The former statute did not apply to judicial sales. *Tuttle v. Jackson*, 6 Wend., 213; *Webb v. Wendon*, 21 id., 98; *Truax v. Thorn*, 2 Barb., 156; nor to sales by decree of competent court. *Id.*; *Pepper v. Haight*, 20 Barb., 429.

The statute of champerty was not applicable to cases of disputed boundary lines. *Allen v. Welch*, 18 Hun, 226.

Where the land has never been the subject of controversy by suit in any court, and the grantor had the actual title, the grant is not condemned by this and the following section. *Danziger v. Boyd*, 120 N. Y., 629; 30 St. Rep., 893; 2 Silv. (Ct. App.), 574.

**Knowledge.**—To render purchaser liable, he must have knowledge of the pendency of the action. *Preston v. Hunt*, 7 Wend., 53; *Etheridge v. Cromwell*, 8 id., 629; *Hassenfrats v. Kelly*, 13 id., 466.

**§ 130. Buying pretended titles.**—A person who buys or sells, or in any manner procures, or takes or makes any covenant or promise to convey any right, or title real or pretended, to any lands or tenements, unless the grantor thereof or the person making such covenant or promise has been in possession, or he and those by whom he claims, have been in possession of the same or of the reversion and remainder thereof, or have taken the rents



and profits thereof for the space of one year before such covenant or promise made, is guilty of a misdemeanor.

See notes under section 129, *ante*.

To bring a case within a statute, the possession of another must be actual and not constructive. *Dawley v. Brown*, 79 N. Y., 390.

**§ 131. Mortgage of lands under adverse possession not prohibited.**—The last two sections shall not be construed to prevent any person having a just title to lands in the adverse possession of another, from executing a mortgage upon such lands, nor shall said sections apply to any conveyance or release of lands or tenements to any person in the lawful possession thereof.

Am'd by chap. 282 of 1888.

This amendment extended the provisions of the former section to conveyance or release.

**§ 132. Common barratry defined.**—Common barratry is the practice of exciting groundless judicial proceedings.

**§ 133. Declared a misdemeanor.**—Common barratry is a misdemeanor.

**§ 134. What proof is required.**—No person can be convicted of common barratry, except upon proof that he has excited actions or legal proceedings, in at least three instances, and with a corrupt or malicious intent to vex and annoy.

This offense consists in the practice or habit of stirring up litigation. *Voorhees v. Dorr*, 51 Barb., 587. A single instance is insufficient. *Id.* A definite number is required by this section.

**§ 135. Interest.**—Upon a prosecution for common barratry, the fact that the defendant was himself a party in interest or upon the record to any action or legal proceeding complained of, is not a defense.

**§ 136. Buying demands for suit by an attorney.**—An attorney or counselor who violates section 73 of the Code of Civil Procedure, relating to buying demands, or section 74 of the Code of Civil Procedure, relating to certain promises and gifts, is guilty of a misdemeanor.

See sections 73, 74 and 75 of Code of Civil Procedure.

**What is.**—The aim of statute was to prevent attorneys from purchasing claims for the express purpose of instituting suits thereon and thus oppressing debtors and making costs. *Wetmore v. Hegeman*, 88 N. Y., 73. It is not violated, if, at the time of the purchase, the suit is pending and being prosecuted by the attorneys. *Id.*

To constitute the offense, the primary purpose must be to bring suit, and such intent must not be merely incidental and contingent. *Moses v. McDivitt*, 88 N. Y., 62; 8 Abb. N. C., 47; *West v. Kurtz*, 15 Civ. Pro., 426; 19 St. Rep., 803. The purchase must be made for the express purpose of bringing suit. *Id.*

When the purpose of such purchase is to bring an action, and is induced by the procurement of an attorney, it comes within the prohibition of section 73



*et seq.* of the Code of Civil Procedure, whether the transfer is taken in his name or that of another person. *Browning v. Marvin*, 100 N. Y., 148.

The statute covers purchases made at judicial sales had under the direction of an officer of the court. *Mann v. Fairchild*, 2 Keyes, 103; *Ramsey v. Gould*, 57 Barb., 398; *Voorhees v. Dorr*, 51 id., 587; *Wood v. Perry*, 1 id., 114; *Barry v. Whitney*, 3 Sandf., 696; *Hall v. Gird*, 7 Hill, 586; *Arden v. Patterson*, 5 John. Ch., 44.

Buying with an intent to sue, though only in a certain contingency, violates the statute. *Moses v. McDivitt*, 2 Abb. N. C., 47.

The intent must be shown. *Williams v. Matthews*, 3 Cow., 252.

**What not.**—The statute was not intended to prevent a purchase for an honest purpose of protecting some other important right of the assignee. *Baldwin v. Latson*, 2 Barb., 306.

It does not forbid buying a judgment for the purpose of collecting it by execution. *Warner v. Payne*, 3 Barb. Ch., 630; *Brotherson v. Consalus*, 26 How., 213.

An attorney may purchase bonds, etc., for investment, or for profit, or for the protection of other interests, and the purchase is not made illegal by an intent to bring suit, if necessary, for collection. *Moses v. McDivitt*, 88 N. Y., 62; *West v. Kurtz*, 15 Civ. Pro., 426; 19 St. Rep., 803.

An attorney may stipulate with his client for any agreed compensation, and may make it absolute or contingent, but he cannot advance, or agree to advance, the money needed to carry on a prosecution as an inducement to the placing of a claim in his hands for prosecution. *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y., 443.

The mere fact of the purchase of a bond, mortgage, etc., by an attorney, is not evidence of a purchase with the intent and for the purpose of bringing an action thereon. *West v. Kurtz*, 15 Civ. Pro., 426; 19 St. Rep., 803; *Hall v. Bartlett*, 9 Barb., 297; *Bristol v. Dann*, 12 Wend., 142.

A contract by an attorney to advance money, employ counsel and render services in obtaining damages for personal injuries, is void under section 74 of Code of Civil Procedure. *Oishei v. Lawrence*, 40 St. Rep., 660.

Advances by an attorney to a client, made long after the commencement of the action, and from motives of humanity, are not within the statute. *Bristol v. Dann*, 11 Wend., 142.

Where a party is induced by an attorney to purchase a mortgage as an investment, the provisions of section 73 of the Code of Civil Procedure do not apply, if the attorney was in no way interested in the purchase so that he might foreclose it. *Stephens v. Humphreys*, 39 St. Rep., 134.

It is not material whether he bought with an idea to foreclose. *Id.*

**Foreclosure by advertisement.**—The statute extends to suits in equity, but foreclosure by advertisement is not a suit. *Hall v. Bartlett*, 9 Barb., 297; *Baldwin v. Latson*, 2 id., 306; *Mann v. Fairchild*, 2 Keyes, 106; *Warren v. Helmer*, 8 How., 419. See *Hall v. Gird*, 7 Hill, 586.

**Justice's court.**—The former provision was not applicable to a demand purchased with the intent of prosecuting it in a justice's court. *Goodell v. People*, 5 Park., 206.

See *Hoag v. Weston*, 1 St. Rep., 585; 10 Civ. Pro., 95.

**§ 137. Buying demands by a justice or constable for suit before justice.**—A justice of the peace or a constable who, directly or indirectly, buys or is interested in buying anything in action, for the purpose of commencing a suit thereon before a justice, is guilty of a misdemeanor.

A justice of the peace is not prohibited from buying claims for the purpose of prosecution in the supreme court. *Hoag v. Weston*, 1 St. Rep., 585; 10 Civ. Pro., 95.

**§ 138. Officers inducing suits to be brought.**—A justice of the peace or constable, who, directly or indirectly, gives, or

promises to give, any valuable consideration to any person as an inducement to bring, or in consideration of having brought, a suit thereon before a justice, is guilty of a misdemeanor.

Amended by chap. 384 of 1882.

This amendment was made before Code went into effect.

See *Hoag v. Weston*, 1 St. Rep., 585; 10 Civ. Pro., 95.

**§ 139. Forfeiture of office.**—A person convicted of a violation of any of the three preceding sections, in addition to the punishment, by fine and imprisonment, prescribed therefor by this Code, forfeits his office.

See *Hoag v. Weston*, 1 St. Rep., 585; 10 Civ. Pro., 95.

**§ 140. Receiving claims, in what cases allowable.**—Nothing in the four preceding sections shall be construed to prohibit the receiving in payment of anything in action for any estate, real or personal, or for any service of an attorney or counselor actually rendered, or for a debt antecedently contracted; or the buying or receiving of anything in action for the purpose of remittance, and without any intent to violate the preceding sections.

See notes under section 136, *ante*.

**What not prohibited.**—The purchase of the stock of a corporation by an attorney is not a violation of the statute. *Ramsey v. Gould*, 57 Barb., 398; 8 Abb. N. S., 17.

It is not one of the securities or evidences of debt mentioned, nor a chose in action, within the meaning of the statute. *Id.*

A purchase made by an attorney for the purpose of securing a debt, and with no intent to evade the statute, is not unlawful. *Watson's Executors v. McLaren*, 19 Wend., 557; *Baldwin v. Latson*, 2 Barb., Ch., 306.

Under the former statute, an attorney was not prohibited from receiving a promissory note for property sold; for services rendered; for an antecedent debt; or for the purpose of remittance, if without any intent to evade or violate the act. *People v. Walbridge*, 3 Wend., 129.

**§ 141. Application of previous sections.**—The provisions of sections 136, 138 and 140, relative to the buying of claims by an attorney, counselor, justice of the peace or constable, with intent to prosecute them, or to the lending or advancing of money by an attorney or counselor in consideration of a claim being delivered for collection, apply to every case of such buying a claim, or lending or advancing money, by any person prosecuting in person an action or legal proceeding.

Amended by chap. 384 of 1882.

This amendment was made before Code went into effect.

**§ 142. Witness' privilege restricted.**—No person shall be excused from testifying, in any civil action or legal proceeding, to any facts showing that a thing in action has been bought, sold or received contrary to law, upon the ground that his testimony might tend to convict him of a crime. But no evidence

derived from the examination of such person shall be received against him upon a criminal prosecution.

See section 712, *ante*.

**§ 143. Criminal contempts.**—A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior, committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority;

2. Behavior of the like character, committed in the presence of a referee or referees, while actually engaged in a trial or hearing, pursuant to the order of the court, or in the presence of a jury, while actually sitting for the trial of a cause, or upon an inquest or other proceeding authorized by law;

3. Breach of the peace, noise, or other disturbance, directly tending to interrupt the proceedings of a court, jury, or referee;

4. Willful disobedience to the lawful process or other mandate of a court;

5. Resistance willfully offered to its lawful process or other mandate;

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory;

7. Publication of a false or grossly inaccurate report of its proceedings. But no person can be punished as provided in this section, for publishing a true, full, and fair report of a trial, argument, decision, or other proceeding had in court.

See sections 247, 680 and 681, *post*.

The case of *People ex rel. McDonald v. Keeler*, 2 N. Y. Cr., 141; 82 Hun, 592, was reversed in 99 N. Y., 474; 3 N. Y. Cr., 848.

The case of *People v. Sharp*, 45 Hun, 493; 10 St. Rep., 522, was reversed in 107 N. Y., 427; 12 St. Rep., 217.

Subd. 4 of this section embodies the provisions of subd. 3, section 10 of 2 R. S., 278.

**Application.**—This section does not include a process issued merely by the act of the district attorney, without any direct action or determination by the court. *Sherwin v. People*, 100 N. Y., 351; 3 N. Y. Cr., 538.

**What is.**—One who disobeys the lawful order of the court, not only offends against the dignity of the particular tribunal, but also against the public law. *People ex rel. Sherwin v. Mead*, 92 N. Y., 420.

The contumacious and unlawful refusal of a witness to answer legal and proper questions may be punished criminally. *People ex rel. Jones v. Davidson*, 35 Hun, 471.

Where a witness, summoned before a grand jury, declined to answer, and subsequently repeated the refusal before the court, it was held to be a contempt in the presence of the court. *People ex rel. Hackley v. Kelly*, 24 N. Y., 74.

A reporter of a newspaper, who, intending to overhear the deliberations of the jury, conceals himself in a jury-room, is guilty of a criminal contempt. *People ex rel. Choate v. Barrett*, 56 Hun, 356; 30 St. Rep., 728; 9 N. Y. Supp., 827.

**What not.**—An act, which is not a private contempt, and is not enumerated

among criminal contempts, is not a contempt at all, though it may be, and very often is, punishable as a misdemeanor. *People ex rel. Munsell v. Court*, etc., 101 N. Y., 245; 4 N. Y. Cr., 75; 3 How. N. S., 417.

By this section, certain acts which are denominated contempts in section 8 of Code of Civil Procedure, are declared to be, and are made punishable as, misdemeanors. *People v. Meakim*, 44 St. Rep., 753; 8 N. Y. Cr., 414; 133 N. Y., 225; aff'g, 61 Hun, 327; 40 St. Rep., 688; 15 N. Y. Supp., 918.

See *King v. Flynn*, 37 Hun, 335.

**§ 144. Grand juror acting after challenge has been allowed.**—A grand juror who, with knowledge that a challenge, interposed against him by a defendant, has been allowed, is present at or takes part or attempts to take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor.

See sections 242 and 243 of Code of Criminal Procedure.

**§ 145. Inspection of depositions on examinations, to whom allowed.**—A magistrate or clerk of any magistrate who willfully permits any deposition taken on an examination of a defendant before such magistrate, and remaining in the custody of such magistrate or clerk to be inspected by any person, except a judge of a court having jurisdiction of the offense, the attorney-general, the district attorney of the county and his assistants, the complainant and his counsel, and the defendant and his counsel, is guilty of a misdemeanor.

Am'd by chap. 145 of 1888.

This amendment extended the right of inspection to the complainant and his counsel.

See section 206 of Code of Criminal Procedure.

See *Smith v. Botens*, 36 St. Rep., 55; 13 N. Y. Supp., 224.

**§ 146. Disclosure of depositions returned by grand jury with presentment.**—A clerk of any court who willfully permits any deposition returned by a grand jury and filed with such clerk, to be inspected by any person, except the court, the deputies or assistants of such clerk, and the district attorney and his assistants, until after the arrest of the defendant, is guilty of a misdemeanor.

See section 206 of Code of Criminal Procedure.

See *Smith v. Botens*, 36 St. Rep., 55; 13 N. Y. Supp., 224.

**§ 147. Racing near a court.**—A person concerned in any racing, running or other trial of speed between horses or other animals, within one mile of the place where a court is actually sitting, is guilty of a misdemeanor; but nothing in this section shall apply to or affect trials of speed between horses or other animals upon the grounds of a county agricultural society during the days on which the fairs of such society are held.

Am'd by chap. 109 of 1900. In effect Sept. 1, 1900.

See section 57 of Code of Criminal Procedure.

**§ 148. Misconduct by attorneys.**—An attorney or counselor who,

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party, as prohibited by section seventy of the Code of Civil Procedure; or,

2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or become answerable for, as prohibited by section seventy-one of the Code of Civil Procedure,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by this Code, he forfeits to the party injured treble damages, to be recovered in a civil action.

See sections 136 and 139, *ante*; sections 670 and 671, *post*.

See *Smith v. Botens*, 36 St. Rep., 55; 13 N. Y. Supp., 224.

**Misleading Court.**—An attorney who knowingly misleads the court or a party, is guilty of a criminal deceit under the statute. *Loeff v. Lawton*, 14 Hun, 588.

It is not necessary that his acts should be such as to constitute a common law or statutory cheat. *Id.*

**What not included.**—The offense created by the two subdivisions of this section does not include the act of obtaining money or property by the attorney by false or fraudulent representations. *People v. Reavey*, 39 Hun, 364; 4 N. Y. Cr., 23.

§ 148a. **Advertising to procure divorces.**—Whoever prints, publishes, distributes or circulates, or causes to be printed, published, distributed or circulated any circular, pamphlet, card, hand bill, advertisement, printed paper, book, newspaper or notice of any kind offering to procure or to aid in procuring any divorce, or the severance, dissolution, or annulment of any marriage, or offering to engage, appear or act as attorney or counsel in any suit for alimony or divorce or the severance, dissolution or annulment of any marriage, either in this state or elsewhere, is guilty of a misdemeanor. This act shall not apply to the printing or publishing of any notice or advertisement required or authorized by any law of this state.

Added by ch. 203. Laws 1902. To take effect September 1, 1902.

§ 149. **Permitting attorney's name to be used.**—If an attorney knowingly permits any person, not being his general law partner or a clerk in his office, to sue out any process or to prosecute or defend any action in his name, except as authorized by the next section, such attorney, and every person who shall so use his name, is guilty of a misdemeanor.

**Who guilty.**—The attorney incurs the penalty, if he knowingly permits such use of his name. *Yorks v. Peck*, 31 Barb., 353.

Every other person than those falling within the exception, incurs it by the use of the name for such purpose, whether or not the attorney knowingly permits it. *Id.*

**Subpoena.**—A subpoena to testify is a process. *Yorks v. Peck*, 31 Barb., 352.

§ 150. **In what cases lawful.**—Whenever an action or proceeding is authorized by law to be prosecuted or defended in the name of the people, or of any public officer, board of officers, or municipal corporation, on behalf of another party, the attorney-general, or district attorney, or attorney of such public officer or board or corporation may permit any proceeding therein, to be taken in his name by an attorney to be chosen by the party in interest.

§ 151. **Production of pretended heir.**—A person who fraudulently produces an infant, falsely pretending it to have been born of a parent whose child is or would be entitled to inherit real property, or to receive a share of personal property, with intent to intercept the inheritance of such real property, or

the distribution of such personal property, or to defraud any person out of the same, or any interest therein; or who, with intent fraudulently to obtain any property, falsely represents himself or another to be a person entitled to an interest or share in the estate of a deceased person, either as executor, administrator, husband, wife, heir, legatee, devisee, next of kin, or relative of such deceased person; is punishable by imprisonment in a state prison for not more than ten years.

What constitutes the offense of fraudulently producing an infant, falsely pretending it to have been born of parents, whose child would be entitled to inherit property, with the intent of intercepting the estate, discussed. *People v. Cunningham*, 3 Park., 520; rev'd, on other grounds, in id., 531.

**§ 152. Substituting one child for another.**—A person, to whom a child has been confided for nursing, education, or any other purpose, who, with intent to deceive a parent, guardian or relative of the child, substitutes or produces to such parent, guardian or relative, another child or person, in place of the child so confided, is punishable by imprisonment in a state prison for not more than seven years.

**§ 153. Importing foreign convicts.**—An owner, master or commander of any vessel arriving from a foreign country, who knowingly lands or permits to land at any port, city, harbor, or place within this state, any passenger, seaman or other person who is a foreign convict of any crime which, if committed within this state, would be punishable therein, without giving notice thereof to the mayor of such city, or other principal municipal officer of such port or place, is guilty of a misdemeanor.

See section 440, *post*; section 674 of Code of Criminal Procedure.

**§ 154. Omission of duty by public officers.**—Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

See sections 116 and 117, *ante*; section 684, *post*.

The case of *People v. Long Island R. R. Co.*, 58 Hun, 413; 34 St. Rep., 716; 12 N. Y. Supp., 412; was affirmed in 134 N. Y., 506; 47 St. Rep., 650.

**Commissioners of excise.**—A willful disregard of their duties by commissioners of excise, in granting or refusing licenses under the excise law, subjects them to indictment. *People v. Norton*, 7 Barb., 477.

**Commissioner of highways.**—As to breach of duty on the part of a highway commissioner, see *Clark v. Miller*, 47 Barb., 38; *Bartlett v. Crozier*, 17 John., 439.

**Common carrier.**—A corporation, holding the employment of a common carrier, is within the provisions of this section. *People v. Long I. R. R. Co.*, 47 St. Rep., 650; 134 N. Y., 509; aff'g, 58 Hun, 412; 12 N. Y. Supp., 42; 34 St. Rep., 716.



**Inspector of election.**—The removal of an inspector of election, under section 13 of 1872, without a previous written notice, save in the excepted cases, was held to be a misdemeanor. *Gardner v. People*, 62 N. Y., 299.

**Motive.**—Where the act thus prohibited is intentionally done, it is a misdemeanor irrespective of the motive or intent. *Gardner v. People*, 62 N. Y., 299.

Acting in good faith and under legal advice, is no defense. *Id.*

A mistake of law does not excuse the doing of a prohibited act. *Id.*

**Order.**—As chap. 439 of 1884 prescribes no penalty for disobedience of any order made pursuant to its provision, and provides no method for its enforcement, obedience to any order so made, imposing a duty upon any public officer, or any person or corporation holding a public trust or employment, must be enforced under this section. *People v. Long I. R. R. Co.*, 58 Hun, 414; 34 St. Rep., 716.

**Overseer of poor.**—A willful neglect, by an overseer of the poor, of the duty as to rendering an account of moneys received, is a misdemeanor. *Matter of Pickett*, 55 How., 491.

**Refusal to administer oath.**—A refusal by officers, before whom oaths and affidavits may be taken, to administer the same when requested, subjects them to an indictment for a misdemeanor. *People v. Brooks*, 1 Denio, 457.

To make such neglect willful, within the meaning of the statute, it is only necessary that it shall appear to be intentional. *Id.*

It is no defense that the officer believed that he was not bound to do the act, and was not guilty of bad faith in refusing. *Id.*

**Supervisor.**—A supervisor is punishable by indictment, if he wickedly abuses or fraudulently exceeds his powers. *People v. Stocking*, 50 Barb., 573; 82 How., 49.

**What not.**—What is not an omission to perform his duty by a public officer, within the meaning of this section. *People v. Ryall*, 58 Hun, 236; 34 St. Rep., 204; 11 N. Y. Supp., 828.

**§ 154a. Falsely marking enrolled person exempt.**—A county clerk who marks "exempt" any person enrolled as liable to military duty, whom he knows not to be exempt, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

**§ 155. Commission of prohibited acts.**—Where the performance of any act is prohibited by a statute, and no penalty for the violation of such statute is imposed in any statute, the doing such act is a misdemeanor.

See notes under preceding section.

See section 471, *post*.

An offense against the provisions of section 13 of the former excise law was held to be a misdemeanor punishable as prescribed in section 40 of 2 R. S., 697, fixing a punishment for misdemeanors not otherwise provided for. *Foot v. People*, 56 N. Y., 321.

**§ 156. Disclosing fact of indictment having been found.**—A judge, grand juror, district attorney, clerk, or other officer, who, except in the due discharge of his official duty, discloses, before an accused person is in custody, the fact of an indictment having been found or ordered against him, is guilty of a misdemeanor.

See subd. 13, section 56 of Code of Criminal Procedure.



§ 157. **Grand juror disclosing what transpired before the grand jury.**—A grand juror who except when lawfully required by a court or officer willfully discloses, either

1. Any evidence adduced before the grand jury; or
2. Any thing which he himself or any other member of the grand jury said, or in what manner he or any other grand juror voted, upon any matter before them;

Is guilty of a misdemeanor.

See sections 265 and 266 of Code of Criminal Procedure.

See *Smith v. Botens*, 36 St. Rep., 55; 13 N. Y. Supp., 224.

§ 157a. **Stenographer disclosing evidence taken before grand jury.**—A stenographer appointed to take testimony given before a grand jury who permits any person other than the district attorney to take a copy of such testimony or of any portion thereof or to read the same or any portion thereof, except on the written order of the court, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

§ 158. **Instituting suit in false name.**—A person who institutes or prosecutes an action or other proceeding in the name of another without his consent and contrary to the statutes, is guilty of a misdemeanor, punishable by imprisonment not exceeding six months.

See section 1900 of Code of Civil Procedure.

§ 159. **Maliciously procuring search warrant.**—A person who maliciously, and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

See section 120, *ante*; fourth amend. to Federal Constitution.

§ 160. **Communication with prisoners prohibited.**—A person who,

1. Not being authorized by law visits any state prison, reformatory, penitentiary, county jail or other place for the detention of persons convicted of crime or communicates with any prisoner therein without the consent of the agent or warden, superintendent, keeper, sheriff or other person having charge thereof or without such consent brings into or conveys out of a state prison, reformatory, penitentiary, county jail or other place for the detention of persons convicted of crime, any letter, information or writing to or from any prisoner or

2. Conveys into or takes from such prison, reformatory, penitentiary, county jail or other place for the detention of persons convicted of crime, or who personally or through any other person or persons gives, sells, furnishes or otherwise delivers to any prisoner or prisoners in custody any drug, liquor or any article prohibited by law or by the rules of the superintendent, keeper, sheriff, board of managers or other person, or official having charge or control thereof; is guilty of a misdemeanor.

As amended by L. 1903, chap. 333. In effect Sept. 1, 1903.

See subd. 14, section 56 of Code of Criminal Procedure.

§ 161. **Neglect to return names of constables.**—A town clerk who willfully omits to return to the county clerk the name

of a person who has qualified as constable, pursuant to law, is punishable by a fine not exceeding ten dollars.

**§ 162. Falsely certifying, etc., as to deeds.**—An officer authorized by law to record a conveyance of real property, or of any other instrument, which by law may be recorded, who knowingly and falsely certifies that such a conveyance or instrument has been recorded, is guilty of a felony.

**§ 163. Other false certificates.**—A public officer who, being authorized by law to make or give a certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not expressly provided by law, is guilty of a misdemeanor.

**§ 164. Penalty for recording, etc., without acknowledgment.**—A public officer authorized to file or record any instrument or conveyance of, or affecting property which is duly proved or acknowledged, who knowingly files or records any such instrument or conveyance which is not accompanied by a certificate, according to law, of the proof or acknowledgment, is guilty of a misdemeanor.

A county clerk may properly refuse to record a deed which is not legally acknowledged. *People v. Brown*, 7 Wend., 493.

**§ 165. False auditing and paying claims.**—A public officer, or a person holding or discharging the duties of any office or place of trust under the state, or in any county, town, city or village, a part of whose duties is to audit, allow or pay, or take part in auditing, allowing, or paying claims or demands upon the state, or such county, town, city or village, who knowingly audits, allows or pays, or directly or indirectly consents to, or in any way connives at the auditing, allowance or payment of any claim or demand, against the state, or such county, town, city or village, which is false or fraudulent, or contains charges, items or claims which are false or fraudulent, is guilty of felony, punishable by imprisonment for a term not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

Amended by chap. 662 of 1892.

This amendment fixed the maximum, and omitted the minimum, punishment.

See section 672, *post*.

A supervisor who, while acting as a member of the board, knowingly, corruptly, unlawfully and partially votes that an account, presented against the county, be allowed, is guilty of a misdemeanor. *People v. Stocking*, 50 Barb., 573. It is not essential that the board should have jurisdiction of the subject-matter upon which it acts. *Id.* If the officer wickedly abuses, or fraudulently exceeds, his powers, he is punishable. *Id.* It is not necessary that any injurious effects should result to individuals from his misconduct. *Id.*

**§ 166. False auditing and paying claims.**—A person who, being or acting as a public officer or otherwise, by willfully auditing or paying, or consenting to or conniving at, the auditing or payment of a false or fraudulent claim or demand, or, by any other means, wrongfully obtains, receives, converts, disposes of or pays out, or aids or abets another in obtaining, receiving, converting, disposing of or paying out, any money or property held, owned or in the possession of the state, or of any city, county or village, or other public corporation, or any board, department, agency, trustee, agent or officer thereof, is guilty of a felony, punishable by imprisonment for not less than three nor more than five years, or by a fine not exceeding five times the amount or value of the money or the property converted, paid out, lost or disposed of by means of the act done or abetted by such person, or by both such imprisonment and fine. The amount of any such fine, when paid or collected, shall be paid to the treasury of the corporation or body injured. A conviction under this section forfeits any office held by the offender, and renders him incapable thereafter of holding any office or place of trust.

See sections 672, *post*.

**§ 167. False auditing and paying claims.**—A transfer in whole or in part of any deposit with any bank or other depository, or of any credit, claim or demand upon such depository, whereby the right, title or possession of the owner or holder of such deposit, or of any custodian thereof, is impaired or affected, is a conversion thereof under the last section.

## CHAPTER VIII

### *Conspiracy.*

- SECTION 168. Conspiracy defined.  
 169. Conspiracies against peace, etc.  
 170. No other conspiracies punishable  
 171. Overt act, when necessary.  
 171a. Coercion by employers.

**§ 168. Conspiracy defined.**—If two or more persons conspire, either

1. To commit a crime; or
2. Falsely and maliciously to indite another for a crime, or to procure another to be complained of or arrested for a crime; or
3. Falsely to institute or maintain an action or special proceeding; or
4. To cheat and defraud another out of property by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or

5. To prevent another from exercising a lawful trade or calling or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property, belonging to or used by another, or with the use or employment thereof; or

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws;

Each of them is guilty of a misdemeanor.

See sections 170, 653 and 673, *post*.

See note on Strikes and Boycotts in 4 N. Y. Cr., 361.

See note on Strikes, Boycott, etc., 24 Abb. N. C., 260.

**Re-enactment.**—The provision of subd. 6, section 8, of 2 R. S., 692, is contained in subd. 6 of this section of the Code. *Leonard v. Poole*, 114 N. Y., 377; 23 St. Rep., 753.

The word "cheat," as used in subd. 4 of this section, retains the meaning it possessed at common law. *People v. Olson*, 39 St. Rep., 297; 15 N. Y. Supp., 778, 9.

**Appointment to office.**—An agreement between two parties that, in consideration of one of them securing the other's appointment to a public office the latter would place his resignation in the former's hands, when requested make no appointment of subordinates in the office without his approval; make such removals therein as he might suggest and request; and transact the business of the office as he might direct, amounts to a conspiracy for the perversion or obstruction of justice, and of the due administration of the laws. *People v. Squire*, 20 Abb. N. C., 369; 6 N. Y., Cr., 264; 1 St. Rep., 535.

**What necessary.**—To constitute guilt, there must be both a wrongful act and a criminal intent. *People v. Flack*, 125 N. Y., 334; 34 St. Rep., 728; 8 N. Y. Cr., 88.

The criminal intent is a question for the jury. *Id.*

To make an agreement between two or more persons to do an act, innocent in itself, a criminal conspiracy, it is not enough that it appears that the act, which was the object of the agreement, was prohibited. *People v. Powell*, 68 N. Y., 88; *People v. Flack*, 125 *id.*, 333; 34 St. Rep., 726; 8 N. Y. Cr., 88.

The mere fact that the conspiracy has for its object the doing of an act which may be unlawful, followed by the doing of such act, does not constitute the crime of conspiracy, unless the jury find that the parties were actuated by a criminal intent. *Id.*

The actual criminal or wrongful purpose must accompany the agreement, and if that is absent, the crime of conspiracy has not been committed. *Id.*

It does not constitute a conspiracy under our statutes for persons to combine together to commit a trespass upon or to destroy another's property. *People v. Everest*, 51 Hun, 25; 20 St. Rep., 461; 3 N. Y. Supp., 614, 7.

The unlawful agreement constitutes the gist of the offense. *Id.*

An agreement between a labor organization and an association of manufacturers that no manufacturer belonging to an association shall employ any person who is not a member of the labor organization, or to retain for a longer time than four weeks any employee who refuses to join the labor organization, is a conspiracy. *Curran v. Galen*, 22 N. Y. Supp., 826.

**Not criminal.**—Subdivisions 5 and 6 of this section are limited by section 170, *post*. *People ex rel. Gill v. Smith*, 5 N. Y. Cr., 512; 10 St. Rep., 730.

But such limitation only goes to the extent of legalizing the peaceable and orderly strike when resorted to in good faith for the authorized purposes. *Id.*

Peaceable withdrawal from employment, commonly called a strike, however extensive, for the purpose of obtaining an advance of the rate of wages, or maintaining such rate, is not an offense against the provisions of this section. *Id.*

All meetings and combinations of workmen, which seek, by all peaceable

means, an increase of wages, and are not distinguished by violence or threats, are lawful. *People ex rel. Gill v. Walsh*, 6 N. Y. Cr., 292; 15 St. Rep., 17.

But a combination to drive out, and prevent from working in a certain district, an objectionable person, is a criminal conspiracy. *Id.*

**Boycott.**—Boycotting is a misdemeanor, both at common law and under this section. *Old Dominion S. S. Co. v. McKenna*, 18 Abb., N. S., 281.

It is a criminal offense for two or more persons corruptly and maliciously to confederate together to deprive another of his liberty or property; or to injure other workmen by adopting means to deprive them of their employment. *State v. Glidden*, 6 N. Y. Cr., 321.

The fact that the conspiracy has a lawful end in view, is no legal excuse for the employment of criminal means. *Id.*

Where a number of men combine together to injure, and thereby to prevent the exercise of a lawful calling, by congregating near the doors of the person to be injured, by printing circulars descriptive of the supposed grievances, and by distributing the same near and about his doors to the customers and passers-by, and the effect of such overt acts is to intimidate and thereby warn off his customers and the general public who might otherwise patronize him, and to intimidate such person himself, those who conspire and participate in the overt acts, are guilty of the crime of conspiracy under subdivision 5 of this section. *People v. Kostka*, 4 N. Y. Cr., 429. See *People v. Wilzig*, 4 N. Y. Cr., 408.

Every attempt by force, threat or intimidation to deter or control an employer in the determination of whom he will employ or what wages he will pay, is an act of wrong and oppression. *Crump v. Commonwealth*, 4 N. Y. Cr., 342. Every combination for such a purpose is an unlawful conspiracy. *Id.*

Individuals who, by unlawful combinations, seek to interfere with the trade, business or occupation of others, with a view of injuring or embarrassing them in the prosecution of such trade or business are subject to the penalties of the criminal law. *Thomas v. Musical M. P. Union*, 121 N. Y., 50; 30 St. Rep., 564.

To constitute intimidation, it is not necessary that there should be any overt act of violence, or any direct threat by word of mouth. *People v. Wilzig*, 4 N. Y. Cr., 408. It is enough if the attitude of those engaged in the overt act is intimidating. *Id.* This may be shown by their numbers, methods, placard, circulars and devices. *Id.* What constitutes intimidation within the meaning of the law. *Id.*

The unlawful purpose may be also evidenced by force, threats or intimidation to prevent another from exercising a lawful trade or calling. *People ex rel. Gill v. Smith*, 5 N. Y. Cr., 512; 10 St. Rep., 780.

**Combination.**—A combination to control prices is illegal. *People v. Sheldon*, 50 St. Rep., 231.

An association of manufacturers of wire cloth formed for the avowed purpose of regulating the price of the commodity, each of the members stipulating, under a heavy penalty, that he will not sell at less than a specified rate, was held in *Dewitt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 14 N. Y. Supp., 277, to be contrary to public policy and illegal.

An agreement, association, combination or arrangement, or whatever else it may be called, having for its objects the removal of competition and the advancement of prices of the necessities of life, violates subdivision 6 of this section. *People v. North R. S. R. Co.*, 54 Hun, 380; 27 St. Rep., 284; 7 N. Y. Supp., 411.

A consolidation of manufacturing corporations, save in the manner and as provided by statute, and whether made directly, or indirectly through the medium of a trust, is unlawful and injurious to the public interests. *People v. North R. S. R. Co.*, 121 N. Y., 582; 31 St. Rep., 781.

If two or more persons conspire to commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor. *Leonard v. Poole*, 114 N. Y., 377; 23 St. Rep., 753.

See *People v. Snaith*, 57 Hun, 834; 32 St. Rep., 569; 10 N. Y. Supp., 590;

People v. Sheldon, 21 id., 859; 50 St. Rep., 231; People v. Crotty, 30 St. Rep., 46; 9 N. Y. Supp., 938; People v. Lenhardt, 4 N. Y. Cr., 326.

See chapter 716 of 1893, preventing monopolies in articles of general necessity.

**§169. Conspiracies against peace, etc**—If two or more persons, being out of this state, conspire to commit any act against the peace of this state, the commission or attempted commission of which, within this state, would be treason against the state, they are punishable by imprisonment in a state prison not exceeding ten years.

**§ 170. No other conspiracies punishable.**—No conspiracy is punishable criminally unless it is one of those enumerated in the last two sections, and the orderly and peaceable assembling or co-operations of persons employed in any calling, trade, or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy.

Amended by chap. 384 of 1882.

This amendment was made before Code went into effect.

See section 168, *ante*; sections 673 and 675, *post*.

The case of People v. Barondess, 61 Hun, 577; 8 N. Y. Cr., 234; 41 St. Rep., 659; 16 N. Y. Supp., 439, was reversed in 8 N. Y. Cr., 876; 45 St. Rep., 248.

This section embodies subd. 6, section 8. chap. 1, title 6, part 4 of Revised Statutes. See chap. 19 of 1870.

Section 168, *ante*, and this section are entirely harmonious. People *ex rel.* Gill v. Smith, 5 N. Y. Cr., 512; 10 St. Rep. 730.

**Object.**—This section is a weapon in aid, not of compulsory organization, but of voluntary co-operation. *Id.*

**Limitation.**—This section does not authorize a combination of individuals to compel, by means condemned in section 168, *ante*, all workmen to join the co-operative forces, or to punish those who are supposed to be inimical thereto. *Id.*

What is permitted by this section cannot be a conspiracy to commit an act injurious to trade or commerce, nor to prevent another from exercising a lawful trade or calling by force, threats and intimidation. *Id.* But what is not permitted by this section may constitute a conspiracy and be punishable under subds. 5 and 6 of section 168, *ante*.

See Reynolds v. Everett, 67 Hun, 304; 50 St. Rep. 896; 22 N. Y. Supp., 313; Rogers v. Evans, 17 Id., 267; Master Stevedore Ass'n v. Walsh, 2 Daly, 1.

**§ 171. Overt act, when necessary.**—No agreement except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act besides such agreement be done to effect the object thereof, by one or more of the parties to such agreement.

See section 720, *post*.

**Overt act necessary.**—To constitute the crime of conspiracy, there must be both an agreement and an overt act to effect the object of the agreement, except where the conspiracy is to commit certain felonies specified. People v. Flack, 125 N. Y., 333; 34 St. Rep., 727; 8 N. Y. Cr., 88.

The entering into the confederation merely, save in the excepted cases, is not an indictable offense, unless some overt act, besides such agreement, is done to effect the object thereof. People v. Everest, 51 Hun, 29; 20 St. Rep., 465; 8 N. Y. Supp., 617.





Opposite page 75.

**§ 171b. Depriving members of national guard of employment.**—A person who, either by himself or with another, willfully deprives a member of the national guard of his employment, or prevents his being employed by himself or another or obstructs or annoys said member of said national guard, or his employer, in respect of his trade, business, or employment, because said member of said national guard is such member, or dissuades any person from enlistment in the said national guard by threat of injury to him in case he shall enlist, in respect of his employment, trade, or business, is guilty of a misdemeanor.

Added by L. 1903, chap. 349. In effect Sept. 1, 1903.

**§ 171c. Discrimination against members of national guard**—No association or corporation, constituted or organized for the purpose of promoting the success of the trade, employment, or business of the members thereof, shall by any constitution, rule, by-law, resolution, vote, or regulation, discriminate against any member of the national guard of the state of New York, because of such membership in respect of the eligibility of such member of the said national guard to membership in such association or corporation, or in respect of his right to retain said last mentioned membership, it being the purpose of this section and the section immediately preceding to protect a member of the said national guard from disadvantage in his means of livelihood and liberty therein but not to give him any preference or advantage on account of his membership of said national guard. A person who aids in enforcing any such provisions against a member of the said national guard with the intent to discriminate against him because of such membership, is guilty of a misdemeanor.

Added by L. 1903, chap. 349. In effect Sept. 1, 1903.

An indictment for conspiracy will be set aside, unless the grand jury had before them proof, not only of the overt acts of the defendants, but also of an illegal combination amounting to a conspiracy under which the overt acts were committed. *People v. Brickner*, 8 N. Y. Cr., 217; 15 N. Y. Supp., 531, 2.

A failure to show an overt act on the part of an alleged conspirator is not material, if it is made to appear that he entered into a conspiracy of which the overt acts were the result. *People v. Brickner*, 8 N. Y. Cr., 224.

An application for appointment to the office, made in pursuance of the conspiracy, and a letter made, signed and delivered to the co-conspirator, embodying the agreement, constitute sufficient overt acts. *People v. Squire*, 20 Abb. N. C., 375; 6 N. Y. Cr., 264.

See *Reynolds v. Everett*, 67 Hun, 304; 50 St. Rep., 896; 22 N. Y. Supp., 813.

**§ 171a. Coercion by employers.**—Any person or persons, employer or employers of labor, and any person or persons of any corporation or corporations on behalf of such corporation or corporations, who shall hereafter coerce or compel any person or persons, employe or employes, laborer or mechanic, to enter into an agreement, either written or verbal from such person, persons, employe, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations, shall be deemed guilty of a misdemeanor. The penalty for such misdemeanor shall be imprisonment in a penal institution for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.

This section was added by chap. 688 of 1887.

It is a misdemeanor for an employer to require, as a condition of a person's entering or remaining in his employ that he shall not become a member of any labor organization. *Curran v. Galen*, 22 N. Y. Supp., 827; 52 St. Rep., 479.

*Reynolds v. Everett*, 22 N. Y. Supp., 813; 50 St. Rep., 896; *Master Stevedores' Ass'n v. Walsh*, 2 Daly, 1.

## TITLE IX.

### OF CRIMES AGAINST THE PERSON.

- CHAPTER**
- I. Suicide.
  - II. Homicide.
  - III. Maiming.
  - IV. Kidnapping.
  - V. Assault.
  - VI. Robbery.
  - VII. Duels and challenges.
  - VIII. Libel.

## CHAPTER I

### *Suicide.*

- SECTION**
- 172. Suicide defined.
  - 173. No forfeiture imposed for suicide.
  - 174. Attempting suicide.
  - 175. Aiding suicide.
  - 176. Abetting an attempt at suicide.
  - 177. Incapacity of person aided, no defense.
  - 178. Punishment of attempting suicide.

**§ 172. Suicide defined.**—Suicide is the intentional taking of one's own life.

**No crime.**—Suicide, or the successful attempt to commit it, is not made a crime by the Code. *Darrow v. Family Fund Society*, 42 Hun, 245; 3 St. Rep., 745.

Suicide is not a violation of, or an attempt to violate, any criminal law. *Freeman v. National B. Society*, 5 St. Rep., 82

**§ 173. No forfeiture imposed for suicide.**—Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.

See section 710, *post*.

Suicide is not a crime in this state. *Darrow v. Family Fund Society*, 116 N. Y., 542; 27 St. Rep., 476; *aff'g* 42 Hun, 247; 3 St. Rep., 745. See *Freeman v. Nat. Ben. Soc.*, 5 St. Rep., 82.

**§ 174. Attempting suicide.**—A person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide.

The attempt to commit suicide is made a crime by this section. *Darrow v. Family Fund Society*, 116 N. Y., 542; 27 St. Rep., 476; *aff'g* 42 Hun, 247; 3 St. Rep., 745.

**§ 175. Aiding suicide.**—A person who willfully, in any manner, advises, encourages, abets or assists another person in taking the latter's life, is guilty of manslaughter in the first degree.

In *Commonwealth v. Bowen*, 2 Wh. Cr. Cas., 226; 13 Mass., 356, it was held that a party, who advises another to commit suicide, whereby the latter does so, is guilty of murder. Under this section, the adviser would be guilty of manslaughter in the first degree.

In *Regina v. Jessup*, 10 Crim. L. Mag., 862, it was held that, where two persons enter into an agreement to commit suicide together, but only one of them dies from the use of the means employed to produce death, the survivor was guilty of murder.

**§ 176. Abetting an attempt at suicide.**—A person who willfully, in any manner, encourages, advises, assists or abets another person in attempting to take the latter's life, is guilty of a felony.

See notes under preceding section.

**§ 177. Incapacity of person aided, no defense.**—It is not a defense to a prosecution under either of the last two sections, that the person who took, or attempted to take, his own life, was not a person deemed capable of committing crime.

Suicide is competent evidence upon the issue of insanity, but is not presumptive evidence of it. *Matter of Card*, 28 St. Rep., 529; 8 N. Y. Supp., 297.

**§ 178. Punishment of attempting suicide.**—Every person guilty of attempting suicide is guilty of felony, punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding one thousand dollars, or both.

This section presumes sanity. *Matter of Card*, 28 St. Rep., 529; 8 N. Y. Supp., 297.

So, in *Coyle v. Commonwealth*, 100 Penn. St., 573, it was held that an attempt at suicide raises no presumption of insanity.

See *Darrow v. Family Fund Society*, 116 N. Y., 548, 27 St. Rep., 476; aff'g 42 Hun, 247; 3 St. Rep., 745.

## CHAPTER II.

### *Homicide.*

**SECTION 179. Homicide defined.**

180. Different kinds of homicide.

181. What proof of death and killing required.

182. Common law petit treason is homicide.

183. Murder in first degree defined.

183a. Murder in the first degree.

184. Id.; second degree.

185. Duel fought out of this state.

186. Murder in first degree, how punished.

187. Murder in second degree, how punished.

188. Manslaughter defined.

189. Id.; In the first degree.

190. Killing unborn quick child.

191. Id.; by administering drugs, etc.

192. Manslaughter, first degree, how punished.

193. Manslaughter, second degree.

194. Women taking drugs, etc.

195. By negligent use of machinery.

196. Owner of animals.

197. Killing by overloading passenger vessel.

198. Liability of persons in charge of steamboats.

199. Liability of persons in charge of steam engines.

200. Liability of physicians.

201. Liability of persons making or keeping gunpowder contrary to law.

202. Manslaughter, second degree.

203. Homicide, when excusable.

204. Justifiable homicide.

205. Same.

**§ 179. Homicide defined.**—Homicide is the killing of one human being by the act, procurement or omission of another.

**When crime.**—The Code makes the killing of a human being a crime only when it is neither justifiable nor excusable. *People v. Hill*, 19 St. Rep., 672; 49 Hun, 432; 3 N. Y. Supp., 564.

**Presumption.**—All homicide is presumed to be malicious. *People v. Conroy*, 97 N. Y., 75; 2 N. Y. Cr., 665.

But there is no legal presumption arising from the mere proof of the commission of a homicide. *Id.*

The mere fact of killing proves homicide, but it does not prove whether the homicide is a crime or is justifiable or excusable. *People v. Downs*, 56 Hun, 9; 29 St. Rep., 121; 7 N. Y. Cr., 485.

**Burden.**—The burden rests upon the prosecution to establish every essential element of the crime. *People v. Hill*, 49 Hun, 432; 19 St. Rep., 672; 3

N. Y. Supp., 564. The proof of the existence of certain elements of the crime does not relieve the prosecution of the obligation to establish the other essentials. *Id.*

See *People v. Webster*, 52 St. Rep., 240; 22 N. Y. Supp., 641.

**§ 180. Different kinds of homicide.**—Homicide is either

1. Murder;
2. Manslaughter;
3. Excusable homicide; or,
4. Justifiable homicide.

**Inference of intent.**—The intent of the homicide must ordinarily be inferred from the nature and surroundings of the act. *People v. Beckwith*, 3 St. Rep., 104; 103 N. Y., 367; 5 N. Y. Cr., 229.

**Less degree.**—A man cannot be convicted of a less degree of crime, simply because a jury doubt whether he committed the greater. *People v. Downs*, 56 Hun, 11; 29 St. Rep., 121; 7 N. Y. Cr., 487.

See *People v. Hill*, 49 Hun, 432; 19 St. Rep., 672; 8 N. Y. Supp., 564.

**§ 181. What proof of death and killing required.**—

No person can be convicted of murder or manslaughter, unless the death of the person alleged to have been killed and the fact of killing by the defendant as alleged are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt.

Amended by chap. 384 of 1882.

This amendment was made before Code went into effect.

The case of *People v. Palmer*, 46 Hun, 480; 11 St. Rep., 817; was reversed in 109 N. Y., 110; 15 St. Rep., 78.

This section, as enacted in 1881, did not contain the words "the former by direct proof, and the latter;" these were added by the amendment of 1882. *People v. Beckwith*, 7 N. Y. Cr., 148; 10 St. Rep., 97; 45 Hun, 422.

**Re-enactment.**—The sole scope and purpose of this section was to declare, in explicit terms, the existing rule of the common law. *People v. Palmer*, 109 N. Y., 118; 15 St. Rep., 78.

**Rule of evidence.**—This section is a rule of evidence applicable upon a trial to all cases within its terms, and is not dependent upon the time of the commission of the offense, whether before or after the taking effect of this Code. *People v. Beckwith*, 103 N. Y., 72; 7 N. Y. Cr., 164; 12 St. Rep., 795.

**Corpus delicti.**—By the *corpus delicti*, has always been meant the existence of a criminal fact. *People v. Palmer*, 109 N. Y., 118; 15 St. Rep., 78.

Identity is not included in the *corpus delicti*, but is left open to indirect or circumstantial evidence. *Id.*

The *corpus delicti* may be completely established, and the need of direct proof satisfied, before the question of identity is reached. *Id.*

There can be no conviction unless the proof shows the fact of the death of the person alleged to have been killed, and the fact of killing by defendant as alleged. *People v. Minisci*, 12 St. Rep., 727.

**Proof.**—This section does not require direct proof of the identity of the victim, but only of the death. *People v. Palmer*, 109 N. Y., 110; 15 St. Rep., 78.

This section requires direct proof, not only of the death, but also of the identification of the dead body, found or produced, with the person named in the indictment as the person killed. *People v. Beckwith*, 45 Hun, 424; 7 N. Y. Cr., 149; 10 St. Rep., 97. Direct proof does not exclude the points and features of resemblance and circumstances tending to establish identity. *Id.*

The death of the person must be established by positive evidence, but the fact of the killing by the defendant may be proved by circumstantial evidence. *People v. McGonegal*, 42 St. Rep., 311; 17 N. Y. Supp., 151. But the evi-

dence must be of such a character as to establish the guilt of the defendant beyond a reasonable doubt. *Id.*

The identity of the slain, and the agency of the slayer, may be established by circumstantial evidence, which convinces the conscience of the jury. *People v. Palmer*, 109 N. Y., 114; 15 St. Rep., 78.

There must be some other evidence of the *corpus delicti* besides the confession of the defendant. *People v. Deacons*, 15 St. Rep., 526; 109 N. Y., 378; section 395 of Code of Criminal Procedure.

Where the deceased was found, on the floor of one of the rooms of her house, lying on her back, almost naked, and quite dead, with several of her ribs broken, it was held that there was sufficient proof of the *corpus delicti*. *People v. Wright*, 49 St. Rep., 74.

**Burden.**—The prosecution is bound to prove all the facts constituting the crime with which the prisoner is charged, and the burden rests upon the people, from the beginning to the end of the trial, to establish, beyond a reasonable doubt, every fact essential to conviction. *People v. Fish*, 125 N. Y., 153; 8 N. Y. Cr., 143, 34 St. Rep., 843.

**§ 182. Common-law petit treason is homicide.**—The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished; and those homicides are punishable, when not justifiable or excusable, as prescribed by this Code.

**§ 183. Murder in first degree defined.**—The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed either

From a deliberate and premeditated design to effect the death of the person killed, or of another; or

By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or

When perpetrated in committing the crime of arson in the first degree.

Amended by chap. 384 of 1892.

This amendment was made before Code went into operation.

See sections 17 to 23, *ante*.

This section substantially embodies chap. 644 of 1873.

**Deliberation and premeditation.**—The terms “deliberation and premeditation” are not the creation of this Code, but were considered essential elements of the crime at common law. *People v. Conroy*, 97 N. Y., 76.

Where the indictment is in the common law form, and charges that defendant killed his wife “willfully, feloniously, and of malice aforethought,” and does not charge that the killing was done, in the statutory language, “from a deliberate and premeditated design to effect” her death, it is proper to prove any fact which will show defendant guilty of murder as defined in any portion of the statute. *People v. Osmond*, 51 St. Rep., 729.

Whatever is done with premeditation and deliberation must be done intentionally. *People v. Fish*, 125 N. Y., 154; 8 N. Y. Cr., 145; 34 St. Rep., 843.

Murder in the first degree is the intentional killing of a human being with deliberation and premeditation. *People v. Kelly*, 35 Hun, 302; 3 N. Y. Cr., 35.

All that the law requires is this: That there should be some reflection and thought, that precede the blow. *People v. Hawkins*, 16 St. Rep., 359; 109 N. Y., 411. If there are a choice and determination as the result of such mental actions, there is sufficient deliberation within the law. *Id.*

If the defendant entertained the resolve that he would kill the deceased, if he could not consummate an arrangement with him, the act of killing in pursuance of such resolve is murder in the first degree. *People v. Walworth*, 4 N. Y. Cr., 355.

In order to constitute murder in the first degree, there must be some amount or kind of deliberation and premeditation, antecedent to the act, which intentionally effects the death. *People v. Conroy*, 33 Hun, 119; 2 N. Y. Cr., 247.

Of this antecedent deliberation and premeditation, the intent alone is not sufficient evidence. *Id.*

If the design to kill is present, the offense is murder in one of its degrees. *People v. Beckwith*, 3 St. Rep., 104; 103 N. Y., 366; 5 N. Y. Cr., 228.

A killing with a design to effect death, but not with deliberation and premeditation, is nothing more than murder in the second degree. *People v. Conroy*, 2 N. Y. Cr., 248; 33 Hun, 119.

Something more than the actual presence of intention formed at the instant of the striking of the blow or firing of the shot, is necessary. *People v. Walworth*, 4 N. Y. Cr., 355.

There must be a deliberate and premeditated design to effect death, distinguishable from a suddenly formed intention without deliberation and premeditation. *Id.*

**Length of time.**—If a choice is made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder. *People v. Leighton*, 88 N. Y., 117.

The intention to kill must precede the act by some appreciable space of time; but the time need not be long. *People v. Majone*, 91 N. Y., 211.

It is enough that the intention precedes the act, though the latter follows immediately. *People v. Conroy*, 97 N. Y., 76; *People v. Clark*, 7 *id.*, 898.

The time for deliberation and premeditation need not be long and may be short. *People v. Beckwith*, 3 St. Rep., 104; 103 N. Y., 368; 5 N. Y. Cr., 230.

If it furnishes room and opportunity for reflection, and the facts show that such reflection existed, and the mind was busy with its design and made the choice with full chance to choose otherwise, the condition of the statute is fulfilled. *Id.*

No particular time is prescribed by law within which deliberation and premeditation must occur, to constitute murder in the first degree. *People v. Druse*, 5 N. Y. Cr., 14; *People v. Majone*, 1 *id.*, 86; *People v. Magano*, *id.*, 411; *People v. Conroy*, 2 *id.*, 565; *People v. Kiernan*, 3 *id.*, 247; 4 *id.*, 88.

If the time is long enough for choice to kill or not to kill, and for the formation of the purpose to kill, it is sufficient. *People v. Druse*, *ante*.

The act which causes the death must be deliberate in the sense that it was not committed under the influence of a sudden and uncontrollable impulse, produced by a proximate cause, and it must be premeditated in the sense that an intention to inflict the injury must have preceded the doing of the act. *Id.*

Time to form the purpose of killing, to announce such intention and to carry it into effect, is time enough for deliberation and premeditation. *People v. Kiernan*, 101 N. Y., 618; 4 N. Y. Cr., 94; *People v. Leighton*, 88 N. Y., 117; *People v. Majone*, 91 *id.*, 211; 1 N. Y. Cr., 94; *People v. Conroy*, 97 N. Y., 75; 2 N. Y. Cr., 565.

**Motive.**—It is not necessary to prove a motive in order to sustain an indictment for murder. *People v. Trezza*, 125 N. Y., 740; 36 St. Rep., 149.

It is not incumbent upon the prosecution to prove the motive for a crime in any case. *People v. Fish*, 125 N. Y., 146; 8 N. Y. Cr., 136; 34 St. Rep., 843.

**Evidence of premeditation, etc.**—What facts show premeditation and deliberation. *People v. Beckwith*, 12 St. Rep., 795; 108 N. Y., 68; 7 N. Y. Cr., 146.



The fact that, after an affray has apparently terminated, the defendant, after an opportunity to reflect upon his course of action, arms himself with a new and dangerous weapon and seeks his adversary with the obvious intention of continuing the affray, is very persuasive proof of a deliberate and determined purpose. *People v. Kelly*, 2 Sel. (Ct. App.), 238; 113 N. Y., 649; 7 N. Y. Cr., 48; 22 St. Rep., 973.

No strict rule can be laid down by the courts as to the character or amount of evidence necessary to show the existence of a deliberate and premeditated design to effect death. *People v. Walworth*, 4 N. Y. Cr., 355.

What evidence of premeditation and deliberation must be given to authorize a submission of such question to the jury. *People v. Conroy*, 33 Hun, 119; 2 N. Y. Cr., 247.

Motive, preparation, lying in wait for opportunity, and a fatal execution of the murderous purpose under circumstances of great atrocity, establish a deliberately planned and premeditated murder. *People v. Lewis*, 7 N. Y. Cr., 140.

Threats and preparation prior to the shooting are sufficient evidence of premeditation and deliberation. *People v. Otto*, 4 N. Y. Cr., 156; 101 N. Y., 690.

It was held, in *People v. Jefferson*, 2 N. Y. Cr., 240, that there was sufficient evidence of deliberate and premeditated design to effect death, to constitute murder in the first degree.

The evidence in *People v. Beckwith*, 12 St. Rep., 795; 108 N. Y., 67, was held to sufficiently show that the crime was committed with a deliberate and premeditated design to effect death.

The facts and circumstances, in *People v. Van Brunt*, 1 Silv. (Ct. App.), 586; 108 N. Y., 656; 11 St. Rep., 60, were held sufficient to establish reflection and deliberation in the commission of the homicide.

In *People v. Cornetti*, 92 N. Y., 85; 1 N. Y. Cr., 303; the case was held to be one of deliberate and premeditated murder.

Motive, deliberation, premeditation and intent to kill were held to be conclusively proved in *People v. Roehl*, 52 St. Rep., 147.

If a police officer, without giving notice of an intention to make an arrest, strikes or attempts to strike the defendant, or to take him into custody, the latter has no right to resist, and if in so doing, he kills the officer, he is guilty of murder in the first degree, when deliberately and designedly committed. *People v. Carlton*, 115 N. Y., 623; 26 St. Rep., 436.

A premeditated and deliberate intention to kill deceased is shown by evidence that defendant was jealous of deceased on account of a supposed intimacy between deceased and defendant's mistress; that defendant had made threats to kill him; and that on meeting deceased he began the encounter and struck him repeatedly with a deadly weapon, while during the whole time deceased was attempting to escape. *People v. Martell*, 51 St. Rep., 679.

**Question for jury.**—The alleged deliberate and premeditated design is a question of fact for the jury. *People v. Walworth*, 4 N. Y. Cr., 355.

**Commission of felony.**—Subdivision 3 of this section includes the commission or the attempt to commit a felony upon or affecting the person killed. *People v. Sweeney*, 41 Hun, 340; 4 N. Y. Cr., 283.

A party who, while attempting to commit a felony, causes the death of another, is guilty of the crime of murder in the first degree. *People v. Johnson*, 110 N. Y., 134; 16 St. Rep., 846.

It was intended to make the killing of any human being, while engaged in the commission of any felony, murder in the first degree, whether the felony was committed upon, or affected, any person or concerned property only. *People v. Greenwall*, 115 N. Y., 523; 7 N. Y. Cr., 310; 26 St. Rep., 227.

A conviction of murder in the first degree, under an indictment drawn in the common law form, is sustained by proof of a killing in the perpetration of a felony. *People v. Giblyn*, 24 St. Rep., 592; 115 N. Y., 196; 7 N. Y. Cr., 132; *People v. Conroy*, 97 N. Y., 62; 2 N. Y. Cr., 568; *People v. Willett*, 1 St. Rep., 384; 102 N. Y., 254; 4 N. Y. Cr., 200.

The legislature, by this section, intended to make killing effected by a party engaged in the commission of a felony upon the person killed, murder in the first degree, notwithstanding that the act which produced death was without any intent to kill. *People v. Cole*, 2 N. Y. Cr., 118.

Deliberation, premeditation or intent to kill is not a necessary ingredient of the crime of murder in the first degree, where the homicide was committed while engaged in the commission of a felony. *People v. Kelly*, 35 Hun, 303; 3 N. Y. Cr., 35.

When a killing by one engaged in committing an assault in the second degree, constitutes murder in the first degree. *People v. Sweeney*, 41 Hun, 340; 4 N. Y. Cr., 283.

A person who, while engaged in the commission of the crime of rape, causes, by means of the force and violence employed by him for the purpose of accomplishing his object, the death of the female, is guilty of murder in the first degree. *Buel v. People*, 78 N. Y., 492. This is so, though he did not intend to kill. *Id.* In such cases, the intention is of no consequence. *Id.* This case was decided under the Revised Statutes, which did not contain the clause "without a design to effect death."

A homicide, committed while engaged in a felonious taking of property, is murder in the first degree, though perpetrated without a design to effect death. *People v. Petmecky*, 2 N. Y. Cr., 457.

Though the indictment charges the defendant specifically and only with the intention to murder his wife, if he intended to kill another and killed his wife, he is just as much guilty of murder as though he had intended to kill her. *People v. Osmond*, 51 St. Rep., 727; 138 N. Y., 80.

**Excuse.**—Provocation by an angry controversy of words alone, however aggravating they may have been, do not excuse from the consequences of a fatal assault. *People v. Kelly*, 2 Silv. (Ct. App.), 237; 113 N. Y., 649; 7 N. Y. Cr., 48; 22 St. Rep., 978.

**Knowledge.**—To convict of murder by poisoning, there must be shown knowledge by defendant of the poisonous character of the substance which produced the death. *People v. Stokes*, 2 N. Y. Cr., 385.

Knowledge that the article was not entirely harmless is not sufficient. *Id.*

**Indictment.**—The various statutory changes in the definition of what may constitute the crime of murder have not affected, and have not been held to affect, the ordinary common law counts in indictments for murder. *People v. Giblin*, 24 St. Rep., 592; 115 N. Y., 196; 7 N. Y. Cr., 132.

See *People v. Hill*, 49 Hun, 422; 19 St. Rep., 672; 3 N. Y. Supp., 564; *People v. Chacon*, 3 N. Y. Cr., 424.

**§ 183a. Murder in the first degree.**—A person who willfully, by loosening, removing or displacing a rail, or by any other interference, wrecks, destroys or so injures any car, tender, locomotive or railway train, or part thereof, while moving upon any railway in this state, whether operated by steam, electricity or other motive power, as to thereby cause the death of a human being, is guilty of murder in the first degree, and punishable accordingly.

Added by ch. 548 of 1897.

**§ 184. *Id.*; second degree.**—Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.

**Definition.**—The statute does not require that the intention should be the result of pre-deliberation, but it may be formed upon the instant and be the result of that instantaneous action of the mind when, from some cause arising upon the moment, the thought of killing flashes into the mind, and the act follows the thought. *People v. Walworth*, 4 N. Y. Cr., 355.

A killing with a design to effect death, but without deliberation and premeditation, is murder in the second degree. *People v. Conroy*, 33 Hun, 119; 2 N. Y. Cr., 247.

In order to establish murder in the second degree, it is necessary that there should be at the time of the commission of the act, an intent to kill. *People v. Walworth*, 4 N. Y. Cr., 355.

Murder in the second degree is the intentional killing of a human being without deliberation and premeditation. *People v. Kelly*, 35 Hun, 302; 3 N. Y. Cr., 35.

See *People v. Hill*, 49 Hun, 432; 19 St. Rep., 672; 3 N. Y. Supp., 564; *People v. Cole*, 2 N. Y. Cr., 113.

**§ 185. Duel fought out of this state.**—A person who, by previous appointment made within the state, fights a duel without the state, and in so doing inflicts a wound upon his antagonist, whereof the person injured dies; or who engages or participates in such a duel, as a second or assistant to either party, is guilty of murder in the second degree, and may be indicted, tried and convicted in any county of this state.

See section 16, *ante*; sections 239, 240 and 676 *post*; section 138 of Code of Criminal Procedure.

**§ 186. Punishment of murder in first degree.**—Murder in the first degree is punishable by death.

See sections 491 to 509 of Code of Criminal Procedure.

**§ 187. Murder in second degree, how punished.**—Murder in the second degree is punishable by imprisonment for the offender's natural life.

**§ 188. Manslaughter defined.**—In a case other than one of those specified in the sections 183, 184 and 185, homicide, not being justifiable or excusable, is manslaughter.

**What is.**—The acts which constitute manslaughter, are by the sections defining that crime, other homicides than those mentioned in the previous sections defining murder. *People v. Cole*, 2 N. Y. Cr., 118.

Manslaughter may be committed by acts of a person who at the time had no intent to wound or inflict grievous bodily harm. *Id.*

Manslaughter is marked by the important characteristic that there is no design to kill. *People v. Beckwith*, 3 St. Rep., 104; 103 N. Y., 366; 5 N. Y. Cr., 228. If such purpose is present, the offense is murder in one of its degrees. *Id.*

A police officer who, while engaged in making an arrest, without intent or design to effect death, conducted the affair with such culpable negligence as to kill the person he sought to apprehend, is guilty of manslaughter. *People v. McCarthy*, 110 N. Y., 316; 18 St. Rep., 267.

See *People v. Hill*, 49 Hun, 432; 19 St. Rep., 672; 3 N. Y., Supp., 564.

**§ 189. In the first degree.**—Such homicide is manslaughter in the first degree, when committed without a design to effect death, either

1. By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another; or

2. In the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon.

**Definition.**—This section and section 193 define and divide the crime of manslaughter into two degrees. *People v. Rego*, 36 Hun, 130; 3 N. Y. Cr., 276.

**First degree.**—The producing of the death of an infant child, while engaged in committing the misdemeanor defined by section 288, *post*, constitutes the crime of manslaughter in the first degree. *People v. McDonald*, 8 St. Rep., 494; 49 Hun, 68; 1 N. Y. Supp., 704.

Where the death was caused by the defendant, while he was engaged in the commission of an assault and battery upon the deceased, he is guilty of manslaughter in the first degree. *People v. McKeon*, 31 Hun, 451.

Under this section, a conviction may properly be had on testimony that deceased and defendant had a struggle on the sidewalk, and that deceased had hold of defendant and struck him, without any weapon, and that defendant returned the blows by shooting deceased. *People v. Kennedy*, 22 N. Y. Supp., 269; 51 St. Rep., 813.

**Dangerous weapon.**—A revolver is a deadly weapon. *People v. Carlton*, 115 N. Y., 624; 26 St. Rep., 434.

See *People v. Webster*, 52 St. Rep., 240; 22 N. Y. Supp., 641.

**§ 190. Killing unborn quick child.**—The willful killing of an unborn quick child, by any injury committed upon the person of the mother of such child, is manslaughter in the first degree.

See section 294, *post*.

The willful killing of an unborn child is not manslaughter except as made so by statute. *Evans v. People*, 49 N. Y., 88.

The child is not the subject of manslaughter, under this section, until it has "quickened." *Id*.

**§ 191. Id.; by administering drugs, etc.**—A person who provides, supplies or administers to a woman, whether pregnant or not, or who prescribes for, or advises or procures a woman to take any medicine, drug or substance, or who uses or employs, or causes to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or of any quick child of which she is pregnant, is thereby produced, is guilty of manslaughter in the first degree.

See sections 294, 297 and 318, *post*.

If a defendant seeks to excuse himself from the charge of having committed an abortion, it is essential that he establish the fact that the same was necessary to preserve the life of the deceased. *People v. McGonegal*, 42 St. Rep., 313.

It is not for the people to prove the negative. *Id*.

**§ 192. Manslaughter, first degree, how punished.**—Manslaughter in the first degree is punishable by imprisonment for a term not exceeding twenty years.

Amended by chap. 662 of 1892.

This amendment omitted the minimum limit of punishment.

**§ 193. Manslaughter, second degree.**—Such homicide is manslaughter in the second degree, when committed without a design to effect death, either

1. By a person committing or attempting to commit a trespass, or other invasion of a private right, either of the person killed, or of another, not amounting to a crime; or

2. In the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual; or

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this chapter, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree.

Amended by chap. 23 of 1887.

This amendment substituted the word "dangerous" for the word "deadly," in subd. 2 of the section.

See sections 195 and 202, *post*.

**Officer.**—When an officer, who shoots and kills an innocent person who runs away from him, in the night time, and does not stop when called upon to do so, is guilty of this offense. *People v. McCarthy*, 47 Hun, 491; 14 St. Rep., 415.

**Subd 3.**—In order to constitute the crime of manslaughter in the second degree, under subd. 3 of this section, the jury must find that the defendant, by some act of culpable negligence procured the killing of the deceased. *People v. Buddensieck*, 4 N. Y. Cr., 266; 1 St. Rep., 436; 3 *id.*, 664.

Culpable negligence is such a careless act or omission by a person as endangers the personal safety or life of another, and which, by the exercise of reasonable attention and exertion, could be avoided. *Id.*

A person who, by culpable negligence, acts and omissions in the selection and use of materials for, and in the construction of, a building which he was erecting, kills and occasions the death of a human being, is guilty of manslaughter in the second degree. *People v. Buddensieck*, 103 N. Y., 487; 5 N. Y. Cr., 70; 8 St. Rep., 664.

If there is a neglect of duty under circumstances where a jury can say that such negligence was wrongful, it becomes a crime if, in consequence of that wrongful negligence, some human being is killed. *People v. Melius*, 1 N. Y. Cr. 42.

It is no excuse that the negligence of an employe of a corporation, who is indicted for manslaughter by culpable negligence causing death, arose from his obedience to the instructions of his official superior, which were in violation of the rules of the corporation. *Id.*

**Excuse.**—Where a party is himself the cause of the assault made upon him, and he intentionally provokes it, he cannot excuse himself for inflicting needless violence upon the person of the assailant. *People v. McGrath*, 18 St. Rep., 359; 47 Hun, 326; 6 N. Y. Cr., 153.

See *People v. Rego*, 36 Hun, 130

**§ 194. Women taking drugs, etc.**—A woman quick with child, who takes or uses, or submits to the use of any drug, medicine, or substance, or any instrument or other means with intent to produce her own miscarriage, unless the same is necessary to preserve her own life, or that of the child whereof she is pregnant, if the death of such child is thereby produced, is guilty of manslaughter in the second degree.

See sections 294, 295 and 318, *post*.

**§ 195. Negligent use of machinery.**—A person who, by any act of negligence or misconduct in a business or employment in which he is engaged, or in the use or management of any machinery, animals, or property of any kind, intrusted to his care, or under his control, or by any unlawful, negligent or reckless act, not specified by or coming within the foregoing provisions of this chapter, or the provisions of some other statute, occasions the death of a human being, is guilty of manslaughter in the second degree.

See subd. 3 of section 193, *ante*; section 196, *post*.

The offense is made out, when the death of the person has been produced by the inexcusable or culpable negligence of the party charged. *People v. Buddensieck*, 4 N. Y. Cr., 268; 1 St. Rep., 436; 3 *id.*, 664.

The want of care on the part of the deceased will not, *it seems*, exonerate from guilt the defendant, if the former's death was caused by the latter's culpable negligence. *Id.*

**§ 196. Owner of animals.**—If the owner of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and the animal, while so at large, and not confined, kills a human being, who has taken all the precautions which the circumstances permitted, to avoid the animal, the owner is guilty of manslaughter in the second degree.

See section 195, *ante*; subd. 11 of section 640, *post*.

**§ 197. Killing by overloading passenger vessels.**—A person navigating a vessel for gain, who willfully or negligently receives so many passengers or such a quantity of other lading on board the vessel, that, by means thereof, the vessel sinks, or is upset or injured, and thereby a human being is drowned, or otherwise killed, is guilty of manslaughter in the second degree.

See section 359, *post*.

**§ 198. Liability of persons in charge of steamboats.**—A person having charge of a steamboat used for the conveyance of passengers, or of a boiler or engine thereof, who, from ignorance, recklessness or gross neglect, or for the purpose of excelling any other boat in speed, creates, or allows to be created, such an undue quantity of steam as to burst the boiler, or other apparatus in which it is generated or contained, or to break any apparatus or machinery connected therewith, whereby the death of a human being is occasioned, is guilty of manslaughter in the second degree.

See sections 360, 361 and 362, *post*.

**§ 199. Liability of persons having charge of steam engines.**—An engineer or other person, having charge of a steam boiler, steam engine, or other apparatus for generating or applying steam, employed in a boat or railway, or in a manufactory, or in any mechanical works, who willfully, or from ignorance or gross neglect, creates, or allows to be created, such an undue quantity of steam as to burst the boiler, engine or apparatus, or to cause any other accident, whereby the death of a human being is produced, is guilty of manslaughter in the second degree.

See sections 360, 361, 362 and 424, *post*.

**§ 200. Liability of physicians.**—A physician or surgeon, or person practicing as such, who, being in a state of intoxication, without a design to effect death, administers a poisonous drug or medicine, or does any other act as a physician or surgeon, to an-



other person, which produces the death of the latter, is guilty of manslaughter in the second degree.

See section 857, *post*.

**§ 201. Liability of person making or keeping gunpowder contrary to law.**—A person who makes or keeps gunpowder or any other explosive substance within a city or village, in any quantity or manner prohibited by law, or by ordinance of the city or village, if any explosion thereof occurs, whereby the death of a human being is occasioned, is guilty of manslaughter in the second degree.

See sections 389, 636 and 645, *post*.

**§ 202. Manslaughter, second degree.**—Manslaughter in the second degree is punishable by imprisonment for a term not exceeding fifteen years, or by a fine of not more than one thousand dollars, or by both.

Am'd by chap. 662 of 1892.

This amendment omitted the minimum limit of imprisonment.

**§ 203. Homicide, when excusable.**—Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with ordinary caution, and without any unlawful intent.

See subd. 4 of section 223, *post*.

**When not excusable.**—There is no rule which authorizes one person to shoot another, because the latter is about to strike him with a club, unless he has reason to fear for his life, or the infliction of great bodily harm. *People v. Carlton*, 115 N. Y., 624; 26 St. Rep., 436.

The killing of a police officer who, without giving any notice of an intention to arrest, strikes or attempts to strike the defendant, or to take him into custody, is neither justifiable nor excusable homicide. *Id*.

When aggravating language induces a personal conflict of strength between persons of comparatively equal ability to inflict injury, the seizure of a dangerous weapon, accidentally near, by one of the parties, and a blow given in the heat of passion, may be regarded by the jury as excusable. *People v. Kelly*, 22 St. Rep., 969; 2 Silv. (Ct. App.), 237; 113 N. Y. 649; 7 N. Y. Cr., 48.

But this rule does not apply, where the parties are unequal in strength and the assaulting party has no reason to apprehend physical injury from the other party. *Id*.

**§ 204. Justifiable homicide.**—Homicide is justifiable when committed by a public officer, or a person acting by his command and in his aid and assistance, either

1. In obedience to the judgment of a competent court; or
2. Necessarily, in overcoming actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty; or
3. Necessarily, in retaking a prisoner who has committed, or has been arrested for, or convicted of a felony, and who has escaped or has been rescued, or in arresting a person who has committed



a felony and is fleeing from justice; or in attempting by lawful ways and means to apprehend a person for a felony actually committed, or in lawfully suppressing a riot, or in lawfully preserving the peace.

See notes under preceding section.

**Justifiable.**—It is only in the last extremity that the right to use a deadly weapon, under any circumstances, arises. *People v. Carlton*, 115 N. Y., 623; 26 St. Rep., 436; *People v. Sullivan*, 7 N. Y., 396.

The difficulty of defining, with absolute precision, when a public officer is justified in resorting to a deadly weapon even when in the discharge of his duty, considered by the court. *People v. McCarthy*, 14 St. Rep., 415; 47 Hun 491.

Invitation to the interview and antecedent threats as bearing upon the question of justification, considered. *People v. Walworth*, 4 N. Y. Cr., 355.

**When.**—The killing of another is justifiable homicide, if there is reasonable ground to apprehend, at the time of the act, a design on the part of the person killed to commit a felony, or to do some great personal injury, and for believing that such design will be accomplished. *People v. Walworth*, 4 N. Y. Cr., 355.

The homicide in *People v. Pallister*, 51 St. Rep., 727, was held, under the facts, not to be justifiable.

**Burden.**—If an excuse exists for the taking of life, or doing the act which caused death, the defendant is bound to show it. *People v. McCarthy*, 18 St. Rep., 267; 110 N. Y., 316.

The burden of justifying the use of a deadly weapon is on the defendant. *Id.*

The burden does not rest upon the prisoner to establish, even to a reasonable probability, the truth of an affirmative defense. *People v. Willett*, 36 Hun 511; 3 N. Y. Cr., 334.

He is entitled to a reasonable doubt of his guilt upon the whole evidence. *Id.*

This is true as to the degree of the crime and as to every essential requisit of that degree. *Id.*

The burden, in all these respects, is never shifted from the prosecution to the prisoner. *Id.*

**§ 205. Justifiable homicide.**—Homicide is also justifiable when committed, either

1. In the lawful defense of the slayer, or of his or her husband or wife, parent, child, brother, sister, master or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished; or

2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is.

See sections 26 and 203, *ante*; section 223, *post*.

See note on self-defense in 6 N. Y. Cr., 119.

**Defense.**—The clause “in lawful defense of the wife” means in defending her against the danger of a felony or of great personal injury. *People v. Downs*, 56 Hun, 11; 29 St. Rep., 121; 7 N. Y. Cr., 487; 8 N. Y. Supp., 524. Where the injury has been done and a further attack on her is not to be apprehended, the homicide is not justifiable. *Id.*

This section relates to a transaction occurring in respect to parties present

the time and place of its occurrence. *People v. Walworth*, 4 N. Y. Cr., 879. It has no application to a case where there is an allegation of danger to an absent person. *Id.*

Where a person is assaulted by another who attempts to take his life or inflict great bodily injury, and the assailed can secure safety by retreat, it is not necessary to take the life of the assailant to prevent the consummation of the felony attempted. *People v. Druse*, 3 St. Rep., 617; 103 N. Y., 655; 5 N. Y. Cr., 10.

To establish the defense of justifiable homicide, it is the duty of one engaged in a quarrel to avoid the attack and not become the aggressor unless other means are unavailable; at most, to use only such force as is necessary to prevent injury to himself. *People v. Kennedy*, 51 St. Rep., 813.

See *People v. Carlton*, 115 N. Y., 623; 26 St. Rep., 436; *People v. Webster*, 22 id., 241; 23 N. Y. Supp., 642.

## CHAPTER III

### *Maiming.*

SECTION 206. Maiming defined.

207. Maiming one's self to escape performance of a duty.

208. Maiming one's self to obtain alms.

209. What injury may constitute maiming.

210. Subsequent recovery of injured person, when a defense.

§ 206. **Maiming defined.**—A person who willfully, with intent to commit felony, or to injure, disfigure, or disable, inflicts upon the person of another an injury which,

1. Seriously disfigures his person by any mutilation thereof; or

2. Destroys, or disables any member or organ of his body; or

3. Seriously diminishes his physical vigor by the injury of any member or organ;

Is guilty of maiming, and is punishable by imprisonment for a term not exceeding fifteen years. The infliction of the injury is presumptive evidence of the intent.

Am'd by chap. 662 of 1892.

This amendment removed the minimum limit of punishment.

The former statutes, and authorities under them, defining the crime of mayhem, are collated and discussed in *Foster v. People*, 50 N. Y., 598.

**Application.**—This section does not limit its application to the entire destruction of a member. *Burke v. People*, 4 Hun, 484.

**Premeditation.**—The injury must be done on purpose, that is, with premeditation. *Id.*

It must not be the result of an unexpected, instantaneous encounter, or of the heat of sudden passion, or of the excitement produced by the fear of bodily harm. *Id.*

In *Godfrey v. People*, 63 N. Y., 207, it was held that the existence of a premeditated design could not be found simply from proof of the commission of the act itself. But this section makes the infliction of the injury presumptive evidence of the intent.

The maiming must be the result of premeditation and design. *Tully v. People*, 67 N. Y., 20.

The design must precede the conflict, and not originate with and grow out of it. *Id.*

This case, as well as *Godfrey v. People*, *ante*, and *Burke v. People*, *ante*, was decided under the Revised Statutes, which contained the phrase, "from premeditated design."

There must be a design or intention existing and a purpose to do the very act, and this must be the result of premeditation. *Godfrey v. People*, 63 N. Y., 211.

Where the act is done in the heat of a casual and sudden affray, without any proof of premeditation, the case is not brought within the section. *Id.*

**Member.**—The ear is a member of the human face. *Burke v. People*, 4 Hun, 484.

**§ 207. Maiming one's self to escape the performance of a duty.**—A person who, with design to disable himself from performing a legal duty, existing or anticipated, inflicts upon himself an injury, whereby he is so disabled, is guilty of a felony.

**§ 208. Maiming one's self to obtain alms.**—A person who inflicts upon himself an injury, such as if inflicted upon another would constitute maiming, with intent to avail himself of such injury, in order to excite sympathy, or to obtain alms or any charitable relief, is guilty of a felony.

**§ 209. What injury may constitute maiming.**—To constitute maiming, it is immaterial by what means or instrument, or in what manner the injury was inflicted.

**§ 210. Subsequent recovery of injured person, when a defense.**—When it appears, upon a trial for maiming another person, that the person has, before the time of trial, so far recovered from the wound that he is no longer by it disfigured in personal appearance, or disabled in any member or organ of his body, or affected in physical vigor, no conviction for maiming can be had; but the defendant may be convicted of assault in any degree.

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## CHAPTER IV.

### *Kidnapping.*

**SECTION 211.** Kidnapping defined.

212. Indictment, where triable.

213. Effect of consent of injured person.

214. Selling services of person.

215. Removing from this state persons held to service in another state.

216. Penalty imposed on judicial officers.

**§ 211. Kidnapping defined.**—A person who willfully,

1. Seizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service or kept or detained against his will; or

2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parent, guardian or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or disposi-

tion of the child, or with intent to steal any article about or on the person of the child; or

3. Abducts, entices or, by force or fraud, unlawfully takes or carries away another, at or from a place without the state, or procures, advises, aids or abets such an abduction, enticing, taking or carrying away, and afterwards sends, brings, has or keeps such person, or causes him to be kept or secreted within this state;

Is guilty of kidnapping, and is punishable by imprisonment for not more than fifteen years.

Am'd by chap. 145 of 1888.

This amendment substituted, in subd. 2 of the original section, the word "sixteen" for the word "twelve."

See section 282, *post*.

**Essentials.**—There are two elements, which must be found in the conduct of the defendant, to constitute the offense under the first subdivision: (1) Seizure, confinement or kidnapping, which ordinarily imply actual force or inveiglement. *People v. DeLeon*, 109 N. Y., 229; 8 N. Y. Cr. 78; 14 St. Rep., 847; (2) One of the several purposes specified therein. *Id.*

What facts authorize a conviction under subdivision 1 of this section. *Id.* *People v. De Leon*, 47 Hun, 308; 8 N. Y. Cr., 71; 13 St. Rep., 588.

**"To inveigle."**—The word "inveigle" is defined in *People v. De Leon*, *ante*.

The words "to inveigle" were designed to provide for cases, where a person, by improper device, is induced or enticed by another to leave the state to promote some unlawful scheme of the latter. *Id.*

In *People v. De Leon*, 109 N. Y., 461; 8 N. Y. Cr., 77; 14 St. Rep., 847, it was held that the defendant had inveigled the complainant, within the meaning of the first subdivision of this section, when he procured her consent to go to Panama, upon the pretense that honest employment had been secured for her there, while, in fact, his secret design was that she should become an inmate of a brothel.

An inveiglement, in the ordinary sense of the word, implies the acquiring of power over another by means of deceptive or evil practices, not accompanied by actual force. *Id.* But every deceptive or evil practice does not constitute an inveiglement. *People v. Fitzpatrick*, 57 Hun, 461; 32 St. Rep., 1013; 8 N. Y. Cr., 85.

A person who, by false and delusive promises, as to obtaining work at a specified compensation at a distant place, induces another to go out of the state, is not guilty under this section, though he had reason to believe that such representations would not prove to be true. *Id.*

**"Against his will."**—The phrase "against his will," in the first subdivision, is defined in *People v. De Leon*, 109 N. Y., 229, 230; 8 N. Y. Cr., 79, 80; 14 St. Rep., 847.

**"Secretly."**—The imprisonment or confinement must be shown to have been done "secretly." *People v. Camp*, 51 St. Rep., 35; 66 Hun, 532, 3; 21 N. Y. Supp., 742.

**"Without authority of law."**—Under this section, the seizure and confinement must be shown to have been "without authority of law." *Id.* The words "without authority of law" have no reference to "due process of law." *Id.*

**What is.**—Under the Revised Statutes, it was held, in *Hadden v. People*, 25 N. Y., 373, that procuring the intoxication of a sailor with the design of getting him on shipboard without his consent, and taking him on board in that condition was kidnapping. This statute is similar to this section of the Code.

**What not.**—A father who, honestly believing that his daughter is insane, takes measures to have her placed in an insane asylum, cannot be held guilty

of kidnapping merely because he did not exercise that care and discretion which a jury may say an ordinarily prudent person should exercise. *People v. Camp*, 51 St. Rep., 33.

Malice and negligence must not be confounded together. *Id.* The former arises from an evil purpose, the latter from a failure of purpose; the former is imputable to a defect of the heart, the latter to a defect of intellect. *Id.*

See *People v. Navagh*; *People ex rel. Navagh v. Frink*, 41 Hun, 191; 4 N. Y. Cr., 295; 4 St. Rep., 162.

**§ 212. Indictment, where triable.**—An indictment for kidnapping may be tried either in the county in which the offense was committed, or in any county through or in which the person kidnapped or confined was taken or kept, while under confinement or restraint.

**§ 213. Effect of consent of injured person.**—Upon a trial for a violation of this chapter, the consent thereto of the person kidnapped or confined shall not be a defense, unless it appear satisfactorily to the jury that such person was above the age of twelve years, and that the consent was not extorted by threats or duress.

**Application.**—This section is not applicable to cases of inveiglement. *People v. De Leon*, 47 Hun, 312; 8 N. Y. Cr., 76; 13 St. Rep., 588.

This section relates to a consent to the very purpose of the defendant. *People v. De Leon*, 109 N. Y., 230; 8 N. Y. Cr., 80; 14 St. Rep., 847.

**Fraud.**—A consent procured by fraud is no consent. *People v. De Leon*, 47 Hun, 313; 8 N. Y. Cr., 76; 13 St. Rep., 588.

**Defense.**—Where there is an alleged seizure or any force, the consent will be an answer, unless obtained by threat or duress. *Id.*

**§ 214. Selling services of person.**—A person who, within this state or elsewhere, sells or in any manner transfers, for any term, the services or labor of any person who has been forcibly taken, inveigled, or kidnapped in or from this state, is punishable by imprisonment in a state prison not exceeding ten years.

**§ 215. Removing from this state persons held to service in another state.**—A person claiming that he or another is entitled to the services of a person alleged to be held to labor or service in a state or territory of the United States who, except as authorized by special statute, takes, or removes, or willfully does any act tending towards removing from this state any such person, is guilty of felony, punishable by imprisonment in the state prison not exceeding ten years, and by a penalty of five hundred dollars, recoverable in a civil action by the party aggrieved.

**§ 216. Penalty imposed on judicial officers.**—A judge, or other public officer of this state who grants or issues any warrant, certificate or other process, in any proceeding for the removal from this state of any person claimed as held to labor or service in a state or territory of the United States, except in pursuance of the statute of this state, is guilty of a misdemeanor; and in

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addition to the punishment therefor prescribed by law, he for five hundred dollars to the party aggrieved, recoverable in a action.

### CHAPTER V.

#### *Assaults.*

SECTION 217. Assault in the first degree defined.

218. Assault in second degree.

219. Id.; in third degree.

220. Assault in first degree, how punished.

221. Id.; in second degree.

222. Id.; in third degree.

223. Use of force or violence, declared not unlawful, etc.

**§ 217. Assault in first degree defined.**—A person with an intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another,

1. Assaults another with a loaded fire-arm, or any other deadly weapon, or by any other means or force likely to produce death

2. Administers to or causes to be administered to or taken another, poison, or any other destructive or noxious thing, so to endanger the life of such other ;

Is guilty of assault in the first degree.

**Subd. 1.**—What will constitute an assault with a loaded fire arm, or deadly weapon, has not been declared or defined by this or any other section of the Penal Code. *People v. Ryan*, 55 Hun, 216; 27 St. Rep., 918; 8 N. Y. Supp., 242.

A pistol is a fire arm. *People v. Whedon*, 2 N. Y. Cr., 320.

An assault with intent to kill with a loaded pistol, which fails to go to an assault in the first degree. *People v. Ryan*, 55 Hun, 215; 7 N. Y. Cr., 27 St. Rep., 917; *Slatterly v. People*, 58 N. Y., 354.

The act of discharging a pistol "at, towards and against" another, with intent to kill him, is an offense within the provisions of this section. *People v. Whedon*, 2 N. Y. Cr., 320.

**Subd. 2.**—The character of the crime is not lessened because, by means of an unskillful administration, death does not ensue. *People v. Burgess*, 1 St. Rep., 21; 45 Hun, 159; 5 N. Y. Cr., 519.

It is not necessary to prove that, by the administration of the poison was endangered. *Id.*

Under the former statute, this element of proof was not essential. *Id.*

**Intent.**—To constitute this offense, there must be an intent to kill. *People v. Terrell*, 33 St. Rep., 370, 11 N. Y. Supp., 365.

Conviction of assault in the first degree depends on the intent to kill. *People v. Sullivan*, 4 N. Y. Cr., 197.

**Actual.**—To consummate this offense, the law requires that the assault shall be actually made. *People v. O Connell*, 60 Hun, 113; 38 St. Rep., 14 N. Y. Supp., 485, 7.

**Felony.**—The assault defined in this section, is a felony. *People v. Masterson*, 2 N. Y. Cr., 306, note

See *People v. Dartmore*, 15 St. Rep., 839; 48 Hun, 322; 2 N. Y. Supp., 100; *Matter of Gray*, 2 N. Y. Cr., 303.

**§ 218. Assault, in second degree.**—A person who, under circumstances not amounting to the crime specified in the first section,



1. With intent to injure, unlawfully administers to, or causes to be administered to, or taken by, another, poison, or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or

2. With intent thereby to enable or assist himself or any other person to commit any crime, administers to or causes to be administered to, or taken by another, chloroform, ether, laudanum, or any other intoxicating narcotic, or anæsthetic agent; or

3. Willfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon; or

4. Willfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce a grievous bodily harm; or

5. Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person;

Is guilty of assault in the second degree.

Amended by chap. 884 of 1882.

This amendment was made before Code went into operation.

See sections 278, 358 and 447, *post*.

**Intent.**—To constitute a criminal assault, an intent to do bodily harm, or by violence to insult, is requisite. *People v. Sullivan*, 4 N. Y. Cr., 197.

There must be an intention, coupled with the present ability of using actual violence against the person. *People v. Ryan*, 55 Hun, 215; 7 N. Y. Cr., 450; 27 St. Rep., 917; 8 N. Y. Supp., 244, 370; *Hays v. People*, 1 Hill, 351.

This section does not take from the crime of assault in the second degree, the necessity for intent. *People v. Sullivan*, 4 N. Y. Cr., 199. In addition to the intent to do bodily harm, the intent must exist to use for that purpose the weapon, other instrument or thing. *Id*.

To authorize a conviction of assault in the second degree, an intention, coupled with present ability, of using actual violence against the person must be shown. *People v. Terrell*, 33 St. Rep., 370; 11 N. Y. Supp., 365.

This offense does not require an intent to kill, nor even the use of a loaded fire arm. *People v. Ryan*, 55 Hun, 220; 7 N. Y. Cr., 455; 27 St. Rep., 917; 8 N. Y. Supp., 244, 370. All that is demanded is the willful and wrongful use of a weapon likely to produce grievous bodily harm. *Id*.

Under this section there must be an absence of intent to kill. *People v. Terrell*, 33 St. Rep., 370; 11 N. Y. Supp., 365. Such intent makes the distinction between the first and second degrees of assault. *Id*.

**Subd. 4.**—The intent to shoot off and discharge the weapon has not been required to create the offense described in subdivision 4, of this section. *People v. Connor*, 25 St. Rep., 138; 53 Hun, 353; 7 N. Y. Cr., 470; 6 N. Y. Supp., 220.

Pointing a loaded gun toward a person, and threatening to shoot if he come near, constitute assault. *People v. Morehouse*, 25 St. Rep., 294.

A person who, while running through the street with an open jack knife in his hand, made several lunges with it at an officer who was attempting to stop him, is guilty of an assault within subd. 4 of this section. *People v. Murray*, 54 Hun, 407; 27 St. Rep., 84; 7 N. Y. Supp., 548.

Striking a person upon the head with a pistol, thereby inflicting severe injuries, is sufficient to create an assault in the second degree, under subds. 3 and 4 of this section. *People v. Irving*, 2 N. Y. Cr., 49; 31 Hun, 615.

**Subd. 5.**—Inasmuch as a police officer may arrest, in the night time, without



a warrant, a person whom he believes to have committed a felony, a party who in aiding such prisoner to escape, assaults the officer, violates subd. 5 of this section *People v. Ryan*, 28 St. Rep., 490; 8 N. Y. Supp., 310.

The word "intent," in subdivision 5 of this section, applies to every part thereof, and the assault must be committed with the intent specified, in order to constitute the offense described. *People v. Cooper*, 8 N. Y. Cr., 118. There must be, in addition to an actual assault, the intent to do one of the other unlawful acts mentioned in the subdivision. *Id.*

An intent to commit a felony is a necessary feature of an assault in the second degree under subd. 5 of this section. *People v. Aldrich*, 33 St. Rep., 792; 11 N. Y. Supp., 465, 6.

An assault with intent to commit rape is accomplished by a felonious assault made upon the person of a female, with a preconceived intent to have sexual connection with her against her will, by the use of absolute force. *People v. Clark*, 3 N. Y. Cr., 280.

An attempt at sexual intercourse with a female, where there is no violence, abandoned as soon as she refuses and resists, is not an assault with intent to commit rape. *Id.*

A conviction for assault with intent to commit a rape is not proper, where full commission of rape is proved. *People v. Aldrich*, 33 St. Rep., 792; 11 N. Y. Supp., 465.

**Felony.**—The assault defined in this section is a felony. *People v. Maschke*, 2 N. Y. Cr., 306, note.

See *People v. Dartmore*, 15 St. Rep., 839; 48 Hun, 322; 2 N. Y. Supp., 311; *People v. Sweeney*, 41 Hun, 340; 4 N. Y. Cr., 283; *People v. Cole*, 2 *id.*, 112; *Matter of Gray*, *id.*, 303; *People v. Hartley*, 51 St. Rep., 804.

**§ 219. *Id.*; in third degree.**—A person who commits an assault, or an assault and battery, not such as is specified in the foregoing sections of this chapter, is guilty of an assault in the third degree.

The reference to this section, in *People ex rel. Brown v. Carpenter*, 123 N. Y., 640, is intended to be to section 291 of this Code.

**Bodily harm.**—One receives bodily harm in a legal sense, when another touches his person against his will with physical force, intentionally hostile and aggressive, or projects such force against his person. *People v. Moore*, 20 St. Rep., 1; 50 Hun, 358.

**What not sufficient.**—Without the intent to commit something besides an assault, the crime is an assault in the third degree. *People v. Cooper*, 8 N. Y. Cr., 119.

An assault, not committed with criminal intent, does not constitute a crime. *People v. Hale*, 1 N. Y. Cr., 536; 18 W. Dig., 213.

The taking hold of a person's arm, in the confidence of existing friendship, trusting to a license acquired by a supposed mutual kind feeling, doing no injury, with no intent to do a wrong, by insult or otherwise, is not an offense under this section. *Id.*

**Assault and battery.**—A charge of assault and battery is equivalent to a charge of assault in the third degree. *Matter of Bray*, 34 St. Rep., 642; 12 N. Y. Supp., 367.

A simple assault and battery is an assault in the third degree. *Matter of Gray*, 2 N. Y. Cr., 303.

An assault and battery, however, may be committed under such circumstances as to amount to a graver crime than an assault in the third degree. *Id.*

The misdemeanor of assault and battery, when attacked collaterally, will be presumed to be the same offense as is designated, in this section as an assault in the third degree. *People v. Maschke*, 2 N. Y. Cr., 168.

**Indecent assault.**—What sufficient to establish an indecent assault and battery in case of young girls. *People ex rel. Engel v. Court*, etc., 18 Hun, 330.

The assent of a child, even of tender years, is a defense to a charge of inde-

cent assault, where there is no pretense of rape, attempt at rape or illicit intercourse. *People v. Parsons*, 2 N. Y. Cr., 117.

**Misdemeanor.**—The degree of assault defined in this section, is a misdemeanor. *People v. Maschke*, 2 N. Y. Cr., 306, note.

**Complaint.**—A complaint, which describes the offense as “maliciously and unlawfully beating the complainant,” by kicking him in the head, body and face without provocation, is good, and will support a conviction of assault in the third degree. *People v. Parker*, 69 Hun, 130.

The name given to the offense is not material. *Id.*

**§ 220. Assault, first degree, how punished.**—Assault in the first degree is punishable by imprisonment for a term not exceeding ten years.

Am'd by chap. 662 of 1892.

This amendment omitted the minimum limit of punishment.

All the authorities, defining the punishment for assault in the first degree, prior to the amendment of 1892 to this section, are now misleading upon this point.

This section was amended by chap. 662 of 1892, subsequent to the decision of the case of *People v. O'Connell*, 60 Hun, 113; 38 St. Rep., 108; 14 N. Y. Supp., 485.

**§ 221. Assault, second degree.**—Assault in the second degree is punishable by imprisonment in a penitentiary or state prison for a term not exceeding five years, or by a fine of not more than one thousand dollars, or both.

Am'd by chap. 662 of 1892.

This amendment omitted the minimum limit of imprisonment.

See section 5, *ante*.

Since the decision of *People v. Sweeney*, 41 Hun, 340; 4 N. Y. Cr., 283, this section has been amended so as to limit the imprisonment to a term not exceeding five years.

The cases under this section, decided prior to the amendment of 1892 to this section, erroneously state the existing punishment for assault in the second degree.

See *People v. Terrell*, 33 St. Rep., 369; 11 N. Y. Supp., 365; *People v. Cole*, 2 N. Y. Cr., 112.

**§ 222. Id.; in third degree.**—Assault in the third degree is punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both.

See section 15, *ante*; subd. 2, section 56 of Code of Criminal Procedure.

**Application.**—This section applies to a case where a prisoner is convicted of assault in the third degree in a court of sessions or court of oyer and terminer, but not in a court of special sessions. *Matter of Bray*, 34 St. Rep., 642; 12 N. Y. Supp., 367.

**Fine.**—The imposition of a fine may be in addition to the sentence of imprisonment. *People v. Sutton*, 2 Sil. (Sup. Ct.), 575; 24 St. Rep., 726; 6 N. Y. Supp., 96.

**Imprisonment.**—Imprisonment for assault in the third degree, *it seems* cannot be in state prison. *People ex rel. Devoe v. Kelly*, 32 Hun, 539; 2 N. Y. Cr., 432; 19 W. Dig., 205.

**Misdemeanors.**—The punishment for assault in the third degree is identical with that provided for the punishment of misdemeanors. *Id.* Same case, 97 N. Y., 212. See section 15, *ante*.

**Section 703, post.**—The difference between this section and section 703, *post*, pointed out. *People ex rel. Devoe v. Kelly*, *ante*.

See *People v. Cooper*, 4 N. Y. Cr., 119.

**§ 223. Use of force or violence, declared not unlawful, etc.**—To use or attempt, or offer to use, force or violence upon or towards the person of another is not unlawful in the following cases:

1. When necessarily committed by a public officer in the performance of a legal duty; or by any other person assisting him or acting by his direction;

2. When necessarily committed by any person in arresting one who has committed a felony, and delivering him to a public officer competent to receive him in custody;

3. When committed either by the party about to be injured or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his lawful possession, if the force or violence used is not more than sufficient to prevent such offense;

4. When committed by a parent or the authorized agent of any parent, or by any guardian, master, or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice or scholar, and the force or violence used is reasonable in manner and moderate in degree;

5. When committed by a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them, at their request, in expelling from a carriage, railway car, vessel or other vehicle a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force or violence used is not more than sufficient to expel the offending passenger, with a reasonable regard to his personal safety;

6. When committed by any person in preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person.

See sections 26, 203 and 205, *ante*; section 377, *post*; sections 83, 168 and 183 of Code of Criminal Procedure.

**Arrest**—A party, either with or without process, may use whatever force is necessary to arrest an offender. *People v. Adler*, 3 Park, 249. If the offense is not committed or attempted in his presence, it must be a felony. See section 183 of Code of Criminal Procedure.

If a felony has been committed, an officer will be justified, even though he take the life of the offender, in arresting him or preventing his escape, provided there is an absolute necessity for his doing so. *Conraddy v. People*, 5 Park, 240.

It is not so in case of an arrest for a misdemeanor. *Id.*

In case of no warrant, even an officer cannot, upon his own belief of the commission of a felony, take the offender's life to prevent his escape, but, to justify, must show the fact of the felony. *Id.*

**Parent.**—A parent may use sufficient force, to maintain a wholesome and proper restraint over a child. *Hernandez v. Carnobeli*, 4 Duer, 642; 10 How., 433.

**Master.**—A master may do likewise in case of a servant. *People v. Shefflein*, 1 Wheeler Cr. Cas., 512; *People v. Phillips*, *id.*, 155.

**Passenger.**—Excessive force cannot be used in ejecting a passenger from a car, though there was lawful cause for his expulsion. *Higgins v. Watervliet Turnpike Co.*, 46 N. Y., 23.

A passenger, who refuses to pay his fare, may be expelled from the car, but not when the car is in motion. *Sandford v. Eighth Ave. R. R. Co.*, 23 N. Y., 343. See *Pease v. D., L. & W. R. R. Co.*, 101 N. Y., 367.

**Priest.**—A Roman Catholic priest, having charge of a parish under his bishop, in whom is the legal title, has the right to regulate the price and occupancy of pews, and to eject the church parishioners who refuse to comply with the regulations. *Crowley v. Miller*, 19 W. Dig., 262.

**Protection of property.**—So, a party may protect property in his lawful custody, even to killing a person attempting to commit a felony. *Ruloff v. People*, 45 N. Y., 213; *Gyre v. Culver*, 47 Barb., 592; *Carey v. People*, 45 *id.*, 262; *Harrington v. People*, 6 *id.*, 607.

**Self defense.**—A party assailed may, even to the killing of his assailant, use sufficient force to defend himself. *People v. Shorter*, 2 N. Y., 193.

To authorize a person to use a weapon in self defense, it is sufficient to show a reasonable ground for apprehending a design to take his life or to do him some great bodily harm, and that the danger was imminent that such design would be accomplished, though it might afterward turn out that such appearances were false, and there was not, in fact, any such design or any danger that it would be accomplished. *Evers v. People*, 3 Hun, 716; *aff'd*, 63 N. Y., 625. See, also, *People v. Sullivan*, 7 *id.*, 396; *People v. Lamb*, 3 Keyes, 360; 54 Barb., 342; *Patterson v. People*, 40 *id.*, 625; *People v. Cole*, 4 Park., 35; *People v. Austin*, 1 Park., 154; *Shorter v. People*, 2 N. Y., 193.

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## CHAPTER VI

### *Robbery.*

**SECTION 224.** Robbery defined.

225. How force or fear must be employed.

226. Degree of force immaterial.

227. Taking property secretly.

228. Robbery in first degree.

229. *Id.*; second degree.

230. *Id.*; third degree.

231. Robbery, first degree, how punished.

232. Robbery, second degree.

233. *Id.*; in third degree.

**§ 224. Robbery defined.**—Robbery is the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force or violence, or fear of injury, immediate or future, to his person or property, or the person or property of a relative or member of his family, or of any one in his company at the time of the robbery.

The case of *People v. Barondess*, 8 N. Y. Cr., 234; 41 St. Rep., 659; 61 Hun, 576; 16 N. Y. Supp., 438, was reversed in 45 St. Rep., 248; 8 N. Y. Cr., 376.

**Fear.**—Fear is not a necessary element of the crime, but may be an element

which goes to make up the crime. *People v. Glynn*, 27 St. Rep., 27; 54 Hun, 333. Neither fear or violence enters into the first part of the definition. *Id.*

**Force.**—The removal of the property, from the presence of another, with force or violence, constitutes robbery. *Id.* The owner or person, in whose presence it is removed, need not know, at the time, of its removal. *Id.*

The mere snatching of property from the hand of a person will not constitute robbery. *McCloskey v. People*, 5 Park, 299; *People v. Hall*, 6 *id.*, 642. The violence must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance. *Id.*

The violence contemplated means more than simple assault and battery. *People v. McGinty*, 24 Hun, 64. In this case, the term "violence" was defined.

The violence may include restraint of the person, as in *Mahoney v. People*, 3 Hun, 202, where the complainant was held around his neck and by his arms.

The felonious taking of a key from a person against his will and in his presence, by violence and by putting him in fear of immediate injury to his person, establishes the crime of robbery in the first degree. *Hope v. People*, 83 N. Y., 418; 11 W. Dig., 386.

**Extortion.**—To extort personal property from another by means of threats of an unfounded charge, known to the defendant to be groundless, is robbery. *People v. McDaniels*, 1 Park, 198.

**Owner.**—It is not necessary that the one, from whose person or in whose presence the property is taken, should be the actual owner thereof. *Brooks v. People*, 49 N. Y., 436. As against the robber, he is deemed the owner. *Id.*

**§ 225. How force or fear must be employed.**—To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking. If employed merely as a means of escape it does not constitute robbery.

See notes under preceding section.

Where the thief has procured the possession of the property, without force or violence, the removal from his presence by means of force or violence, constitutes the crime of robbery. *People v. McGlynn*, 27 St. Rep., 27; 54 Hun, 334.

See *People v. Foley*, 9 St. Rep., 35; 27 W. Dig., 217.

**§ 226. Degree of force immaterial.**—When force is employed in either of the ways specified in the last section, the degree of force employed is immaterial.

This section changed the rule as to the amount of force or violence required to constitute this offense.

When the property is taken by force, the degree of force is immaterial. *People v. Foley*, 9 St. Rep., 35; 27 W. Dig., 217. This is the rule now, whatever it may have been heretofore. *Id.*

**§ 227. Taking property secretly, not robbery.**—The taking of property from the person of another is robbery, when it appears that although the taking was fully completed without his knowledge, such knowledge was prevented by the use of force or fear.

Secretly picking a pocket is not robbery. *Norris' case*, 6 City H. Rec., 86.

It was held in *People v. Hall*, 6 Park., 651, that snatching a thing from a person was not robbery. But see section 226, *ante*. The violence must be actual and not constructive, and such an amount must be employed as shall overcome the free agency or power of resistance of the person despoiled. *Id.* This rule does not apply to that class of cases where property is taken by putting a person in fear. *Id.* *McCloskey v. People*, 5 Park., 299.

**§ 228. Robbery in first degree.**—An unlawful taking or compulsion, if accomplished by force or fear, in a case specified in the foregoing sections of this chapter, is robbery in the first degree, when committed by a person,

1. Being armed with a dangerous weapon; or
2. Being aided by an accomplice actually present; or
3. When the offender inflicts grievous bodily harm or injury upon the person from whose possession, or in whose presence, the property is taken, or upon the wife, husband, servant, child, or inmate of the family of such person, or any one in his company at the time, in order to accomplish the robbery.

See *People v. McInnery*, 4 St. Rep., 598; 5 N. Y. Cr., 47; *People v. Joyce*, 4 id., 342.

**§ 229. Id.; second degree.**—Such unlawful taking or compulsion when accomplished by force or fear, in a case specified in the foregoing sections of this chapter, but not under circumstances amounting to robbery in the first degree, is robbery in the second degree, when accomplished either

1. By the use of violence; or
2. By putting the person robbed in fear of immediate injury to his person or that of some one in his company.

See *People v. Holfelder*, 5 St. Rep., 489; 5 N. Y. Cr., 179.

**§ 230. Id.: third degree.**—A person who robs another, under circumstances not amounting to robbery in the first or second degree, is guilty of robbery in the third degree.

**§ 231. Robbery, first degree, how punished.**—Robbery in the first degree is punishable by imprisonment for a term not exceeding twenty years.

Am'd by chapter 662 of 1892.

This amendment omitted the minimum limit of punishment.

**§ 232. Robbery, second degree.**—Robbery, in the second degree, is punishable by imprisonment for a term not exceeding fifteen years.

Am'd by chap. 662 of 1892.

This amendment omitted the minimum limit of punishment.

**§ 233 Id.; in third degree.**—Robbery in the third degree is punishable by imprisonment for not more than ten years.

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## CHAPTER VII.

### *Duels and Challenges.*

**SECTION 234.** Duelling. defined and how punished.

235. Challenger, abettor, etc.

236. Challenge defined,

237. Attempts to induce a challenge.



**SECTION 238.** Posting for not fighting.

239. Duel outside of state.

240. Where such person may be indicted and tried.

241. Witnesses.

§ **234. Duelling defined, and how punished.**—A person who fights a duel or engages in any combat with another, with deadly weapons, by previous agreement, or upon a previous quarrel, although no death or wound ensues, is punishable by imprisonment for a term not exceeding ten years. A person convicted under this section is thereafter incapable of holding, or of being elected or appointed to any office or place of trust or emolument, civil or military, within the state.

Am'd by chap. 662 of 1892.

This amendment omitted the minimum limit of punishment.

See section 486, *post*.

The latter clause of this section is constitutional. *Barker v. People*, 20 Johns., 457; 3 Cow., 686.

§ **235. Challenger, abettor, etc.**—A person who challenges another to fight a duel, or who sends a written or verbal message, purporting or intended to be a challenge to fight a duel, or an invitation to a combat with deadly weapons, or who accepts such a challenge or message, or who knowingly carries or delivers such a challenge or message, or who is present at the time appointed for such a duel or combat, or when such a duel or combat is fought, either as second, aid, or surgeon, or who advises or abets, or gives any countenance or assistance to such a duel or combat upon previous agreement, is punishable by imprisonment for not more than seven years.

§ **236. Challenge defined.**—Any word, spoken or written, or any sign, uttered or made to any person, expressing or implying, or intended to express or imply, a desire, request, invitation, or demand, to fight a duel, or to meet for the purpose of fighting a duel, is deemed a challenge.

See section 459, *post*.

§ **237. Attempts to induce a challenge.**—A person guilty of sending or using to another any word or sign whatever, with intent to provoke or induce such person to give or receive a challenge to fight a duel, is guilty of a misdemeanor.

§ **238. Posting for not fighting.**—A person who posts or advertises another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who, in writing or in print, uses reproachful or contemptuous language to or concerning any one, for not sending or accepting a challenge to fight a duel, or for not fighting a duel, is guilty of a misdemeanor.

§ **239. Duel outside of state.**—A person who leaves this state with intent to elude any provision of this chapter, or to



commit any act without this state, which is prohibited by this chapter, or who being a resident of this state, does any act without this state which would be punishable by the provisions of this chapter, if committed within this state, is guilty of the same offense, and subject to the same punishment, as if the act had been committed, or was to have been consummated within this state.

See section 188, *ante*; section 461, *post*; section 133 of Code of Criminal Procedure.

**§ 240. Where such person may be indicted and tried.—**

A person offending against any provision of the last section, may be indicted and tried in any county within this state; but the person so offending may plead a former conviction or acquittal in another state or country for the same offense; and if such plea is admitted or established, it shall be a bar to further proceedings against him for such offense.

See section 185, *ante*.

**§ 241. Witnesses.—**A person offending against any provision of this chapter is a competent witness against any other person offending in the same transaction, and must not be excused from testifying or answering any question, upon an investigation or trial for an offense under this chapter, upon the ground that his testimony might tend to convict him of a crime. But evidence given by a person so testifying, cannot be received against him, in any criminal action or proceeding.

See section 712, *post*.

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## CHAPTER VIII

### *Libel.*

**SECTION 242. Libel defined.**

243. Libel a misdemeanor.

244. Malice presumed. Defense to prosecution.

245. Publication defined.

246. Liability of editors and others.

247. Publishing a true report of public official proceedings.

248. Qualification of last section.

249. Indictment against resident.

250. Libel against non-resident.

251. Indictment, punishment restricted.

252. Indictment, power of court, place of trial.

253. Privileged communications.

254. Threatening to publish libel.

**§ 242. Libel defined.—**A malicious publication, by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause, any person to be shunned or avoided, or which has a tendency to injure any person, corpora-

tion or association of persons, in his or their business or occupation, is a libel.

See section 289 of Code of Criminal Procedure.

**Manner of publication.**—This section shows that a publication may be "by mere speech," but, when so made, it is not indictable. *People v. Stark*, 59 Hun, 54; 35 St. Rep., 152; 12 N. Y. Supp., 690, 2.

The manner of the publication is of the essence of the crime. *Id.*

**Libelous.**—Publication in a newspaper to the effect that a married man was threatened with a breach of promise suit, is libelous *per se*, in that its tendency is to disgrace him and bring him into ridicule and contempt. *Morey v. M. J. Ass'n*, 33 St. Rep., 49; 123 N. Y., 207.

Matter, which tends to expose one to public hatred, contempt or ridicule, is libelous, though not within the letter of the statute. *Turton v. New York Recorder Co.*, 22 N. Y. Supp., 769.

Words affecting a man injuriously in his trade or occupation may be libelous, though they convey no imputation upon his character. *Moore v. Frances*, 121 N. Y., 205; 30 St. Rep., 467.

Words written of a man in relation to his business or occupation, which will have a tendency to hurt, or are calculated to prejudice him therein, are actionable, though they charge no fraud or dishonesty and were uttered without actual malice. *Id.*

Words imputing insanity are actionable *per se*, when written of one occupying a position of trust and confidence, in relation to his occupation. *Id.*

An article charging a woman with being an illegitimate child, is libelous *per se*. *Shelby v. Sun P. Ass'n*, 38 Hun, 474; *aff'd* 109 N. Y., 611.

A publication containing statements which hold a person up to scorn or ridicule, and degrade or disgrace him in the eyes of men, is libelous *per se*. *Bergmann v. Jones*, 94 N. Y., 51.

A circular, charging plaintiff, among other things, with being in debt, spending trust money and secreting trust assets, with improper business methods and visionary and unsound business ideas, with being a treacherous wretch and having a shallow head and unprincipled heart, is libelous. *Carpenter v. Hammond*, 1 St. Rep., 551.

Instance of a libelous circular. *People v. Clegg*, 32 St. Rep., 701.

Charging a maister with using filthy water in brewing. *White v. Delavan*, 17 Wend., 49. See *Turrell v. Dolloway*, *id.*, 426; *Fidler v. Delavan*, 20 *id.*, 51; *Ryckman v. Delavan*, 25 *id.*, 186.

So, charging a politician with corruption. *Powers v. Dubois*, 17 Wend., 63.

So, charging a senator with corrupt conduct in his official capacity, though not published till after the expiration of his term of office. *Cramer v. Riggs*, 17 Wend., 209.

So, charging a politician with corruptly using money. *Weed v. Fuller*, 11 Barb., 203.

So, a charge of smuggling. *Stillwell v. Barter*, 19 Wend., 487.

So, a charge of blackmail. *Edsall v. Brooks*, 26 How., 426; 17 Abb., 221; 2 Robt., 29; *Robertson v. Bennett*, 44 Supr., 66.

So, a charge of swindling. *Williams v. Godkin*, 5 Daly, 499.

So, a charge of dishonesty. *Taylor v. Church*, 1 E. D. Smith, 279.

An imputation of poverty, if so alleged as to excite nothing but ridicule, may be libelous. *Moffat v. Caldwell*, 3 Hun, 26.

So, an imputation of insanity. *Perkins v. Mitchell*, 31 Barb., 465; *Southwick v. Stevens*, 10 Johns., 443.

So, an imputation of drunkenness. *Sanderson v. Caldwell*, 45 N. Y., 401.

So, to charge an attorney with offering himself as a witness in order to divulge the secrets of his client, is libelous. *Biggs v. Denniston*, 3 Johns. Cas., 198.

So, a charge of kidnapping another and bringing him into slavery. *Nash v. Benedict*, 25 Wend., 645.

**Non-libelous.**—Publication by mercantile agency was held, in *Kingsbury v. Bradstreet Co.*, 116 N. Y., 211; 26 St. Rep., 520, not to be libelous *per se*.

Nor is a report, by such agency, of a judgment entered. *Woodruff v. Sime*, 116 N. Y., 217; 26 St. Rep., 523.

A charge that a person, at a time and place mentioned, met the wife of another and "committed an abomination in the sight of the Lord," is not libelous *per se*. *People v. Isaacs*, 1 N. Y. Cr., 153.

**Nature.**—The publication of a libel is not an infamous crime. *People v. Parr*, 42 Hun, 316; 5 N. Y. Cr., 36.

*Clark v. Anderson*, 11 N. Y. Supp., 730; 33 St. Rep., 866.

**§ 243. Libel a misdemeanor.**—A person who publishes a libel, is guilty of a misdemeanor.

See *People v. Starke*, 59 Hun, 58; 35 St. Rep., 152; 12 N. Y. Supp., 692.

**§ 244. Malice presumed. Defense to prosecution.**—A publication having the tendency or effect, mentioned in section 242, is to be deemed malicious, if no justification or excuse therefor is shown. The publication is justified when the matter charged as libelous is true, and was published with good motives and for justifiable ends. The publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public.

See section 8, art. 1 of State Constitution.

**Justification.**—The matter, that will serve to mitigate damages, must be connected with or bear upon the defamatory charge. *Hamilton v. Eno*, 81 N. Y., 128. It must tend to prove the truth of the charge, or to show that there was induced in the defendant a belief of the truth of it. *Id.*; *Bush v. Prosser*, 11 N. Y., 347; *Bisbey v. Shaw*, 12 id., 67.

The question of good faith and belief in the truth of the statement is for the jury. *Brooks v. Harison*, 91 N. Y., 89; *Hamilton v. Eno*, 81 id., 122.

Rumors are no justification. *Powers v. Skinner*, 1 Wend., 451.

That the article was copied is no defense; *Hotchkiss v. Oliphant*, 2 Hill, 510; nor that the author's name was given. *Dole v. Lyon*, 10 Johns., 447.

Giving the name of the author is no excuse. *Ropke v. Brooklyn Daily Eagle*, 9 St. Rep., 712.

Its truth must be established. *Rice v. Withers*, 9 Wend, 138.

The facts in *Holmes v. Jones*, 121 N. Y., 461; 31 St. Rep., 379, were held to fully justify the libel.

**Malice.**—The general rule is that, in the case of a libelous publication, the law implies malice. *Byam v. Collins*, 19 St. Rep., 581; 111 N. Y., 150.

In case of a privileged communication, plaintiff must prove express malice. *Lovell Co. v. Houghton*, 116 N. Y., 520; 27 St. Rep., 559.

Distinct charges, not privileged, are not justified by proof of charges which are privileged but imply malice. *Moore v. Man. Nat. B'k*, 123 N. Y., 420; 34 St. Rep., 335.

**§ 245. Publication defined.**—To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself.

The reference to this section, in *People v. Parr*, 4 N. Y. Cr., 546, should be to section 243, *ante*.

**Publication.**—The reading of a libelous letter to a stranger, before sending it, is a publication. *Snyder v. Andrews*, 6 Barb., 43.

Proof of publication of a libelous article by defendant is sufficient to put him upon his defense. *Marx v. P. P. Co.*, 34 St. Rep., 316.

When the presentation of a pamphlet to the governor, by a person appearing before him to urge him to approve an act awaiting his signature is not a publication of the matter therein contained. *Woods v. Wiman*, 14 St. Rep., 526; 47 Hun, 364. This case was reversed in 34 St. Rep., 46; 122 N. Y., 445, on other grounds.

It was held, in *Prescott v. Tousey*, 50 Supr., 12, that publication was not established by proof that defendant sold copies of the newspaper containing the libel without proof that anybody ever saw or read the libel in any of the papers so sold. But see this section.

**§ 246. Liability of editors and others.**—Every editor, or proprietor of a book, newspaper or serial, and every manager of a partnership or incorporated association, by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution for libel the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication and whose act was disavowed by him so soon as known.

**§ 247. Publishing a true report of public official proceedings.**—A prosecution for libel cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein, of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report.

See section 143, *ante*.

**Privileged.**—Legislative or judicial proceedings are privileged. *Kelly v. Taintor*, 48 How., 270; *Thorn v. Blanchard*, 5 Johns., 508.

The transactions embraced in the purview of the statute are such as resemble judicial and legislative proceedings, such as the transactions of administrative boards in which the subjects dealt with are liable to be considered, deliberated upon, discussed and determined. *Sanford v. Bennett*, 24 N. Y., 26.

The statute was intended to embrace all the cases in which it was thought proper to protect publications connected with public proceedings. *Id.*

The publication of a slander uttered by a murderer at the time of his execution is not privileged under this section. *Id.*

**§ 248. Qualification of last section.**—The last section does not apply to a libel contained in the heading of the report, or in any other matter added by any other person concerned in the publication; or in the report of any thing said or done at the time and place of the public and official proceeding, which was not a part thereof.

No libelous matter interspersed or connected with the report is within the privilege. *Sanford v. Bennett*, 24 N. Y., 25.

**§ 249. Indictment against resident.**—An indictment for a libel, contained in a newspaper published within this state,

against a resident thereof, may be found either in the county where the paper was published, or in the county where the person libeled resided when the offense was committed. In the latter case the defendant is entitled to an order of the supreme court, directing the indictment against him to be tried in the county in which the paper was printed and published, upon compliance with the following conditions:

1. He must apply for the order within thirty days after being committed upon, or giving bail to answer the indictment;

2. He must execute a bond to the complainant, with two sufficient sureties, approved by the judge hearing his application, in a penal sum fixed by the judge, not less than two hundred and fifty nor more than one thousand dollars, conditioned for the payment, in case the defendant is convicted, of all the complainant's reasonable expenses in going to and from his place of residence and the place of trial, and in attendance upon the trial;

3. He must, within ten days after the granting of the order, file the order and deposit the bond with the clerk of the county in which the indictment is pending.

See section 138 of Code of Criminal Procedure.

**§ 250. Libel against non-resident.**—An indictment for libel published against a person not a resident of this state, must be found and tried in the county, where the paper containing the libel purports upon its face to be published; or, if no county is indicated upon the face of the paper, in any county where the paper was circulated.

See section 138 of Code of Criminal Procedure.

**§ 251. Indictment. Punishment restricted.**—A person cannot be indicted or tried for the publication of the same libel against the same person, in more than one county.

See section 138 of Code of Criminal Procedure.

**§ 252. Indictment. Power of court, place of trial.**—Nothing contained in this chapter shall be construed to abridge, or in any manner affect, the power of a competent court, to change the place of trial of an indictment for libel, in the same manner as may lawfully be done, in respect to any other indictment.

**§ 253. Privileged communications.**—A communication made to a person entitled to, or interested in, the communication by one who was also interested in or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious, and is called a privileged communication.

**Privileged communications.**—Such communications are exceptions to the rule that the law implies malice in the case of a libelous communication *Byam v. Collins*, 111 N. Y., 150; 19 St. Rep., 581.

Rule as to privileged communications, stated. *Id.*

Privileged communications defined. *Lovell Co. v. Houghton*, 116 N. Y., 520; 27 St. Rep., 559.

A communication to the governor of the state, giving information for the purpose of influencing his action on a bill, which has passed the legislature, is *prima facie* privileged. *Woods v. Wiman*, 34 St. Rep., 46; 122 N. Y., 445. But if it contains defamatory matter, and is unnecessarily published to others, it is not privileged. *Id.*

The privilege of counsel extends, irrespective of motive, to all matters pertinent to the controversy. *Marsh v. Ellsworth*, 50 N. Y., 309. It is otherwise, if his declarations are not pertinent. *Gilbert v. People*, 1 Denio, 41; *Star v. Selden*, 4 N. Y., 91. His advice to client is privileged, unless express malice is shown. *Washburn v. Cook*, 3 Denio, 110.

An agreement between persons interested in a prosecution, wherein they state that they have been "robbed and swindled" by certain parties, and covenant to bear equally the expenses of prosecuting the offenders criminally, is privileged. *Klinck v. Colby*, 46 N. Y., 427. The exhibition of the paper to an agent of one of the parties for the purpose of procuring his principal's signature, does not take away its character. *Id.*

A physician's certificate that a person is insane, if given in good faith, is privileged. *Perkins v. Mitchell*, 31 Barb., 461.

Communications to the board of directors of a charitable institution, as to an employe, if made in good faith and without malice, are privileged. *Halstead v. Nelson*, 24 Hun, 395.

**Not privileged.**—To accuse a public officer of an offense is not privileged, *Hamilton v. Eno*, 81 N. Y., 116. If the charge is false, the utterer is liable, however good his motives. *Id.* While his official acts may be freely criticised, the occasion will not of itself excuse an attack upon his character and motives. *Id.* Nothing but the truth will do this. *Id.*

**Burden.**—It rests with the party claiming the privilege to show that the case is brought within the exception. *Byam v. Collins*, 111 N. Y., 143; 19 St. Rep., 581.

Whether a libelous communication is privileged, is a question of law. *Id.* When it is held, as matter of law, to be privileged, the burden rests upon the plaintiff to establish, as matter of fact, that it was maliciously made. *Id.*

**Question of law.**—The duty of determining whether communication is, or is not, privileged, upon uncontradicted facts, rests with the court. *Lovell Co. v. Houghton*, 116 N. Y., 520; 27 St. Rep., 559.

It is for the court to determine whether the alleged libel was a privileged communication. *Hamilton v. Eno*, 81 N. Y., 116. The questions of good faith, belief in the truth of the statement, and the existence of actual malice remain for the jury. *Id.*

**§ 254. Threatening to publish libel.**—A person who threatens another with the publication of a libel, concerning the latter or concerning any parent, husband, wife, child or other member of the family of the latter, and a person who offers to prevent the publication of a libel upon another person upon condition of the payment of, or with intent to extort, money or other valuable consideration from any person, is guilty of a misdemeanor.

See sections 553 and 558, *post*.

**§ 254a. Furnishing libelous information.**—Any person who willfully states, delivers or transmits by any means whatever to any manager, editor, publisher, reporter or other employee of a publisher of any newspaper, magazine, publication, periodical or serial any statement concerning any person or corporation



ration which, if published therein, would be a libel, is guilty a misdemeanor.

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## TITLE X.

### OF CRIMES AGAINST THE PERSON AND AGAINST PUBLIC DECEIT AND GOOD MORALS.

- CHAPTER**
- I. Crimes against religious liberty and conscience.
  - II. Rape, abduction, carnal abuse of children, and seduction.
  - III. Abandonment and neglect of children,
  - IV. Abortions and concealing death of infant.
  - V. Bigamy, incest and the crime against nature.
  - VI. Violating sepulture and the remains of the dead.
  - VII. Indecent exposures, obscene exhibitions, books and prints in disorderly houses.
  - VIII. Lotteries.
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  - X. Pawnbrokers.

## CHAPTER I.

### *Of Crimes against Religious Liberty and Conscience.*

- SECTION**
- 259. The Sabbath.
  - 260. Sabbath breaking.
  - 263. Labor, except works of necessity and charity, prohibited on Sunday.
  - 264. Defense to a prosecution for work on first day of the week.
  - 265. Shooting, etc., prohibited.
  - 266. Trades, manufactures, and mechanical employments.
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  - 269. Sabbath breaking, how deemed and punished.
  - 270. Commodities exposed for sale forfeited.
  - 271. Remedy for maliciously serving process.
  - 272. Compelling adoption of a form of belief.
  - 273. Preventing performance of religious act.
  - 274. Disturbing religious meetings.
  - 275. Disturbing religious meetings; definition of the offense.
  - 276. Processions and parades.
  - 277. Performance of comedies, etc., prohibited.

§ 255, was repealed by chap. 384 of 1882.

§ 256, was repealed by chap. 384 of 1882.

§ 257, was repealed by chap. 384 of 1882.

§ 258, was repealed by chap. 384 of 1882.

§ 259. **The Sabbath.**—The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified which are serious interruptions of the repose and religious liberty of the community.

**Power of legislature.**—The legislature has power to protect the Christian Sabbath from desecration by such laws as it may deem necessary. Neuen



*v. Duryea*, 69 N. Y., 563. It is the sole judge of the acts proper to be prohibited, with a view to the public peace. *Id.* See *Lindenmuller v. People*, 33 Barb., 548.

In this state, the Sabbath exists as a day of rest by the common law; all that the legislature attempts to do, is to regulate its observance. *Lindenmuller v. People*, 33 Barb., 548.

**Specific acts.**—This section declares that the acts subsequently specified are serious interruptions to the rights of others, and, therefore, they are prohibited in general. *Anonymous*, 12 Abb. N. C., 456.

The specified acts are declared to be unlawful. *People v. Moses*, 47 St. Rep., 181; 65 Hun, 132; 8 N. Y. Cr., 397.

The question is not left to the individual judgment of courts, witnesses or jurors. *Id.*

Proof that any of the specified acts are serious interruptions of the repose and religious liberty of the community, is not required. *People v. Moses*, 47 St. Rep., 181; 65 Hun, 132; 8 N. Y. Cr., 398.

See *People v. Dennin*, 35 Hun, 327; 3 N. Y. Cr., 128.

**§ 260. Sabbath breaking.**—A violation of the foregoing prohibition is Sabbath breaking.

**Sabbath breaking.**—A violation of the prohibitions contained in sections 263 and 266, *post*, is Sabbath-breaking. *Anonymous*, 12 Abb. N. C., 457.

**§ 261** was repealed by chap. 677 of 1892.

See section 27 of chap. 677 of 1892.

**§ 262** was repealed by chap. 358 of 1883.

This section has been subsequently referred to in *People v. Dennin*, 35 Hun, 328; 3 N. Y. Cr., 128, and *People v. Moses*, 47 St. Rep., 181; 65 Hun, 132; 8 N. Y. Cr., 398.

**§ 263. Labor, except works of necessity and charity, prohibited on Sunday.**—All labor on Sunday is prohibited, excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community.

Am'd by chap. 358 of 1883.

The amendment of 1883 omits the word "servile," and provides that "all labor on Sunday is prohibited, excepting the works of necessity or charity." It added the last sentence.

See sections 263, 265, 267 and 268, *post*.

**Common law.**—At common law, the observance of the Sabbath was a duty of imperfect obligation. *Merritt v. Earle*, 29 N. Y., 122.

**Works of necessity, etc.**—The authorities, defining the meaning of the word "servile," as used in the section, before amendment, and in the former statute, are no longer applicable. *Bilordeaux v. H. B. L. Co.*, 30 St. Rep., 656; 9 N. Y. Supp., 507. "Work of necessity or charity" is now the test. *Id.*

Neither this section nor section 266 *post*, prohibits works of necessity from being continued or performed on Sunday. *Manhattan Iron Works Co. v. French*, 12 Abb. N. C., 449.

**Void contracts.**—A contract for the publication of an advertisement in a newspaper to be issued and sold on Sunday, is void. *Smith v. Wilcox*, 24 N. Y., 353. But a contract, made on Sunday, for the publication of an advertisement in a newspaper published on the ordinary business days of the week is not prohibited. *Id.*

No recovery can be had for instructions in art given on Sunday. *Bilordeaux v. H. B. L. Co.*, 30 St. Rep., 657; 9 N. Y. Supp., 507.

To invalidate a transaction, the contract must necessarily require the act to

be performed on Sunday. *Merritt v. Earle*, 29 N. Y., 120; *Boynnton v. Page*, 13 Wend., 425; *Watts v. Van Ness*, 1 Hill, 76.

**Inter-state commerce.**—If the provisions of this section interfere with the inter-state traffic of an express company, they are, in so far, unconstitutional and void. *Adams Ex. Co. v. Board, etc.*, 65 How., 72. A different rule prevails where the state is the initial and terminal point. *Id.* Under this section, the company is prohibited from transacting its ordinary business, or receiving and delivering merchandise in the state on Sunday, save in case of perishable articles whose delivery is essential to their owners. *Id.*

The provisions of the Code, in so far as they authorize an interference by the police with the inter-state traffic of common carriers are repugnant to subd. 3, section 8, art. 1 of the Federal Constitution and void. *Dinsmore v. N. Y. Board of Police*, 12 Abb. N. C., 436.

A different rule, *it seems*, prevails where the state is both the initial and terminal point of commerce. *Dinsmore v. N. Y. Board of Police*, 12 Abb. N. C., 436.

**Hebrew.**—There is no exception that can avail the Hebrew citizen. *Anonymous*, 12 Abb. N. C., 457.

See *Barron v. Yost*, 16 Daly, 441.

**§ 264. Defense to a prosecution for work on first day of the week.**—It is a sufficient defense to a prosecution for work or labor on the first day of the week, that the defendant uniformly keeps another day of the week as holy time, and does not labor on that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

Am'd by chap. 519 of 1885.

This amendment substituted the words "work or" for the word "servile."

It must appear that the accused uniformly keeps another day holy, and that he does not then labor. *Anonymous*, 12 Abb. N. C., 457.

This does not protect him from arrest. *Id.*

It can only be shown as a defense to a prosecution. *Id.*

The act of 1830, in relation to the Seventh Day Baptists, which prohibits the service and execution of all writs, etc., on Saturday, etc., does not affect a judgment rendered against such person on that day. *Maxson v. Annas*, 1 Denio, 204.

**§ 265. Shooting, etc., prohibited.**—All shooting, hunting, fishing, playing, horse racing, gaming or other public sports, exercises or shows, upon the first day of the week, and all noise disturbing the peace of the day, are prohibited.

Am'd by chap. 358 of 1883.

This amendment omitted from the original section, the word "pastimes," after the word "exercises."

To constitute the crime, the act need not disturb the repose of the community. *People v. Moses*, 8 N. Y. Cr., 399; 65 Hun, 162; 47 St. Rep., 182; 20 N. Y. Supp., 10.

While only public sports, exercises and pastimes are forbidden, all shooting, hunting and fishing, etc., on Sunday, are inhibited. *People v. Moses*, 47 St. Rep., 181; 65 Hun, 162; 8 N. Y. Cr., 399; *People v. Dennin*, 35 Hun, 327; 3 N. Y. Cr., 128.

The decision in *People v. Dennin*, 35 Hun, 327; 3 N. Y. Cr., 128, proceeded on this distinction.

Ball playing, on private grounds, with the consent of the owner, where there is no noise or disturbance, is not an offense under this section. *Id.*

To constitute a violation, the playing must seriously interrupt the repose of the community. *Id.*

**§ 266. Trades, manufactures and mechanical employments.**—All trades, manufactures, agricultural or mechanical employments, upon the first day of the week are prohibited, except that when the same are works of necessity they may be performed on that day in their usual and orderly manner, so as not to interfere with the repose and religious liberty of the community.

Am'd by chap. 358 of 1883.

This amendment added the exception contained in present section.

The case of *Landers v. Staten I. R. Co.*, 13 Abb. N. S. 355, was reversed in 53 N. Y. 450; 14 Abb. N. S. 346.

**Works of necessity.**—The smelting of iron and other metallic ores, which cannot be interrupted on Sunday without irreparable loss and damage to property, was held, in *Manhattan Iron Works Co. v. French*, 12 Abb. N. C. 448, to be a work of necessity.

"Tending lock" on the canal was held, in *People v. Lyons*, 5 Hun, 643, to imply a necessary work.

**Not a necessity.**—Vending cigars is not a work of necessity. *Anonymous*, 12 Abb. N. C. 458.

Selling ice cream is not a work of necessity. 5 Law Bulletin, 13.

See *Anonymous*, 12 Abb. N. C. 467.

**§ 267. Public traffic**—All manner of public selling or offering for sale of any property on Sunday is prohibited, except that articles of food may be sold and supplied at any time before ten o'clock in the morning, and except also that meals may be sold to be eaten on the premises where sold or served elsewhere by caterers; and prepared tobacco, milk, ice and soda-water in places other than where spirituous or malt liquors or wines are kept or offered for sale, and fruit, flowers, confectionery, newspapers, drugs, medicines and surgical appliances may be sold in a quiet and orderly manner at any time of the day. The provisions of this section, however, shall not be construed to allow or permit the public sale or exposing for sale or delivery of uncooked flesh foods, or meats, fresh or salt, at any hour or time of the day.

Am'd by chap. 392, Laws 1901. Takes effect Sept. 1, 1901.

Am'd by chap. 648 of 1896. In effect May 14, 1896.

Am'd by chap. 858 of 1883.

This amendment substituted the present for the original section on the same subject, enlarging its scope very materially.

This section has been extended no further than to prohibit the public selling, or offering or exposing for sale publicly, on Sunday, any property, with certain specified exceptions. *O'Shea v. Kohn*, 33 Hun, 115.

The prohibition of this section is not applicable to a private contract for the sale of a span of horses, made without violating, or tending to violate, the public order and solemnity of the day. *Batsford v. Every*, 44 Barb., 618. Such a contract is not necessarily a public exposure of property on Sunday, within the statute. *Id.* The act of "exposing for sale publicly" was eliminated from the prohibition of the section by the amendment of 1883.

**§ 268. Serving process.**—All service of legal process of any kind whatever, upon the first day of the week, is prohibited, except in cases of breach of the peace, or apprehended breach of the peace, or when sued out for the apprehension of a person charged with crime, or except where such service is specially authorized by statute. Service of any process upon said day except as herein permitted is absolutely void for any and every purpose whatever.

Am'd by chap. 622 of 1892.

This amendment added the last provision making such service absolutely void.

See section 2015 of Code of Civil Procedure.

A judgment rendered upon such service is confessedly *coram non judice*, and void. *Hastings v. Farmer*, 4 N. Y., 296.

It was held, in *Butler v. Kelsey*, 15 Johns., 177, that a writ of inquiry of damages could not be executed on Sunday.

Process can be neither issued nor served on a Sunday. *Van Vechten v. Paddock*, 12 John., 178.

**§ 269. Sabbath breaking, how deemed and punished.**—Sabbath breaking is a misdemeanor, punishable by a fine not less than five dollars and not more than ten dollars, or by imprisonment in a county jail not exceeding five days, or by both; but for a second or other offense, where the party shall have been previously convicted, it shall be punishable by a fine not less than ten dollars and not more than twenty dollars, and by imprisonment in a county jail not less than five nor more than twenty days.

Am'd by chap. 535 of 1887.

This amendment changed the minimum imprisonment from "one" to "five" days, and added the provision as to punishment of second offense.

See Anonymous, 12 Abb. N. C., 457.

**§ 270. Commodities exposed for sale forfeited.**—In addition to the penalty imposed by the last section, all property and commodities exposed for sale on the first day of the week in violation of the provisions of this chapter shall be forfeited. Upon conviction of the offender by a justice of the peace of a county, or by any police justice or magistrate, or by a mayor, recorder or alderman of a city, such officer shall issue a warrant for the seizure of the forfeited articles, which, when seized, shall be sold on one day's notice, and the proceeds paid to the overseers of the poor, for the use of the poor of the town or city.

Am'd by chap. 358 of 1883.

This amendment inserted after the word "county," the words "by any police justice or magistrate, or by."

See Anonymous, 12 Abb. N. C., 457.

**§ 271. Remedy for maliciously serving process.**—Whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action, to which such person is a party, to be adjourned to that day for trial, is guilty of a misdemeanor.

See notes under section 264, *ante*.

**§ 272. Compelling adoption of a form of belief.**—An attempt by means of threats or violence, to compel any person to adopt, practice or profess a particular form of religious belief, is a misdemeanor.

See section 3, Art. 1 of State Constitution; first amendment to Federal Constitution.

**§ 273. Preventing performance of religious act.**—A person who willfully prevents, by threats or violence, another person from performing any lawful act enjoined upon or recommended to such person by the religion which he professes, is guilty of a misdemeanor.

**§ 274. Disturbing religious meetings.**—A person who willfully disturbs, interrupts or disquiets any assemblage of people met for religious worship, by any of the acts enumerated in the next section, is guilty of a misdemeanor.

See sections 448 and 650, *post*.

**Common law.**—When the offense of disturbing religious meetings was indictable at common law. *People v. Crowley*, 23 Hun, 412.

It was held in this case, that the former statute did not take away the remedy by indictment existing at common law.

**When.**—The act of disturbance is within the statute, if the assemblage has met for the purposes of religious worship. *Wall v. Lee*, 34 N. Y., 150.

The religious services need not be in actual progress. *Id*.

**Disturbance.**—A pewholder cannot use his pew as a place from which to interrogate the clergyman, or in any way interrupt the services, or to impede or interfere with the charitable or other collections. *Id*.

**Removal.**—A person disturbing a religious meeting may be removed by the application of force sufficient for that purpose. *Id*.

To justify such force it is not necessary that the disturbance should be willful. *Id*.

The officers of a religious corporation have power to remove disturbers from the meetings of the church. *Beckett v. Lawrence*, 7 Abb. N. S., 403.

**§ 275. Disturbing religious meetings ; definition of the offense.**—The following acts, or any of them, except as permitted by chapter four hundred and seventy-nine of the laws of eighteen hundred and eighty-seven or the acts amendatory thereof, constitute a disturbance of a religious meeting :

1. Uttering any profane discourse, committing any rude or indecent act, or making any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting.

2. Engaging in, or promoting, within two miles of the place where a religious meeting is held, any racing of animals or gambling of any description ; or elsewhere than in a city or village keeping open any huckster shop, inn, store or grocery, in any other place than that in which such business shall have usually been carried on ; or elsewhere than in a city exhibiting within the distance aforesaid any shows or plays, unless the same shall have been duly licensed by the proper authorities.

3. Obstructing in any manner without authority of law, within the like distance, free passage along a highway to the place of such meeting.

Am'd by chap. 292 of 1893.

This amendment introduced the present exception into the first sentence, and added the last provision of the present subd. 2. It will go into effect July 1, 1898.

See notes under preceding section.

**§ 276. Processions and parades.**—All processions and parades on Sunday in any city, excepting only funeral processions for the actual burial of the dead, and processions to and from a place of worship in connection with a religious service there celebrated, are forbidden; and in such excepted cases there shall be no music, fire-works, discharge of cannon or fire-arms, or other disturbing noise. At a military funeral, and at the burial of a national guardsman or of a deceased member of an association of veteran soldiers, or of a disbanded militia regiment, or of a secret fraternal society, music may be played while escorting the body, but not within one block of a place of worship where service is then celebrated.

A person willfully violating any provision of this section is punishable by fine not exceeding twenty dollars, or imprisonment not exceeding ten days, or by both. [Am'd by chap. 778 of 1895. Took effect May 27, 1895.]

Amended by chap. 302 of 1883.

This amendment inserted after the words "military funeral," the words "and at the burial of a national guardsman, or of a deceased member of an association of veteran soldiers, and members of the old guard of the city of New York, or of a disbanded militia regiment," and omitted the word "however."

Am'd by chap. 358 of 1883.

This amendment eliminated from the amendment of chap. 302, the words "and members of the old guard of the city of New York."

This amendment inserted the words "or of a secret fraternal society."

**§ 277. Performance of comedies, etc., prohibited.**—The performance of any tragedy, comedy, opera, ballet, farce, negro minstrelsy, negro or other dancing, wrestling, boxing with or without gloves, sparring contest, trial of strength, or any part or parts therein, or any circus, equestrian, or dramatic performance or exercise, or any performance or exercise of jugglers, acrobats, club performances or ropedancers, on the first day of the week, is forbidden; and every person aiding in such exhibition, performance or exercise, by advertisement, posting or otherwise, and every owner or lessee of any garden, building or other room, place or structure, who leases or lets the same for the purpose of any such exhibition or performance or exercise, or who assents to the use of the same for any such purpose, if it be so used, is guilty of a misdemeanor.

In addition to the punishment therefor provided by statute, every person violating this section is subject to a penalty of five hundred dollars; which penalty "The Society for the Reformation of Juvenile Delinquents" in the city of New York, for the use of that society, and the overseers of the poor in any other city or town, for the use of the poor, are authorized, in the name of the people of this state, to recover. Besides this penalty,



every such exhibition, performance or exercise, of itself, annuls any license which may have been previously obtained by the manager, superintendent, agent, owner or lessee, using or letting such building, garden, room, place or other structure, or consenting to such exhibition, performance or exercise.

Am'd by chap. 358 of 1883.

This amendment extended the prohibition of the original section so as to include many more cases within its provisions.

The act of 1860, prohibiting certain exhibitions and plays within the city and county of New York, on Sunday, was held, in *People v. Hoym*, 20 How., 76, to be constitutional and valid, as a lawful exercise of legislative authority.

See *Neuendorff v. Duryea*, 67 N. Y., 557.

## CHAPTER II

### *Rape, Abduction, Carnal Abuse of Children, and Seduction.*

SECTION 278. Rape in first degree.

279. When physical ability must be proved.

280. Penetration sufficient.

281. Compelling women to marry. How punished.

282. Abduction in certain cases, defined.

283. No conviction on certain testimony.

284. Seduction under promise of marriage.

285. Subsequent marriage.

286. No conviction on certain testimony.

§ 278. Rape in first degree.—A person who perpetrates an act of sexual intercourse with a female not his wife, against her will or without her consent, or,

1. When through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent, or, by reason of mental or physical weakness, or immaturity, or any bodily ailment, she does not offer resistance; or,

2. When her resistance is forcibly overcome; or,

3. When her resistance is prevented by fear of immediate and great bodily harm, which she has reasonable cause to believe will be inflicted upon her; or

4. When her resistance is prevented by stupor, or weakness of mind produced by an intoxicating, or narcotic or anæsthetic agent; or, when she is known by the defendant to be in such state of stupor or weakness of mind from any cause; or,

5. When she is, at the time, unconscious of the nature of the act, and this is known to the defendant; or when she is in custody of the law, or of any officer thereof, or in any place of lawful detention, temporary or permanent, is guilty of rape in the first degree and punishable by imprisonment for not more than twenty years. A person who perpetrates an act of sexual intercourse with a female, not his wife, under the age of eighteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years. [To take effect, September 1, 1895.]



Amended by chap. 384 of 1882

This amendment was made before Code went into effect.

Am'd by chap. 693 of 1887.

This amendment raised the age, in subd. 1, from "ten" to "sixteen."

Am'd by chap. 325 of 1892.

This amendment remodeled and enlarged the section and added the final provision as to rape in the second degree.

See latter part of amending act of 1892 in section 303, *post*.

The reference to this section in *People v. Clark*, 8 N. Y. Cr., 210, is to same section of Criminal Code.

Rape and an assault with intent to commit rape are distinct crimes. *People v. Kerwan*, 51 St. Rep., 300.

**Revised Statutes.**--Under the Revised Statutes, if the female was over the age of ten years, a "forcible ravishing" constituted the crime. *People v. Draper*, 28 Hun, 1; 1 N. Y. Cr., 151.

If under that age, "carnal and unlawful knowledge" was enough. *Id.*

**Under Code.**--The codifiers undertook to make a comprehensive definition of the crime, including all of the cases which should be punishable as rape. *People v. Connor*, 126 N. Y., 281; 37 St. Rep., 25.

Such cases as come within the definitions of this section, and such alone now constitute the crime of rape.

This section makes the crime of criminal intercourse, other than rape equally punishable with rape, but does not make it rape. *People v. Maxon*, 57 Hun 370; 32 St. Rep., 132; 10 N. Y. Supp., 593. This decision was rendered prior to amendment of chap. 325 of 1892.

**Fraud.**--Where the defendant accomplishes his alleged purpose by fraud without intending to use force, such fraud does not constitute rape, unless the evidence shows that he intended to use force, if the fraud had failed. *Walter v. People*, 50 B. Rb., 146. This, probably, would not be correct in case the female was under sixteen years of age.

**Fear.**--Violence by the accused, fear and apprehension on the part of the accuser, and actual penetration without her consent, are sufficient under this section. *People v. Crowley*, 4 N. Y. Cr., 36.

**Resistance.**--The phrase "the utmost resistance" is a relative one. *People v. Connor*, 126 N. Y., 282; 37 St. Rep., 26.

The extent of the resistance required of an assaulted female is governed by the circumstances of the case, and the grounds which she has for apprehending the infliction of bodily harm. *Id.*

Whatever the circumstances may be, there must be the greatest effort on which she is capable therein, to foil the pursuer and preserve the sanctity of her person. *Id.*

When the submission is produced by the fear of great bodily harm, the necessity of showing the same degree of resistance required in other cases is now unnecessary. *Id.*

In *People v. Dohring*, 59 N. Y., 374, it was held that, in order to constitute the crime of rape of a female over ten years of age, when it appears that at the time of the alleged offense she was conscious, had the possession of her natural, mental and physical powers, was not overcome by numbers, or terrified by threats, or in such place and position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time and under the circumstances. Since this decision, the Code has changed the term from ten to sixteen years of age. To be rape in the first degree, the resistance to be overcome is the same in all ages of the female. But any sexual intercourse with a female, not the wife, who is under sixteen years of age, is rape in the second degree.

To support the charge of rape, where the woman is conscious and has possession of her mental and physical powers, it is necessary that she resist to the extent of her ability and be overcome by physical force, unless she is by threat terrified into submission, or is in a place and so situated that resistance will be useless. *People v. Clemons*, 37 Hun, 581; 3 N. Y. Cr., 566; *People v. Dohring*, 59 N. Y., 374.

If the female is overpowered by force, and is unable for want of strength to actively resist any longer, or, if such resistance is absolutely useless, the crime may be committed. *People v. Clemons, ante.*

Resistance to the extent of her ability is the test of rape. *People v. Connor*, 31 St. Rep., 164.

The law, while exceedingly strict in its general requirements, furnishes no primary rule on the data of resistance. *Id.* Each case must rest upon its own peculiar facts and circumstances. *Id.*

Whether the resistance is all that the law requires in such cases, is not a matter of law but one of fact. *People v. Bowles*, 3 N. Y. Cr., 447; *Higgins v. People*, 58 N. Y., 379.

If consent, in any degree, at any time of the occasion, be yielded by the female, the crime is not consummated; but the yielding to overpowering force may be submission and not consent. *People v. Clemons*, 37 Hun, 584; 3 N. Y. Cr., 568.

**Will and Consent.**—In order to constitute the crime of rape, the act must be committed against the will and without the consent of the female. *People v. Maxon*, 57 Hun, 369; 10 N. Y. Supp., 593; 32 St. Rep., 132.

Any criminal sexual intercourse, which is not committed against the will and without the consent of the female, is not rape. *Id.*

The connection must be effected against the will and consent of the female. *People v. Connor*, 126 N. Y., 281; 37 St. Rep., 25.

But such consent cannot be implied, unless the case is brought within the meaning of some of the conditions named in the statute. *Id.*

**Consent.**—Any partial or voluntary submission to an assault will be construed to amount to a consent. *Id.*

If consent, though not express, enters into her conduct, there is no rape. *People v. Dohring*, 59 N. Y., 384.

In *Walter v. People*, 50 Barb., 146, it was held that, where resistance is not made by reason of a representation leading the female to believe that sexual penetration of her body was necessary for her recovery from disease, the force used in ordinary sexual intercourse is not sufficient to constitute rape.

**Under sixteen.**—A man who has sexual intercourse with a female, not his wife, under sixteen years of age, commits a rape upon her. *People v. Connor*, 31 St. Rep., 168.

In *Singer v. People*, 13 Hun, 418, it was held that, where an assault with intent to commit rape is made upon a female child under the age of ten years, the fact that she assented thereto does not alter the nature of the crime or diminish the guilt of the assailant. But, in case of the commission of rape upon a female under the age of sixteen years, has not the Code changed the offense from rape in the first degree to rape in the second degree, where she consented to the act?

**Indictment.**—It is unnecessary to allege in the indictment that the female, on whom the offense was committed, was of the age of sixteen years or upwards. *People v. Draper*, 28 Hun, 1; 1 N. Y. Cr., 141.

**Evidence. Disclosures.**—The rule as to disclosure is founded upon the laws of human nature, which induce a female thus outraged to complain at the first opportunity. *Higgins v. People*, 58 N. Y., 377; *People v. O'Sullivan*, 5 St. Rep., 702; 104 N. Y., 489.

Such is the natural impulse of an honest female. *Id.*

The omission to make a prompt disclosure of the improper intercourse militates strongly against the testimony of the female. *Zoppi v. Smith*, 29 St. Rep., 251; 55 Hun, 551.

The rule requires that the disclosure should be recent and made at the first suitable opportunity. *People v. O'Sullivan*, 5 St. Rep., 702; 104 N. Y., 489.

There may be circumstances which will excuse delay, as when the prosecutrix is under the physical control of the defendant; when she is among strangers and there is no one in whom she can confide; when she is induced to silence by threats, and is so far within his power or reach that the threats may be executed. *Id.*

The rule admitting disclosures in cases of rape is an exception to the general rule excluding declarations made out of court, and is confined within narrow limits. *Id*; *Baccio v. People*, 41 N. Y., 265. In the last cited case, a delay of twenty-four days was held, under the circumstances, not to be sufficiently recent. *Id*.

A disclosure of the offense by the complainant, made nearly eleven months after the commission of the alleged assault, is too remote to be received in evidence. *People v. O'Sullivan, ante*.

Any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending more or less upon the surrounding circumstances. *Id*; *Higgins v. People*, 58 N. Y., 377. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. *Id*. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. *Id*. There can be no iron rule on the subject. *Id*.

Details, given by the prosecutrix, as to how the offense was committed and by whom, is not competent as evidence in chief. *People v. Batterson*, 18 St. Rep., 845; 50 Hun, 46. It is competent to show the condition of the prosecutrix mentally or otherwise, immediately after the offense. *Id*.

Such evidence is admissible only on the question of her credibility and can be received only when she has testified as a witness. *People v. Clemons*, 3 N. Y. Cr., 570; *Baccio v. People*, 41 N. Y., 265; *People v. McGee*, 1 Denio, 19.

It may be shown that the name of the person complained of, and other particulars, were mentioned by the prosecutrix to the witness. *People v. Clemons, ante*. But what was stated in those respects is not admissible. *Id*.

**Chastity.**—Evidence of the character of the prosecutrix for chastity must be confined to what is generally said of her by those among whom she dwells or with whom she is chiefly conversant. *Conkey v. People*, 5 Park, 31; 1 Abb. Dec., 418.

**Lewd conduct.**—Evidence of previous acts of lewdness and unchastity by the complainant with other men was held admissible. *People v. Abbott*, 19 Wend., 192. See *Crossman v. Bradley*, 53 Barb., 125.

In *People v. Jackson*, 3 Park, 391, it was held that evidence of specific unchaste conduct of the prosecutrix, whether sought to be proved by herself or others, was inadmissible.

In *Woods v. People*, 55 N. Y., 515, it was held that evidence, on behalf of the prisoner, that the prosecutrix was in the habit of receiving men at her dwelling for the purpose of promiscuous intercourse with them is proper. See *Brennan v. People*, 7 How., 171.

**Threats.**—Evidence as to threats, made by the prosecutrix several days after the offense had been committed, that she would commit suicide, is inadmissible. *People v. Batterson*, 18 St. Rep., 845; 50 Hun, 46.

**Similar acts.**—It is incompetent to prove that the defendant had committed or attempted to commit a rape upon any other woman. *People v. O'Sullivan*, 5 St. Rep., 702; 104 N. Y., 484. But it is competent to show that he had previously declared his intention to commit the same offense, or had previously made an unsuccessful attempt to do so. *Id*.

**§ 279. When physical ability must be proved.**—No conviction for rape can be had against one who was under the age of fourteen years, at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, beyond a reasonable doubt.

The reference to this section, in *People v. Clark*, 8 N. Y. Cr., 210, 211; 14 N. Y. Supp., 655; is to same section of Criminal Code.

A person under fourteen years of age is presumed to be incapable of committing the crime of rape. *People v. Randolph*, 2 Park., 176. Such presumption may be rebutted by proof that he has arrived at puberty. *Id*. The proof of his capacity must be clear. *Id*.

**§ 280. Penetration sufficient.** — Any sexual penetration, however slight, is sufficient to complete the crime.

The language of this section is in accord with the rule established by the authorities in the country. *People v. Crowley*, 1 St. Rep., 388; 102 N. Y., 234; 4 N. Y. Cr., 36.

This means nothing more than penetration of the private part of the man into the person of the woman, without any regard to the extent of the entry. *People v. Crowley*, 1 St. Rep., 388; 102 N. Y., 234; 4 N. Y. Cr., 189.

**§ 281. Compelling woman to marry. How punished.**—A person who by force, menace or duress, compels a woman against her will to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment for a term not exceeding ten years, or by a fine of not more than one thousand dollars, or by both.

Am'd by chapter 662 of 1892.

This amendment removed the minimum limit of imprisonment.

See subd. 3 of following section.

It is not essential that personal violence should be used in the unlawful taking. *Beyer v. People*, 86 N. Y., 373; *Schnicker v. People*, 88 id., 194. The statute embraces a case where the person has not consented to be taken away for her own defilement, but, contrary to her will, wishes and intention, and without her knowledge of the purpose in contemplation, is induced to go with another for a lawful object, and is afterward, in accordance with the original intent, by force, menace or duress, unlawfully defiled. *Id.*

**§ 282. Abduction in certain cases, defined.**—A person who,

1. Takes, receives, employs, harbors or uses, or causes or procures to be taken, received, employed or harbored or used, a female under the age of eighteen years, for the purpose of prostitution; or, not being her husband, for the purpose of sexual intercourse; or without the consent of her father, mother, guardian or other person having legal charge of her person, for the purpose of marriage; or,

2. Inveigles or entices an unmarried female, of previous chaste character, into a house of ill-fame or of assignation, or elsewhere, for the purpose of prostitution or sexual intercourse; or,

3. Takes or detains a female unlawfully against her will, with the intent to compel her, by force, menace or duress, to marry him, or to marry any other person, or to be defiled; or,

4. Being parent, guardian or other person having legal charge of the person of a female under the age of eighteen years, consents to her taking or detaining by any person for the purpose of prostitution or sexual intercourse;

Is guilty of abduction, and punishable by imprisonment for not more than ten years, or by a fine of not more than one thousand dollars, or by both.

Am'd by ch. 83, Laws 1902. To take effect September 1, 1902.

This amendment made every taking "for the purpose of prostitution or sexual intercourse" an offense, and attached the absence of consent to the marriage prohibition only. It also added subd. 4 of the present section.

Am'd by chapter 31 of 1886.

This amendment increased the acts constituting the offense, excepted, a "sexual intercourse," the husband, and removed the limitation of age to subd. 2.

See preceding section.

The case of *People v. Platt*, 1 How. N. S., 402, was affirmed in 3 N. Y. Cr., 129; 36 Hun, 454, but the latter decision was reversed in 4 N. Y. Cr., and under the name of *People v. Plath*, in 100 N. Y., 590.

See note in *People v. Everhardt*, 2 Silv. (Ct. App.), 516.

**Ingredients of offense.**—This section declares that a person who takes, receives, harbors or uses a female under the age of sixteen years for the purpose of sexual intercourse, not being her husband, is guilty of abduction. *People v. Sheppard*, 44 Hun, 565; 5 N. Y. Cr., 136; 9 St. Rep., 35.

It is sufficient, within this section, if the female is induced by defendant's request, advice or persuasion, to go from the place where he met her, and to accompany or meet him at some other indicated place, with the intent to have sexual intercourse there to accomplish her defilement. *People v. Seeley*, 3 N. Y. Cr., 231; 37 Hun, 192; 2 How. N. S., 105.

To constitute the offense, as this section reads after the amendment of 1886, it is not necessary that the girl should be taken from her parents or other guardian of her person. *Id.*

It is not necessary that the accused should in any case use any force or commit any fraud or deception. *Id.*

The offense may be accomplished without an actual manual capture of the female, and it is not necessary that she should be taken against her will.

If the female is taken by defendant for the purpose of sexual intercourse, it is immaterial whether or not he had such intercourse with her. *People v. Stott*, 4 N. Y. Cr., 306.

This offense is quite independent of the fact whether there is actual sexual intercourse, fornication or forcible intercourse. *People v. Stott*, 5 N. Y. Cr., 136; 9 St. Rep., 736.

The commission of either of these crimes is not material except where the crime is merged into the higher felony of rape. *Id.*

The offense of abduction is complete whenever a female under sixteen years is taken, etc., for the purpose of sexual intercourse. *Id.*

Such intercourse need not be proved, if the purpose of the taking be otherwise shown. *Id.*

But it may be proved as an element or incident tending to establish the purpose. *Id.*

The belief of defendant that the abducted female was over sixteen years of age, is immaterial. *People v. Stott*, 4 N. Y. Cr., 306.

So, it is immaterial whether or not he had knowledge that she was under such age. *Id.*

So, whether she was or was not, prior to the commission of the offense, a person of chaste character, is immaterial, except as bearing on the question of her credibility as a witness. *Id.*

Over the statutory age, the statute does not make such intercourse a crime if effected without persuasion or device, by the free will and consent of the female. *People v. Plath*, 100 N. Y., 597; 4 N. Y. Cr., 59.

Under the first clause of subd. 1 of this section, where the intercourse has been established by proper proof or admitted, the prosecution is bound to show beyond a reasonable doubt and by proper evidence, the age of the complainant. *People v. Sheppard*, 9 St. Rep., 35; 44 Hun, 565; 5 N. Y. Cr., 136.

The word "taking" implies some persuasive inducement on the part of the accused, not a mere permission or allowance to follow a life of prostitution. *People v. Plath*, 100 N. Y., 596; 4 N. Y. Cr., 54.

Mere seduction does not amount to a "taking." *People v. Parshall*, 6 P. S., 129.

Not only a taking by defendant, within the meaning of this section, but also shown by the people, but also that such taking was for the purpose of prostitution. *People v. Plath*, 100 N. Y., 592; 4 N. Y. Cr., 54.

Prostitution may include more general acts than would necessarily be within the phrase, "sexual connection with men not her husband." *People v. Brandt*, 14 St. Rep., 420.

**Evidence.**—The testimony of the prosecutrix that she was unmarried at the time of the alleged offense, *prima facie* sufficiently establishes such fact within the requirements of the statute. *People v. Kenyon*, 5 Park, 254.

An entry in a family bible as to the age of a female is not admissible in a criminal prosecution for the offense of using a female under the age of sixteen years for the purpose of sexual intercourse, except where a case is made justifying the introduction of hearsay evidence. *People v. Sheppard*, 44 Hun, 565; 5 N. Y. Cr., 137; 9 St. Rep., 35.

It is not error to allow a doctor to express an opinion that the genitive organs of the abducted female had been penetrated with force within a week. *People v. Stott*, 5 N. Y. Cr., 61; 4 St. Rep., 736.

But it is error to admit testimony by physicians as to what they found on an examination of the person of the female four years after the alleged abduction. *People v. Betsinger*, 49 St. Rep., 597; 21 N. Y. Supp., 136.

The people cannot, in the first instance and for the purpose of making out a *prima facie* case, show that other girls were seen to visit defendant's room. *People v. Gibson*, 21 St. Rep., 59; 6 N. Y. Cr., 390; 4 N. Y. Supp., 170.

The actual personal chastity of the female must be shown, and evidence as to her general reputation in this respect is inadmissible. *Kauffman v. People*, 11 Hun, 86.

She must be shown to have been actually chaste up to the beginning of the acts by the party accused. *Carpenter v. People*, 8 Barb., 603; *Safford v. People*, 1 Park., 478.

A disclosure has no legal value whatever, unless it is the natural result of the horror and sense of wrong which would prompt every virtuous female to make outcry at the first suitable opportunity. *People v. O'Sullivan*, 5 St. Rep., 702; 104 N. Y., 490.

See *People v. Crotty*, 30 St. Rep., 45; 9 N. Y. Supp., 938; *People v. Powell*, 1 N. Y. Cr., 589; *Moot v. Moot*, 37 Hun, 294; *Schuicker v. People*, 88 N. Y., 92; *Matter of Haupe*, 2 City Ct., 403, note.

**§ 283. No conviction on certain testimony.**—No conviction can be had for abduction, compulsory marriage, rape or defilement, upon the testimony of the female abducted, compelled or defiled, unsupported by other evidence.

Am'd by chap. 663 of 1886.

This amendment made the provision of this section apply also to rape.

See note in *People v. Everhardt*, 2 Silv. (Ct. App.), 516.

The case of *People v. Platt*, 1 How. N. S., 402, was affirmed in 3 N. Y. Cr., 129; 36 Hun, 454. The decision of the general term was reversed in 4 N. Y. Cr., 52, and *sub nomine* *People v. Plath*, 100 N. Y., 590.

This section does not in express terms require corroboration of complainant's evidence in respect to the attempt to commit rape or the assault with intent to commit rape. *People v. Kerwan*, 51 St. Rep., 300; 22 N. Y. Supp., 160.

**Extent and nature.**—The extent and nature of the corroborating evidence is not fixed by the statute. *People v. Morris*, 35 St. Rep., 943; 12 N. Y. Supp., 492.

It is not indispensable that such corroboration should be furnished by positive and direct evidence. *People v. Stott*, 4 N. Y. Cr., 312; *People v. Plath*, 100 N. Y., 590; 4 N. Y. Cr., 53.

But proof of circumstances, legitimately tending to establish the existence of the material facts, will be sufficient to authorize a conviction. *Id.*

Proof must be given, aside from her testimony, tending to establish the commission of the crime, and that it was perpetrated by the accused. *People v. Plath*, *ante*.

The corroborating evidence should tend to show the material facts neces-



sary to establish the commission of a crime, and the identity of the person committing it. *Id.*

The testimony of the female abducted, if corroborated as to the facts of the taking, receiving and employing, etc., for the purpose of prostitution, and as to the fact of her being within the age prescribed by the statute, is sufficient to uphold a conviction. *People v. Brandt*, 14 St. Rep., 420.

Proof that the defendant, when charged with the crime of rape in the presence of his wife, made no denial, but seemingly admitted it, is sufficient to corroborate the complainant's testimony. *People v. Morris*, 35 St. Rep., 943; 12 N. Y. Supp., 492.

The "other evidence," required by this section, may be given, *it seems*, by an accomplice of defendant. *People v. Powell*, 4 N. Y. Cr., 590.

The abducted female is not, in any legal sense, an accomplice of the abductor. *Id.*

Where the accused testified in his own behalf, it is not improper for the trial judge to charge the jury that "while his evidence is to be considered as that of any other witness, they should, in determining his credibility, consider the fact that he stood charged with the commission of an offense of a serious criminal nature." *People v. Crowley*, 1 St. Rep., 388, 102 N. Y., 234.

**Question for jury.**—Whether the complainant has, or has not, been corroborated, is a question for the jury. *Crandall v. People*, 2 Lans., 309.

Where there is any evidence which tends to support the complainant as to some material part of the crime, it is the duty of the court to submit the question to the jury. *People v. Cullen*, 23 St. Rep., 560; 5 N. Y. Supp., 886.

**§ 284. Seduction under promise of marriage.**—A person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both.

See note in 5 N. Y. Cr., 221.

The case of *People v. Kearney*, 13 St. Rep., 46; 47 Hun, 139, was reversed in 17 St. Rep., 165; 110 N. Y., 188.

**Age.**—It is not necessary to prove that the defendant is twenty-one years of age. *People v. Kenyon*, 5 Park., 254.

The defendant need not be of full age. *Id.* It is sufficient that he has arrived at the age of puberty. *Id.*

**Character.**—The crime denounced by the law is the seduction of a female of chaste character under promise of marriage. *People v. Eckert*, 2 N. Y. Cr., 483.

Previous chaste character is presumed. *People v. Kane*, 14 Abb., 15.

The word "character," as used in this section, means personal virtue, and not reputation. *Kenyon v. People*, 26 N. Y., 203. The female must be unmarried and chaste in fact when seduced. *Id.* The accused may, by proof of specific acts of lewdness on the part of the female, and not otherwise, show that she was in fact unchaste. *Id.*

**Conditional promise.**—As to whether, where the promise of marriage is only upon the condition that pregnancy results from the illicit intercourse, the case is brought within the statute, *quære*. *Armstrong v. People*, 70 N. Y., 52.

A promise of marriage upon a condition that the intercourse results in pregnancy falls within the statute. *People v. Hustis*, 32 Hun, 58; 2 N. Y. Cr., 448. It is not necessary that the promise should be a valid and binding one between the parties. *Id.*

A conditional promise that, if the female will submit to an illicit connection, the offender will marry her, is sufficient to bring the case within the statute. *Boyce v. People*, 55 N. Y., 645.

It is sufficient that the defendant effected his object by a conditional promise that, if the girl would permit his illicit connection, he would marry her. *Kenyon v. People*, 26 N. Y., 208. The submission to this proposition is a promise on her part. *Id.*



**Consent.**—The consent of the female to marry the seducer, amounting to a mutual promise on her part to marry, is implied. *People v. Kenyon*, 5 Park., 234.

**Inducing cause.**—The illicit intercourse must have been procured through the influence of the promise of marriage. *Cook v. People*, 2 T. & C., 408.

The fact that the promise of marriage was made some time prior to the illicit intercourse, does not take the case out of the statute. *Armstrong v. People*, 70 N. Y., 51.

The seduced female may testify that the promise of marriage was the inducement to the illicit intercourse. *Kenyon v. People*, 26 N. Y., 203.

**Non-marriage.**—The non-marriage of the female may be *prima facie* established by her own testimony as to such fact. *People v. Kenyon*, 5 Park., 234.

**Knowledge.**—The offense is not committed, if the complainant knew that the defendant was a married man. *People v. Alger*, 1 Park., 333.

**Repetition.**—The offense cannot be twice committed against the same person. *Cook v. People*, 2 T. & C., 404.

**Non essentials.**—The existence of pregnancy is not essential to a conviction under the statute. *Id.*

A refusal, subsequent to seduction, to marry the prosecutrix, forms no part of the offense. *Id.*

Proof that, after the alleged seduction, the female has had illicit intercourse with another, is incompetent. *Boyce v. People*, 55 N. Y., 646.

The willingness or unwillingness of the party charged with the offense to perform his promise, is wholly immaterial. *Cook v. People*, 2 T. & C., 407.

**Indictment.**—Upon the trial of an indictment for seduction under promise of marriage, it may be amended by making the name of the female alleged to have been seduced conform to the proof. *People v. Johnson*, 104 N. Y., 213; 5 N. Y. Cr., 218; 5 St. Rep., 606.

**Credibility.**—The defendant, who has testified in his own behalf, may be asked on the cross-examination, for the purpose of affecting his credibility, whether he has had sexual intercourse with a person other than the prosecutrix, and in no way connected with the action. *People v. Eckert*, 2 N. Y. Cr., 481; *People v. Irving*, 95 N. Y., 541; 2 N. Y. Cr., 171.

See *People v. Crotty*, 30 St. Rep., 45; 9 N. Y. Supp., 938.

**§ 285. Subsequent marriage.**—The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offense before the finding of an indictment, is a bar to a prosecution for a violation of the last section.

An actual marriage between the parties will constitute a bar to a conviction. *Cook v. People*, 2 T. & C., 407.

**§ 286. No conviction on certain testimony.**—No conviction can be had for the offense specified in section two hundred and eighty-four, upon the testimony of the female seduced, unsupported by other evidence.

See section 399 of Code of Criminal Procedure.

The case of *People v. Kearney*, 47 Hun, 130; 13 St. Rep., 246, was reversed in 17 St. Rep., 165; 110 N. Y., 188.

**Upon what points.**—Supporting evidence is only required as to the promise of marriage and the carnal connection. *Armstrong v. People*, 70 N. Y., 43; *Kenyon v. People*, 26 id., 203; *Boyce v. People*, 55 id., 644.

It need be only such as the character of these matters admits of being furnished. *Id.*

Support is required, upon two points only, the promise of marriage and the intercourse following upon the faith of it. *People v. Kearney*, 17 St. Rep., 165; 110 N. Y., 191.

Supporting evidence never was and is not now required upon the questions

of the previous chaste character of the female seduced and that she was unmarried. *Id.*

**Nature of the evidence.**—Evidence in corroboration of the female in this class of cases upon the points of seduction and promise of marriage is not very easily obtainable. *Id.* Only such corroboration, therefore, as in the natural and ordinary course of events, these facts are capable of, is to be required. *Id.*

This section does not require direct or positive additional evidence of any of the material facts constituting the offense. *Boyce v. People*, 55 N. Y., 646. As to what kind of evidence will satisfy the statute. *Id.*

This section does not require the testimony of an additional witness. *People v. Kenyon*, 5 Park., 254. The corroborating evidence may be supplied by the facts and circumstances surrounding the transaction and otherwise established in the case. *Id.* Her testimony need not be corroborated in every particular; only in the main features of the case. *Id.*

Evidence tending to show that the defendant had intercourse with the prosecutrix subsequent to the time when she alleges that she was seduced, is admissible as tending to prove such act at the time laid. *People v. Kearney*, 17 St. Rep., 165; 110 N. Y., 194.

Evidence as to the birth of a child is not competent, unless it tends in some degree to corroborate the testimony of the prosecutrix as to the commission of the crime charged. *Id.* In this case, such evidence was held inadmissible from the fact that it did not tend to show illicit intercourse at the time alleged, which was thirteen months before the birth of the child. The case of *Armstrong*, 70 N. Y., 38, went to the extreme limit in the admission of such evidence. *People v. Kearney, ante.*

**Question for jury.**—Whether the female is sufficiently supported to justify a conviction, is a question for the jury. *Crandall v. People*, 2 Lans., 809.

## CHAPTER III.

### *Abandonment and other Acts of Cruelty to Children.*

- SECTION** 287. Abandonment of child under six years.  
 288. Unlawfully omitting to provide for child.  
 289. Endangering life, health or morals of child under sixteen years of age.  
 290. Acts of cruelty to children.  
 290a. Boarding of infants without license.  
 291. Vagrant children, arrest of, etc.  
 292. Certain employment of a child.  
 292a. Penalty for sending messenger boys to certain places.  
 292b. Taking apprentice without consent of guardian.  
 293. Duty of officers of society.

§ 287. Abandonment of child under fourteen years.—A parent, or other person having the care or custody, for nurture, or education, of a child under the age of fourteen years, who deserts the child in any place, with intent wholly to abandon it, is punishable by imprisonment in a state prison, for not more than seven years.

Am'd by chap. 325 of 1892, again am'd by chap. 376, Laws 1903; raising the age limit from three to fourteen. Takes effect Sept. 1, 1903.

See latter part of amending act in section 303, *post*.

**Abandonment.**—Under the act of 1871, abandonment was held not to be a continuous act. *Bayne v. People*, 14 Hun, 181.

**Protection of public.**—In *People ex rel. Douglass v. Naehr*, 30 Hun, 461, it was held that chap. 395 of 1871, as amended by chap. 171 of 1882, was designed to protect the public. See *Bayne v. People*, 14 id., 181; *People ex rel. Kehlbeck v. Walsh*, 11 id., 292.

**§ 287a. Abandonment of children.**—A parent or other person charged with the care or custody for nurture or education of a child under the age of sixteen years, who abandons the child in destitute circumstances and willfully omits to furnish necessary and proper food, clothing or shelter for such child is guilty of felony, punishable by imprisonment for not more than two years, or by a fine not to exceed one thousand dollars, or by both. In case a fine is imposed the same may be applied in the discretion of the court to the support of such child. Proof of the abandonment of such child in destitute circumstances and omission to furnish necessary and proper food, clothing or shelter is prima facie evidence that such omission is willful. The provisions of section seven hundred and fifteen of this code prohibiting the disclosure of confidential communications between husband and wife shall not apply to prosecutions for the offense here defined. A previous conviction or convictions of felony or misdemeanor shall not prevent the court from suspending sentence upon a conviction under this section, or from arbitrarily fixing the limit of imprisonment or fine, in case imprisonment or fine is imposed upon conviction herein.

§ 2. Nothing in this act contained shall be deemed or construed to repeal, amend, impair or in any manner affect the provisions of sections two hundred and eighty-seven, two hundred and eighty-eight or two hundred and eighty-nine of the penal code or any other existing provisions of law relating to abandonment or other acts of cruelty to children.

Am'd by ch. 168, Laws 1905. Takes effect Sept. 1, 1905.

**§ 288. Unlawfully omitting to provide for child, etc.**—A person who,

1. Willfully omits, without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor, or to make such payment toward its maintenance as may have been required by the order of a court or magistrate when such minor has been committed to an institution; or,

2. Not being a superintendent of the poor, or a superintendent of alms house, or an institution duly incorporated for the purpose, without having first obtained a license in writing so to do from the board of health of the city or town wherein such females or children are received, boarded or kept, erects, conducts, establishes or maintains any maternity hospital, lying-in asylum where females may be received, cared for or treated during pregnancy, or during or after delivery; or receives, boards or keeps any nursing children, or any children under the age of twelve years not his relatives, apprentices, pupils or wards, without legal commitment; or,

3. Being a midwife, nurse or other person having the care of an infant within the age of two weeks, neglects or omits to report immediately to the health officer or to a legally qualified practitioner of medicine of the city, town or place where such child is being cared for, the fact that one or both eyes of such infant are inflamed or reddened, whenever such shall be the case, or who applies any remedy therefor without the advice, or except by the direction of such officer or physician; or,

4. Neglects, refuses or omits to comply with any provisions of this section, or who violates the provisions of such license, is guilty of a misdemeanor. Every such license must specify the name and residence of the person so undertaking the care of such females or children, and the place and the number of females or children thereby allowed to be received, boarded and kept therein, and shall be revocable at will by the authority granting it. Every person so licensed must keep a register wherein he shall enter the names and ages of all such children and of all children born on said premises, and the names and residences of their parents, as far as known, the time of the reception and discharge of such children and the reasons therefor, and also a correct register of the name and age of every child under the age of five years who is given out, adopted, taken away or indentured from such place to or by any one, together with the name and residence of the person so adopting, taking or indenturing such child; and shall cause a correct copy of such register to be sent to the authority issuing such license within forty-eight hours after such child is so given out, adopted, taken away or indentured. It shall be law-

ful for the officers of any incorporated society for the prevention of cruelty to children and of such board of health at all reasonable times to enter and inspect the premises wherein such females and children are so boarded, received or kept, and also such license, register and the children.

5. No institution shall be incorporated for any of the purposes mentioned in this section except with the written consent and approbation of a justice of the supreme court, upon the certificate in writing of the state board of charities approving of the organization and incorporation of such institution. The said board of charities may apply to the supreme court for the cancellation of any certificate of incorporation previously filed without its approval, and may institute and maintain an action in such court through the attorney general to procure a judgment dissolving any such corporation not so incorporated and forfeiting its corporate rights, privileges and franchises.

Am'd by chap. 46 of 1884.

This amendment added requirement of license for keeping more than two foundlings, etc.

Am'd by chap. 31 of 1886.

This amendment excepted from the amendment of 1884 "a superintendent of the poor, or a superintendent of alms-house" substituted for the words "more than two foundlings, abandoned or homeless," the words "any nursing children, or any," and inserted the provision as to register of children.

Am'd by chap. 145 of 1888.

This amendment inserted after the word "minor" in the first sentence of the section, the words "or to make such payment towards its maintenance as may have been required by the order of a court or magistrate, when such minor has been committed to an institution."

Am'd by chap. 325 of 1892.

This amendment materially enlarged the scope of the provisions of the section so as to include other persons and acts, and placed the matter under appropriate subdivisions.

See latter part of amending act in section 303, *post*.

The unlawfully and feloniously suffering and permitting the death of a child, by willfully neglecting, without lawful excuse, to supply it with proper food, clothing and care, constitutes a misdemeanor under this section. *People v. McDonald*, 17 St. Rep., 494; 49 Hun, 68; 1 N. Y. Supp., 704.

It was held that one failing to supply a child in his custody with proper food, etc., was guilty of an offense under section 4, chap. 122 of 1876, and that it was not necessary that the accused should have committed any affirmative act. *Crowley v. People*, 21 Hun, 415.

So, in same case on appeal, 83 N. Y., 464, it was held that one who, with no natural or legal duty, voluntarily seeks and assumes the care and custody of a child, is amenable to such statute, if he fails to perform the duty required, to the injury of the child; that it is not requisite to aver or prove that he had means of support, but he must either perform his duty or surrender such care and custody.

The Code limits the offense under this section to a person upon whom the duty as imposed by law.

**§ 289. Endangering life, morals or health of child under sixteen years of age.**—A person who,

1. Willfully causes or permits the life or limb of any child

§ 289, subd. 3. Any parent or guardian or other person having custody of a child under sixteen years of age, except in the city of New York who omits to exercise due diligence in the control of such child, to prevent such child from violating any of the provisions of this chapter and any such person or any other person responsible for or who by any act or omission causes, encourages or contributes to the violation by any such child of said provisions shall be guilty of a misdemeanor and punishable accordingly.

Am'd by chap. 655, Laws 1905. Takes effect Sept. 1, 1905.

**§ 290. Acts of cruelty to children.**—A person who,

1. Admits to or allows to remain in any dance-house, concert saloon, theatre, museum, skating rink, or in any place where wines or spirituous or malt liquors are sold or given away, or in any place of entertainment injurious to health or morals, owned, kept or managed by him in whole or in part, any child actually or apparently under the age of sixteen years, unless accompanied by its parent or guardian; or,

2. Suffers or permits any such child to play any game of skill or chance in any such place, or in any place adjacent thereto, or to be or remain therein, or admits to or allows to remain in any reputed house of prostitution or assignation, or in any place where opium or any preparation thereof is smoked, any child actually or apparently under the age of sixteen years; or,

3. Sells or gives away, or causes or permits or procures to be sold or given away to any child actually or apparently under the age of sixteen years any beer, ale, wine, or any strong or spirituous liquor; or,

4. Being a pawnbroker or person in the employ of a pawnbroker, makes any loan or advance or permits to be loaned or advanced to any child actually or apparently under the age of sixteen years any money, or in any manner directly or indirectly receives any goods, chattels, wares or merchandise from any such child in pledge for loans made or to be made to it or to any other person or otherwise howsoever; or,

5. Sells, pays for or furnishes any cigar, cigarette or tobacco in any of its forms to any child actually or apparently under the age of sixteen years; is guilty of a misdemeanor.

6. Or who, being the owner, keeper or proprietor of a junk shop, junk cart or other vehicle or boat or other vessel used for the collection of junk, or any collector of junk, receives or purchases any goods, chattels, wares or merchandise from any child under the age of sixteen years, is guilty of a misdemeanor.

7. No child actually or apparently under sixteen years of age shall smoke or in any way use any cigar, cigarette or tobacco in any form whatsoever in any public street, place or resort. A violation of this subdivision shall be a misdemeanor, and shall be punished by a fine not less than two dollars for each offense.

Am'd by chapter 46 of 1884.

This amendment enlarged the scope of the provisions of the original section, and added the provision as to gaming, etc.

Am'd by chapter 31 of 1886.

This amendment added to the section, as amended in 1884, the provision as to house of prostitution or assignation.

Am'd by chapter 170 of 1889.

This amendment separated the previous matter into two subdivisions, inserted into subdivision 2 a provision as to opium, etc., and added subdivisions 3-5, inclusive.

Am'd by chapter 417 of 1890.

This amendment added subdivision 7 to the section.

The engrossed bill, in the office of the secretary of state expressly added the seventh subdivision above to section 291, *post*. So do the Session Laws of 1890, ch. 417. If this subdivision actually belonged to section 291, it was repealed, by implication, by chap. 217 of 1892, in adding the present subdivision 7. Sixth section added by chap. 309, Laws 1903.

See *People ex rel. Van Heck v. Catholic Protectory*, 101 N. Y., 197 ; 4 N. Y. Cr., 80.

§ 290a, repealed by chap. 171 of 1894.

§ 291. **Vagrant children, arrest of, etc.**—Any child actually or apparently under the age of sixteen years, who is found:

1. Begging or receiving or soliciting alms, in any manner or under any pretense; or gathering or picking rags, or collecting cigar stumps, bones or refuse from markets; or,

2. Not having any home or other place of abode or proper guardianship; or who has been abandoned or improperly exposed or neglected, by its parents or other person or persons having it in charge, or being in a state of want or suffering; or,

3. Destitute of means of support, being an orphan, or living or having lived with or in custody of a parent or guardian who has been sentenced to imprisonment for crime, or who has been convicted of a crime against the person of such child, or has been adjudged an habitual criminal; or,

4. Frequenting or being in the company of reputed thieves or prostitutes, or in a reputed house of prostitution or assignation, or living in such a house either with or without its parent or guardian, or being in concert saloons, dance-houses, theatres, museums or other places of entertainment, or places where wines, malt or spirituous liquors are sold, without being in charge of its parent or guardian; or playing any game of chance or skill in any place wherein or adjacent to which any beer, ale, wine or liquor is sold or given away, or being in any such place; or,

5. Coming within any of the descriptions of children mentioned in section two hundred and ninety-two, must be arrested and brought before a proper court or magistrate, who may commit the child to any incorporated charitable reformatory, or other institution, and when practicable, to such as is governed by persons of the same religious faith, as the parents of the child, or may make any disposition of the child such as now is, or hereafter may be authorized in the cases of vagrants, truants, paupers or disorderly persons, but such commitment shall, so far as practicable, be made to such charitable or reformatory institutions. Whenever any child shall be committed to an institution under this code, and the warrant of commitment shall so state, and it shall appear therefrom that either parent, or any guardian or custodian of such child was present at the examination before such court or magistrate, or had such notice thereof as was by such court or magistrate deemed and adjudged sufficient, no further or other notice required by any local or special statute, in regard to the committal of children to such institution, shall be necessary, and such commitment shall in all respects be sufficient to authorize such institution to receive and retain such child in its custody as therein directed. Whenever any commitment of a child shall for any reason be adjudged or found defective, a new commitment of the child may be made or directed



by the court or magistrate, as the welfare of the child may require. And no commitment of a child which shall recite therein the facts upon which it is based shall be deemed invalid by reason of any omission of the court or magistrate by whom such commitment is made to file any documents, papers or proceedings relating thereto, or by reason of any limitation as to the age of the child committed, contained in the act or articles of incorporation of the institution to which it may have been committed.

6. Any magistrate having criminal jurisdiction may commit, temporarily, to an institution authorized by law to receive children on final commitment, and to have compensation therefor from the city or county authorities, any child under the age of sixteen years, who is held for trial on a criminal charge; and may, in like manner, so commit any such child held as a witness to appear on the trial of any criminal case; which institution shall thereupon receive the same, and be entitled to the like compensation proportionally therefor as on final commitment, but subject to the order of the court as to the time of detention and discharge of the child. Any such child convicted of any misdemeanor shall be finally committed to some such institution, and not to any prison or jail, or penitentiary, longer than is necessary for its transfer thereto. No child under restraint or conviction, actually or apparently under the age of sixteen years, shall be placed in any prison or place of confinement, or in any court-room, or in any vehicle for transportation in company with adults charged with or convicted of crime.

7. All cases involving the commitment or trial of children, actually or apparently under the age of sixteen years, for any violation of law, in any court shall be heard and determined by such court, at suitable times to be designated therefor by it, separate and apart from the trial of other criminal cases, of which session a separate docket and record shall be kept. All such cases shall, so far as practicable, be heard and determined in a separate court room to be known as the children's court and to be used exclusively for the examination and trial of children, actually or apparently under the age of sixteen years, charged with any offense. And all such cases and cases of offenses by, or against the person of, a child under the age of sixteen years shall have preference over all other cases before all magistrates and in all courts and tribunals in this state both civil and criminal; and where a child is committed or detained as a witness in any case such case shall be brought to trial or otherwise disposed of without delay, whether the defendant be in custody or enlarged on bail.

8. All children actually or apparently under the age of sixteen who desert their homes without good or sufficient cause, or keep company with dissolute, immoral, or vicious persons, shall be deemed disorderly children. Those actually or apparently under the like age who are not susceptible of proper restraint or control by their parents, guardians, or lawful custodians, or who are habitually disobedient to their reasonable and lawful commands, shall be deemed ungovernable children. A disorderly or ungovernable child may be dealt with as provided in the fifth subdivision of this section.

9. Whenever any child is brought before any court or magistrate, to be dealt with under any of the subdivisions of this section, instead of committing such child to confinement in any institution, the court or magistrate may place such child under the custody of a probation or parole officer, and at any time within one year thereafter such court or magistrate, may issue a warrant for such child, and after giving such child an opportunity to be heard, may make the commitment which could have been made in the first instance as aforesaid. The foregoing provision shall not apply to the children's court created by special enactment in cities of the first class but this section shall not be construed as taking away or limiting any jurisdiction now possessed by such children's courts.

Am'd by chap. 655, Laws 1905. Takes effect Sept. 1, 1905.

Subd. 7 am'd by chap. 14, Laws 1896; again am'd by chap. 331, Laws 1903; subd. 8 added by L. 1903, chap. 50. In effect Sept. 1, 1903.



Am'd by chapter 46 of 1884.

This amendment extended the provisions to any child actually or apparently under sixteen years of age, added the last clauses of subdivisions 1, 2, 4 and 5, and the whole of subdivision 6.

Am'd by chapter 31 of 1886.

This amendment changed the provisions of subd. 5 in several particulars, but embodies the present subdivision with a single exception, which will be noticed.

Am'd by chap. 145 of 1888.

This amendment affected only the fifth subdivision and made the presence of, or notice to, either parent sufficient.

Amended by chap. 217 of 1892.

This amendment omitted from subd. 6 the words, "except in the presence of a proper official," and added the present seventh subdivision to the section.

Subd. 7 of last section was expressly added, by chap. 417 of 1890 (see engrossed bill and session laws of 1890), to this section. In such case, it was, by implication, repealed by chap. 217 of 1892.

See section 893 of Code of Criminal Procedure.

The case of *People ex rel. Brown v. Carpenter*, 32 St. Rep., 822; 11 N. Y. Supp., 853, was reversed in 33 St. Rep., 1029; 123 N. Y., 640.

**Effect of section.**—Section 5, chap. 172 of 1865, was not repealed by the Penal or Criminal Codes. *Matter of Riley*, 31 Hun, 613.

The Code has not repealed the statutes authorizing commitment of children to the New York Catholic Protectory. *People ex rel. Van Heck v. Catholic Protectory*, 101 N. Y., 197; 4 N. Y. Cr., 80.

**Disorderly person.**—A magistrate cannot commit, under this section, for being a disorderly person. *People ex rel. Day v. Mt. Magdalen School*, 28 St. Rep., 254; 5 Silv. (Sup. Ct.), 18.

Neither this nor the following section provides for the case of a disorderly person who has, without good and sufficient cause, deserted her home and kept company with dissolute or vicious persons, against the lawful commands of her parents. *Matter of Riley*, 31 Hun, 613.

**What constitutes.**—This section declares under what circumstances children shall be regarded as vagrants. *Matter of Mos s*, 1 N. Y. Cr., 510.

By this section, certain acts or conduct on the part of children render them liable to be arrested and dealt with as vagrants. *Matter of McMahon*, 1 N. Y. Cr., 60; 64 How., 285.

It is not necessary that the children should be found wandering in the streets. *Matter of Moses*, 1 N. Y. Cr., 512.

This section does not mean that a child, who is merely a homeless or a destitute orphan, may be punished as a disorderly person. *People ex rel. Van Heck v. Catholic Protectory*, 101 N. Y., 197; 4 N. Y. Cr., 80; 3 How. N. S., 345.

The statute is not designed to provide for the arrest and commitment to a charitable institution of every young child who happens to get into the street or park without a suitable custodian. *People ex rel. Van Riper v. Catholic Protectory*, 19 Abb. N. C., 148; *sub nomine*, *People ex rel. Van Riper v. Home of the Good Shepherd*, 44 Hun, 529; 5 N. Y. Cr., 139; 11 St. Rep., 155.

The mere fact of a child meeting a prostitute in a public park and unwittingly walking and being in her company on a single occasion, does not make a case within the statute. *People ex rel. Van Riper v. Catholic Protectory*, 106 N. Y., 608; 5 N. Y. Cr., 504; 11 St. Rep., 155; *aff'g* 9 St. Rep., 95; 44 Hun, 526; 19 Abb. N. C., 142.

The words "not having any proper guardianship" in subd. 2 of this section, refer to a permanent and usual condition of a child being without proper guardianship, and not to a child casually in the street, without protection. *Id.*

The proper guardianship of a child, referred to in this section, is not a mere temporary supervision. *People ex rel. Van Riper v. Home of the Good Shepherd*, 9 St. Rep., 95; 44 Hun, 526; 5 N. Y. Cr., 139; *sub nomine*, *People ex rel. Van Riper v. Catholic Protectory*, 19 Abb. N. C., 142.

This section does not apply to a child casually and temporarily in the street without protection, but to those waifs who are in a permanent and usual condition of having no home, place of abode, or guardianship, or who are permanently abandoned, improperly exposed, or in a state of want and suffering. *Matter of Heery*, 51 Hun, 372; 21 St. Rep., 82; *sub nomine*, *Matter of Mahoney*, 6 N. Y. Cr., 241; *People ex rel. Van Riper v. Catholic Protectory*, 11 St. Rep., 155; 106 N. Y., 608; 5 N. Y. Cr., 504.

Such abandonment or improper exposure must be by the parents or the person or persons having it in charge. *People ex rel. Van Riper v. Home of the Good Shepherd*, 9 St. Rep., 95; 44 Hun, 529; 5 N. Y. Cr., 139; *sub nomine*, *People ex rel. Van Riper v. Catholic Protectory*, 19 Abb. N. C., 141.

The evidence was held, in *People ex rel. Perkerson v. Sisters etc.*, 34 Hun, 463; 2 N. Y. Cr., 528; 1 How. N. S., 133, to justify the commitment of a child as a vagrant.

**Notice.**—The provisions of this section as to giving notice of the proceedings are imperative, not discretionary. *Matter of Heery*, 51 Hun, 372; 21 St. Rep., 82; *sub nomine*, *Matter of Mahoney*, 6 N. Y. Cr., 241.

Where the examining magistrate commits the child without summoning its guardian, if it has one, the child will be discharged on *habeas corpus*. *Matter of Maloney*, 2 N. Y. Supp., 248; 4 id., 428.

The notice need not of necessity be personal, and the magistrate may, under this section, adjudge what and how notice shall be given. *People ex rel. Van Riper v. Catholic Protectory*, 106 N. Y., 608; 5 N. Y. Cr., 508; 11 St. Rep., 155.

Magistrate's commitment, under chap. 364 of 1864, which does not contain a statement of notice as required by this section, is insufficient upon *habeas corpus*. *People ex rel. Slatzkata v. Baker*, 19 St. Rep., 485; 3 N. Y. Supp., 536.

A commitment which does not show that a notice of the proceeding was given to the parent, guardian or custodian of the child, is fatally defective. *Matter of Heery*, 51 Hun, 372; 21 St. Rep., 82; *sub nomine*, *Matter of Mahoney*, 6 N. Y. Cr., 241.

The father was held, in *People ex rel. Van Riper v. Catholic Protectory*, 106 N. Y., 604; 5 N. Y. Cr., 499; 11 St. Rep., 155, to be entitled to notice, even though the mother was present at the examination. But see amendment of 1888 to this section.

Since the decision of the *Van Riper* case, 106 N. Y., 611; 11 St. Rep., 155, subd. 5 of this section has been so amended by chap. 145 of 1888, that the presence of either parent at the examination before the court or magistrate is sufficient. *People ex rel. Brown v. Carpenter*, 33 St. Rep., 1029; 123 N. Y., 640.

**Commitment.**—Where the commitment shows a full compliance with the provisions of the statute, there can be no discharge on *habeas corpus*. *People ex rel. Eck v. American F. G. Society*, 2 N. Y. Cr., 538, note.

Where the proceedings are regular, and the commitment valid upon its face, an application for a discharge must be denied. *In re Diss Debar*, 3 N. Y. Supp., 668.

Where the commitment recites the facts upon which it is based, it cannot be deemed invalid by reason of any imperfection or defect in form. *Matter of Nichols*, 19 Abb. N. C., 138.

A commitment which states that the party committed is fourteen years of age, contains a sufficient statement of the age and sufficiently shows that he is under the age of sixteen years as required by the statute. *Matter of Roach*, 18 W. Dig., 514.

The purpose is to permit the committing magistrate to make a new commitment, where the child has been regularly arrested, brought before him, convicted of some act mentioned in the section, and the commitment made by him thereupon is found to be defective. *People ex rel. Day v. Mt. Magdalen School*, 28 St. Rep., 255; 5 Silv. (Sup. Ct.), 18.

**Institution.**—The institutions intended by this section and section 713. *post*, are not necessarily such as were in existence when chap 240 of 1879 was passed.

People ex rel. Mt. Magdalen School v. Dickson, 57 Hun, 315; 32 St. Rep., 496; 10 N. Y. Supp., 605; aff'd in 123 N. Y., 639, without opinion.

This section limits the power of the magistrate in designating the charitable reformatory or other institution as the place of commitment to one authorized by law to receive and take charge of the child. People ex rel. Van Heck v. Catholic Protectory, 38 Hun, 131; 22 W. Dig., 57.

This section conferred upon the New York Catholic Protectory no power to receive and retain a child, so committed to it, under any other circumstances than those defined in its charter and the Construction Act. Id.

The institution to be mentioned in the commitment is to be one which a law, other than the Penal Code, has authorized to receive minor children, and it is in obedience to that authority that the commitment is allowed to be made. Id.

The effect of the provisions of subd. 5 of this section is that the magistrate is no longer restricted to the three institutions named in the Consolidation Act, as places to which he can commit children. People ex rel. Van Heck v. Catholic Protectory, 101 N. Y., 197; 4 N. Y. Cr., 80.

The institution can only take and hold a child for the time, and in the manner and under the regulations prescribed by its fundamental law. Id.

The institution to which children are thus committed is to receive compensation. People ex rel. Mt. Magdalen School v. Dickson, 57 Hun, 314; 32 St. Rep., 496; 10 N. Y. Supp., 605; aff'd in 123 N. Y., 639, without opinion.

**Information.**—The information in these proceedings for summary conviction ought to be precise and show a case clearly within the statute. People ex rel. Van Riper v. Catholic Protectory, 11 St. Rep., 155; 106 N. Y., 608; 5 N. Y. Cr., 503; Matter of Heery, 51 Hun, 372; 21 St. Rep., 82; *sub nomine*, Matter of Mahoney, 6 N. Y. Cr., 247. When an essential ingredient or circumstances is omitted and the defect is not supplied by the evidence, the conviction is bad. Id.

**Habeas corpus.**—The sufficiency of the evidence upon which the relator was committed, cannot be examined into on *habeas corpus*. People ex rel. Perkerson v. Sisters, etc., 34 Hun, 463; 2 N. Y. Cr., 528; 1 How. N. S., 133; Matter of Moses, 1 N. Y. Cr., 508; 13 Abb. N. C., 189.

## § 292. Certain employments of children a misdemeanor.

—A person who employs or causes to be employed, or who exhibits, uses, or has in custody, or trains for the purpose of the exhibition, use or employment of, any child actually or apparently under the age of sixteen years; or who having the care, custody or control of such a child as parent, relative, guardian, employer, or otherwise, sells, lets out, gives away, so trains, or in any way procures or consents to the employment, or to such training, or use, or exhibition of such child; or who neglects or refuses to restrain such child from such training, or from engaging or acting, either

1. As a rope or wire walker, gymnast, wrestler, contortionist, rider or acrobat; or upon any bicycle or similar mechanical vehicle or contrivance; or,

2. In begging or receiving or soliciting alms in any manner or under any pretense, or in any mendicant occupation; or in gathering or picking rags, or collecting cigar stumps, bones or refuse from markets; or in peddling; or

3. In singing; or dancing; or playing upon a musical instrument; or in a theatrical exhibition; or in any wandering occupation; or,

4. In any illegal, indecent or immoral exhibition or practice; or in the exhibition of any such child when insane, idiotic, or when presenting the appearance of any deformity or unnatural physical formation or development; or

5. In any practice or exhibition or place dangerous or injurious to the life, limb, health or morals of the child, is guilty of a misdemeanor. But this section does not apply to the employment of any child as a singer or musician in a church, school or academy; or in teaching or learning the science or practice of music; or as a musician in any concert or in a theatrical exhibition, with the written consent of the mayor of the city, or the president of the board of trustees of the village where such concert or exhibition takes place. Such consent shall not be given unless forty-eight hours previous notice of the application shall have been served in writing upon the society mentioned in section two hundred and ninety-three of the Penal Code, if there be one within the county, and a hearing had thereon if requested, and shall be revocable at the will of the authority giving it. It shall specify the name of the child, its age, the names and residence of its parents or guardians, the nature, time, duration and number of performances permitted, together with the place and character of the exhibition. But no such consent shall be deemed to authorize any violation of the first, second, fourth or fifth subdivisions of this section.

Am'd by chap. 46 of 1884.

This amendment fixed the age of the child of both sexes at sixteen years.

Am'd by chap. 31 of 1886.

This amendment introduced, immediately prior to subd. 1, the words "or to such training, use or exhibition —; or who neglects or refuses to restrain such child from such training, or from engaging or acting," and added the last clauses to each of subds. 1, 2 and 4.

Am'd by chap. 319 of 1892.

This amendment added to the section, as amended in 1886, the provision in respect to notice of application for consent, and the effect of such consent.

**Constitutional.**—This section is not unconstitutional as infringing on the rights of parents or those of the child. *People v. Ewer*, 47 St. Rep., 501; 8 N. Y. Cr., 392.

**Effect of section.**—Chap. 122 of 1876 was repealed by this section. *Ryan v. Buchanan*, 37 Hun, 425.

**Business or avocation.**—This section does not prohibit the employment of children in a dangerous "business or avocation," but only their employment in a dangerous "practice or exhibition." *Id.*

See *People ex rel. Mt. Magdalen School v. Dickson*, 57 Hun, 314; 32 St. Rep., 496; 10 N. Y. Supp., 605; aff'd. 123 N. Y., 639, without written opinion; *People ex rel. Van Riper v. Catholic Protectory*, 156 N. Y., 608; 5 N. Y. Cr., 502; 11 St. Rep., 155; *Matter of Riley*, 31 Hun, 613; *People v. Ewer*, 47 St. Rep., 501; 19 N. Y. Supp., 933; *Matter of Roach*, 18 W. Dig., 514; *Beatty v. Hessman*, 2 City Ct., 12, note.

§ 292a. **A Penalty for sending messenger boys to certain places.**—A corporation or person employing messenger boys, who:

1. Knowingly places or permits to remain in a disorderly house, or in an unlicensed saloon, inn, tavern or other unlicensed place where malt or spirituous liquors or wines are sold, any instrument or device by which communication may be had between such disorderly house, saloon, inn, tavern or unlicensed place, and any office or place of business of such corporation or person; or

2. Knowingly sends or permits any person to send any messenger boy to any disorderly house, unlicensed saloon, inn, tavern, or other unlicensed place, where malt or spirituous liquors or wines are sold on any errand or business whatsoever except to deliver telegrams at the door of such house, is guilty of a misdemeanor, and incurs a penalty of fifty dollars to be recovered by the district attorney.

This section was added by chap. 692 of 1893, and will go into effect, as amended, October 1, 1893.

**§ 292b. Taking apprentice without consent of guardian.**—A person who takes an apprentice without having first obtained the consent of his legal guardian, or unless a written agreement has been entered into as prescribed by law, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

**§ 293. Arrests, by whom made.**—A constable or police officer must, and any agent or officer of any incorporated society for the prevention of cruelty to children may, arrest and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of this chapter and any minor coming within any of the descriptions of children mentioned in section two hundred and ninety-one, or in section two hundred and ninety-two. Such constable, police officer or agent may interfere to prevent the perpetration in his presence of any act forbidden by this chapter. A person who obstructs or interferes with any officer or agent of such society in the exercise of his authority under this chapter, is guilty of a misdemeanor. All fines, penalties and forfeitures imposed or collected for a violation of the provisions of this Code or of any act relating to or affecting children, now in force or hereafter passed, must be paid on demand to the incorporated society for the prevention of cruelty to children in every case where the prosecution shall be instituted or conducted by such a society; and any such payment heretofore made to any such society may be retained by it.

Am'd by chap. 145 of 1888.

This amendment added the last sentence of the present section.

See section 56 of Code of Criminal Procedure.

## CHAPTER IV.

*Abortion and Concealing Death of Infant.*

SECTION 294. Abortion defined.

295. Killing of child in attempting miscarriage.

296. Concealing birth.

297. Selling drugs, etc.

§ 294. **Abortion defined.**—A person who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of the woman, or of the child with which she is pregnant, either

1. Prescribes, supplies or administers to a woman, whether pregnant or not, or advises or causes a woman to take any medicine, drug or substance; or

2. Uses, or causes to be used, any instrument or other means; Is guilty of abortion, and is punishable by imprisonment in a state prison for not more than four years, or in a county jail for not more than one year.

See section 191, *ante*; section 318, *post*.

See note in *People v. Everhardt*, 2 Silv. (Ct. App.), 514, 515.

**Accessory.**—This section provides for the punishment of the accessory. *People v. Phelps*, 61 Hun, 115; 39 St. Rep., 599; 15 N. Y., Supp., 441.

**Accomplice.**—The person, upon whom an abortion is performed, is not an accomplice in the commission of the offense described in this section. *People v. Meyers*, 5 N. Y. Cr., 126; 7 St. Rep., 217.

The language of this section, fairly construed, implies that the person upon whom this operation is performed cannot be one of the persons guilty of the offense described. *People v. Vedder*, 98 N. Y., 631; 3 N. Y. Cr., 33. She is not, therefore, an accomplice. *Id.* But she is guilty of a separate and distinct offense. *Id.*

**Principal.**—The party, who procures other persons to actually use the means which were designed to, and did, produce the miscarriage, is a principal with those who perform the operation. *People v. Bliven*, 14 St. Rep., 496; 6 N. Y. Cr., 368.

A person, who was absent at the time an abortion was committed, is a principal, if he counseled, induced and procured its commission. *People v. Bliven*, 112 N. Y., 79; 6 N. Y. Cr., 365; 20 St. Rep., 486.

**Woman not pregnant.**—Abortion may be committed on a woman not pregnant. *People v. Phelps*, 61 Hun, 115; 39 St. Rep., 599; 15 N. Y. Supp., 441.

**What not.**—Mere suggestion or advice to go to a physician and get some medicine to procure an abortion, without evidence of its being acted upon, does not constitute the crime of abortion, under this section. *People v. Phelps*, 44 St. Rep., 910; 133 N. Y., 269.

**Burden.**—It is not necessary for the people to show that the use of the instrument was not necessary to preserve the life of the woman or of the child. *Bradford v. People*, 20 Hun, 309.

The burden of proving such necessity for its use rests upon the accused. *Id.* In any event, the absence of such necessity need not be established by direct proof, but may be shown by circumstantial evidence bearing upon the subject. *Id.*

§ 295. **Killing of child in attempting miscarriage.**—A pregnant woman, who takes any medicine, drug or substance, or uses or submits to the use of any instrument or other means,



with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, is punishable by imprisonment for not less than one year, nor more than four years.

See sections 190, 191 and 194, *ante*.

This section provides for the punishment of the pregnant woman upon whom the miscarriage is produced. *People v. Phelps*, 61 Hun, 115; 39 St. Rep., 599; 15 N. Y. Supp., 441.

The person upon whom an abortion is performed is guilty of the offense described in this section. *People v. Meyers*, 5 N. Y. Cr., 126; 7 St. Rep., 217.

The woman upon whom the miscarriage is committed, is not guilty of abortion, but her crime is of a different nature. *People v. McGonegal*, 48 St. Rep., 900; 136 N. Y., 76.

The act of the woman in submitting to the perpetration of the crime is made a distinct and separate offense, and is punishable by a different penalty. *People v. Vedder*, 98 N. Y., 630; 3 N. Y. Cr., 33.

**§ 296. Concealing birth.**—A person who endeavors to conceal the birth of a child, by any disposition of the dead body of the child, whether the child died before or after its birth, is guilty of a misdemeanor.

See section 693, *post*.

**§ 297. Selling drugs, etc.**—A person who manufactures, gives or sells an instrument, a medicine or drug, or any other substance, with intent that the same may be unlawfully used in procuring the miscarriage of a woman, is guilty of a felony.

See section 191, *ante*; sections 318 and 321, *post*.

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## CHAPTER V.

### *Bigamy, Incest and the Crime Against Nature.*

**SECTION 298.** Bigamy defined; how punished

299. Id.; exceptions.

300. Indictment for bigamy.

301. Punishment of consort.

302. Incest.

303. Sodomy.

304. Penetration sufficient.

**§ 298. Bigamy defined; how punished.**—A person who, having a husband or a wife living, marries another person, is guilty of bigamy, and is punishable by imprisonment in a penitentiary or state prison for not more than five years.

A married man, imagining himself to effect mere seduction, may, *it seems*, blunder into bigamy. *Hayes v. People*, 25 N. Y., 390; 5 Park., 325.

**Marriage.**—It is a sufficient marriage in fact that the parties agree to be husband and wife, and cohabit and recognize each other as such. *Hayes v. People*, 25 N. Y., 390; 5 Park., 325. It is immaterial whether a person, who pretended to solemnize the contract, was or was not a clergyman or magistrate. *Id.*; or that either party was deceived by his false representation of such character. *Id.*



A marriage, valid under the laws of the state where it was contracted, is valid in this state. *Thorp v. Thorp*, 90 N. Y., 602.

In order to convict a person accused of bigamy, the second marriage must be valid according to the laws of the country where it occurred. *People v. Chase*, 27 Hun, 259.

**Second marriage.**—Unless the second marriage takes place within its territorial jurisdiction, bigamy is not punishable in this state. *People v. Mosher*, 2 Park., 195.

Prohibition against second marriage in a judgment for divorce, has no extra territorial effect. *People v. Chase*, 28 Hun, 310; 16 W. Dig., 143.

A person who, after having been divorced on account of his or her adultery, marries again in this state, in violation of the prohibitory provision of this section, is guilty of the crime of bigamy. *People v. Faber*, 92 N. Y., 146; 1 N. Y. Cr., 115; rev'g 29 Hun, 320; overruling *People v. Hovey*, 5 Barb., 117.

**Defense.**—Ignorance of the law is no defense to an indictment for bigamy. *People v. Weed*, 29 Hun, 628; 1 N. Y. Cr., 349. Where the defendant and his first wife, prior to his second marriage, entered into and signed a sealed agreement in the state of Connecticut, providing that, if either party should apply for a divorce, the other would not oppose the application, and the justice, before whom it was executed, advised him that the agreement was in effect a divorce, it did not destroy the effect of an intentional violation of the statute. *Id.* This case was affirmed in 96 N. Y., 625, without an opinion.

**Estoppel.**—When, upon a trial of an indictment for bigamy, the defendant is estopped from denying the identity of the person he has married. *People v. Chase*, 28 Hun, 310; 16 W. Dig., 143.

See *Price v. Price*, 124 N. Y., 596; 37 St. Rep., 147.

**§ 299. Exceptions.**—The last section does not extend.

1. To a person whose former husband or wife has been absent for five years successively then last past, without being known to him or her within that time to be living, and believed by him or her to be dead; or

2. To a person whose former marriage has been pronounced void, or annulled, or dissolved, by the judgment of a court of competent jurisdiction, for a cause other than his or her adultery; or

3. To a person who being divorced for his or her adultery has received from the court which pronounced the divorce, permission to marry again; or

4. To a person whose former husband or wife has been sentenced to imprisonment for life.

**Re-enactment.**—A statute containing about the same provisions as are prescribed by subd. 1 of this section was enacted in this state February 7, 1788. *Price v. Price*, 124 N. Y., 596; 37 St. Rep., 147. Its provisions, with slight modifications, have been continued in force to the present time. *Id.*

This Code re-enacts the statute in the same language as used in the Revised Statutes, save that an exception has also been made in favor of a party who has obtained from the court which pronounced the divorce, permission to marry again. *People v. Faber*, 92 N. Y., 146; 1 N. Y. Cr., 115; rev'g 29 Hun, 320; overruling, *People v. Hovey*, 5 Barb., 117.

**Belief.**—This section, as to the matter of defendant's belief, is simply declaratory of that which, by proper interpretation, was the meaning of the prior statute. *People v. Meyer*, 8 St. Rep., 259.

It makes the defendant's belief of the death of the husband or wife one of the elements essential to the exemption. *Id.*

Though the defendant may not have actual knowledge that his wife is liv-

ing, yet, if she is living, and he has reason to, and does, believe that such ~~is~~ the fact, he is guilty of bigamy in case he contracts a second marriage. *Id.*

**Indictment.**—In an indictment for bigamy, it is unnecessary to negative the exceptions, though they are referred to in the section defining the offense — *Fleming v. People*, 27 N. Y., 329. It lies upon the defendant to bring him — self within the exceptions. *Id.*

**Defense.**—An invalid foreign divorce is no defense to an indictment for bigamy against a citizen of this state. *People v. Baker*, 76 N. Y., 78.

It is no defense that the first marriage has been dissolved subsequently to the second marriage. *Baker v. People*, 2 Hill, 325.

**§ 300. Indicting for bigamy.**—An indictment for bigamy may be found in the county in which the defendant is arrested, and the like proceedings, including the trial, judgment, and conviction, may be had in that county, as if the offense were committed therein.

See preceding section; section 376, *post*.

The trial of an indictment for bigamy cannot be had in a county where the offense was not committed nor the prisoner apprehended. *Collins v. People*, 1 Hun, 610; 4 T. & C., 77.

In such case, the indictment must show his apprehension in the county in which he is indicted. *Houser v. People*, 46 Barb., 33. The omission of such an averment is not a defect of form, but of substance. *Id.*

**§ 301. Punishment of consort.**—A person who knowingly enters into a marriage with another, which is prohibited to the latter by the foregoing provisions of this chapter, is punishable by imprisonment in a penitentiary or state prison, for not more than five years, or by a fine of not more than one thousand dollars, or both.

**Re-enactment.**—This enactment is taken from section 12, art. 2, title 5, chap. 1, part 4 of Revised Statutes. *People v. Lake*, 110 N. Y., 63; 10 St. Rep., 381.

**Knowledge.**—To constitute the crime, an unmarried person must knowingly marry the husband or wife of another, etc. *Sauser v. People*, 8 Hun, 304.

**Indictment.**—Sufficiency of allegations as to prior marriage in an indictment for marrying a married person. *Id.*

**Venue.**—The trial of an indictment under this section must be had in the county where the marriage ceremony was performed. *Blake v. Everman*, 56 Hun, 454; 31 St. Rep., 355; 10 N. Y. Supp., 74.

**§ 302. Incest.**—When persons, within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by imprisonment for not more than ten years.

**Application.**—The statute is only applicable to cases in which the sexual intercourse is by mutual consent. *People v. Harriden*, 1 Park., 346.

Where it is accomplished by force, it is punishable only as rape. *Id.*

This statute was designed to embrace only cases of sexual intercourse between relations within the prohibited degrees, not coming within the statute in respect to the crime of rape. *Id.*

The provisions of this section apply to carnal intercourse between a father and his illegitimate daughter. *People v. Lake*, 110 N. Y., 63; 10 St. Rep., 381.

**Double crime.**—A party cannot, by the same act, commit both incest and rape. *Iowa v. Thomas*, 21 Abb. L. J., 498.

**Indictment.**—The omission of the middle name of the female, in the indictment, is not a material variance, when there is no question as to her identity. *People v. Lake*, 110 N. Y., 63; 10 St. Rep., 381.

**§ 303. Sodomy.**—A person who carnally knows in any manner any animal or bird; or carnally knows any male or female person by the anus or by or with the mouth; or voluntarily submits to such carnal knowledge; or attempts sexual intercourse with a dead body, is guilty of sodomy, and is punishable with imprisonment for not more than twenty years.

This act shall take effect on the first day of September, eighteen hundred and ninety-two, but nothing herein contained applies to an offense committed or other act done at any time before the day when this act takes effect. Such an offense must be punished according to, and such act must be governed by, the provisions of law existing when it is done or committed in the same manner as if this act had not been passed. An offense specified in this act under its provisions, committed after the beginning of the day when this act takes effect, must be punished according to the provisions of this act and not otherwise. The act referred to is chapter 325 of 1892.

Am'd by chapter 81 of 1886.

This amendment substituted the present, for the original, section upon the same subject.

Am'd by chapter 325 of 1892.

This amendment substituted the words "by the anus, or by or with the mouth," for the words "in any manner contrary to nature;" also the word "sodomy" for the words "the detestable and abominable crime against nature," and omitted the statement of the minimum limit of punishment.

See section 280, *ante*.

**§ 304. Penetration sufficient.** — Any sexual penetration, however slight, is sufficient to complete the crime specified in the last section.

## CHAPTER VI.

### *Violating Sepulture and the Remains of the Dead.*

- SECTION 305.** Right to direct disposal of one's own body after death.  
**306.** Duty of burial.  
**307.** Burial in other states.  
**308.** Dissection when allowed.  
**309.** Unlawful dissection a misdemeanor.  
**310.** Remains after dissection must be buried.  
**311.** Body stealing.  
**312.** Recovering stolen body.  
**313.** Opening grave.  
**314.** Arresting or attaching a dead body.  
**315.** Disturbing funerals.

**§ 305. Right to direct disposal of one's own body after death.**—A person has the right to direct the manner in which his

body shall be disposed of after his death; and also to direct the manner in which any part of his body, which becomes separated therefrom during his lifetime, shall be disposed of; and the provisions of this chapter do not apply to any case where a person has given directions for the disposal of his body or any part thereof inconsistent with those provisions.

As to the right of relatives to control the burial of the dead, see 10 Cent. L. J., 303; *Johnston v. Marinus*, 18 Abb., N. C., 72 and note.

**Dissection.**—A person or his relatives may permit his body to be dissected. *Rowland v. Milier*, 39 St. Rep., 107; 15 N. Y. Supp., 703.

**§ 306. Duty of burial.**—Except in the cases in which a right to dissect it is expressly conferred by law, every dead body of a human being, lying within this state must be decently buried within a reasonable time after death.

The husband has a right to select the permanent place of burial of his wife's body, and is liable for such burial. *Johnston v. Marinus*, 18 Abb. N. C., 72.

See *Rowland v. Miller*, 39 St. Rep., 117; 15 N. Y. Supp., 703.

**§ 307. Burial in other states.**—The last section does not impair any right to carry the dead body of a human being through this state, or to remove from this state the body of a person dying within it, for the purpose of burying the same elsewhere.

**§ 308. Dissection, when allowed.**—The right to dissect the dead body of a human being exists in the following cases:

1. In the cases prescribed by special statutes;
2. Whenever a coroner is authorized by law to hold an inquest upon the body, so far as such coroner authorizes dissection for the purposes of the inquest, and no further;
3. Whenever and so far as the husband, wife or next of kin of the deceased, being charged by law with the duty of burial, may authorize dissection for the purpose of ascertaining the cause of death, and no further;
4. Whenever any district attorney in this state, in the discharge of his official duties, shall deem it necessary, he may exhume, take possession of, and remove the body of a deceased person, or any portion thereof, and submit the same to a proper physical or chemical examination, or analysis, to ascertain the cause of death, and the same shall be made on the order of any justice of the supreme court of this state, or the county judge of the county in which such dead body shall be, which order shall be made on the application of the district attorney with or without notice to the relatives of the deceased person, or to any person or corporation having the legal charge of such body, as the court may direct. Said district attorney shall have power to direct the sheriff, constable or other peace officer in this state, or to employ such person or persons as he may deem necessary to assist him in

exhuming, removing, obtaining possession of and examining physically or chemically such dead body or any portion thereof. The expense therefor shall be a county charge, to be paid by the county treasurer on the certificate of the district attorney.

Am'd by chap. 500 of 1889.

This amendment added subd. 4 of the present section.

See section 773 of Code of Criminal Procedure.

The case of *People v. Fitzgerald*, 43 Hun, 35; 6 St. Rep., 599, was reversed in 6 St. Rep., 828; 105 N. Y., 152; 5 N. Y. Cr., 342; but the dissenting opinion was approved and concurred in by the court of appeals.

Dissection by order of the coroner is expressly authorized. *People v. Fitzgerald*, 6 St. Rep., 828; 105 N. Y., 152; 5 N. Y., Cr., 354.

A coroner has authority to employ a physician to aid in a *post mortem* examination. *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 47; 5 N. Y. Cr., 342; *Rhodes v. Brandt*, 21 Hun, 1. He has a discretion to determine whether any persons, and what persons, besides the surgeons, may be present. *Id.*; *Cresfield v. Perine*, 15 Hun, 202; aff'd in 81 N. Y., 622, upon opinion of court below.

**§ 309. Unlawful dissection, a misdemeanor.**—A person who makes, or causes or procures to be made, any dissection of the body of a human being, except by authority of law, or in pursuance of a permission given by the deceased, is guilty of a misdemeanor.

**§ 310. Remains after dissection must be buried.**—In all cases in which a dissection has been made, the provisions of this chapter, requiring the burial of a dead body, and punishing interference with or injuries to it, apply equally to the remains of the body dissected, as soon as the lawful purposes of such dissection have been accomplished.

**§ 311. Body stealing.**—A person who removes the dead body of a human being, or any part thereof, from a grave, vault, or other place, where the same has been buried, or from a place where the same has been deposited while awaiting burial, without authority of law, with intent to sell the same, or for the purpose of dissection, or for the purpose of procuring a reward for the return of the same, or from malice or wantonness, is punishable by imprisonment for not more than five years, or by a fine not exceeding one thousand dollars, or both.

The case of *People v. Fitzgerald*, 43 Hun, 35; 6 St. Rep., 599, was reversed in 105 N. Y., 152; 5 N. Y. Cr., 342; 6 St. Rep., 828. The dissenting opinion in this case was fully approved and virtually concurred in by the court of appeals.

**Extent.**—This section describes every kind of "body stealing" known to the law. *People v. Fitzgerald*, 105 N. Y., 151; 5 N. Y. Cr., 353; 6 St. Rep., 828; rev'g 43 Hun, 35; 6 St. Rep., 599.

**Addition to Revised Statutes.**—The addition, inserted in this section, "Or for the purpose of obtaining a reward for the same," is the only substantial change made, since the Revised Statutes, in the definition of this offense. *Id.*

**Application.**—This section was not intended to apply to exhumations made by legally constituted public authorities, for the purpose of ascertaining

whether crime has been committed in producing the death of the person exhumed. *Id.*

**Authority of law.**—Absence of authority of law is necessary to constitute an offense under this section. *People v. Fitzgerald*, 43 Hun, 48; 5 N. Y. Cr., 343; 6 St. Rep., 599.

If such removal is made with authority of law, no crime can be predicated of the act. *Id.*

If made without authority of law, then, in order to constitute the crime, it must be found as a fact that it was made with intent to sell the body, or for the purpose of dissection, or for the purpose of procuring a reward for the return of the same, or from malice or wantonness. *Id.*

**Removal from cemetery.**—There is no law which prohibits the removal of human remains from a cemetery for a lawful purpose and placing them elsewhere. *Matter of Board of Street Opening*, 45 St. Rep., 216.

A cemetery, which gives permits for burials without granting any interest in the lots, can at any time remove the remains of the dead and place them in a suitable manner in some other cemetery. *Id.* But it cannot remove them and leave them exposed. *Id.*

See *People v. Thomsen*, 3 N. Y. Cr., 562; 21 W. Dig., 346.

**§ 312. Receiving stolen body.**—A person who purchases, or receives, except for the purpose of burial, the dead body of a human being, or any part thereof, knowing that the same has been removed contrary to the last section, is punishable by imprisonment for not more than three years.

**§ 313. Opening grave.**—A person who opens a grave or other place of interment, temporary or otherwise, or a building wherein the dead body of a human being is deposited while awaiting burial, without authority of law, with intent to remove the body, or any part thereof, for the purpose of selling it or demanding money for the same, or for the purpose of dissection, or from malice or wantonness, or with intent to steal or remove the coffin or any part thereof, or anything attached thereto, or any vestment, or other article interred, or intended to be interred with the dead body, is punishable by imprisonment for not more than two years, or by a fine of not more than two hundred and fifty dollars, or by both.

See notes under section 311, *ante*.

It was held to be no offense under the former statute, where the father caused the body of his child to be disinterred, and a thigh bone removed, in order that it might be used as evidence in an action for malpractice. *Rhodes v. Brandt*, 21 Hun, 1.

**§ 314. Arresting or attaching dead body.**—A person who arrests or attaches the dead body of a human being upon any debt or demand whatever, or detains or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor.

In times gone by, dead bodies were arrested or attached for debt, and held until the friends or relatives satisfied the creditor by discharging the obligation. *Rowland v. Miller*, 39 St. Rep., 117; 15 N. Y. Supp., 703. Statutory provisions were found necessary to stop this pernicious practice. *Id.* This section furnishes such prohibition. *Id.*



§ 315. **Disturbing funerals.**—A person who, without authority of law, obstructs or detains any persons engaged in carrying or accompanying the dead body of a human being to a place of burial, is guilty of a misdemeanor.

## CHAPTER VII.

*Indecent Exposures, Obscene Exhibitions, Books and Prints, and Bawdy and Other Disorderly Houses.*

SECTION 316. **Exposure of person.**

317. Advertising or sale of obscene publications, pictures, figures, etc., prohibited.

318. Indecent articles, etc.

319. Mailing, carrying obscene print, etc.

320. Warrant to sheriff to search, etc.

321. Physician's instruments.

322. Keeping or lease of disorderly house, etc.

§ 316. **Exposure of person.**—A person who willfully and lewdly exposes his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another so to expose himself, is guilty of a misdemeanor.

**Indecent exposure.**—The offense of indecent exposure, under the statute, may be jointly committed where several persons agree in concert to do the acts, which constitute the crime, for the purpose of making a common exhibition. People ex rel. Lee v. Bixby, 4 Hun, 636; 67 Barb., 222.

Where a number of women made an indecent exposure of their persons for hire, in the presence of men, in a room in the rear of the second story of a house of prostitution, though the doors, windows and shutters were closed, it was held to constitute an offense against the former statute. People ex rel. Lee v. Bixby, 4 Hun, 636; 67 Barb., 222. The room, in which it occurred, was held to be a "public place." Id.

Any place may be made public by a temporary assemblage. People ex rel. Lee v. Bixby, 4 Hun, 636; 67 Barb., 222.

**Intent.**—In Miller v. People, 5 Barb., 203, it was held that the intent was a material ingredient in the offense, and a question for the jury.

§ 317. **Advertising or sale of obscene publications, pictures, figures, etc., prohibited.**—A person who sells, lends, gives away or shows, or offers to sell, lend, give away, or show, or has in his possession with intent to sell, lend or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, story paper, writing, paper, figure, image, matter, article or thing, or who writes, prints, pub-



lishes or utters, or causes to be written, printed, published or uttered, any advertisement or notice of any kind, giving information, directly or indirectly stating or purporting so to do, where, how, of whom, or by what means any or what purports to be any, obscene, lewd, lascivious, filthy, disgusting or indecent book, picture, writing, paper, figure, image, matter, article or thing named in this section can be purchased, obtained or had, or who has in his possession, any slot machine or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene, indecent or immoral, or other lewd, obscene, indecent or immoral drawing, image, article or object, or who shows, advertises or exhibits the same, or causes the same to be shown, advertised or exhibited, or who buys, owns or holds any such machine with the intent to show, advertise or in any manner exhibit the same, or who

Am'd by chap. 781 of 1900.

2. Prints, utters, publishes, sells, lends, gives away or shows, or has in his possession with intent to sell, lend, give away or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; or who

3. In any manner, hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, or any of them, is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment, or be fined not less than fifty dollars nor more than one thousand dollars, or both, for each offense.

Am'd by chapter 380 of 1884.

This amendment introduced, after the words "indecent book," the words "magazine, pamphlet, newspaper, story paper," and added subds. 2, 3 and 4, to the original section.

Am'd by chapter 692 of 1837.

This amendment materially enlarged the scope of the provisions of the section, as amended in 1884, omitted the third subd. except as incorporated in the other subdivisions, and attached a specific punishment.

See section 297, *ante*.

**Extent.**—The words of this section include all pictures, drawings and photographs of an indecent or immoral tendency, and intend to include as obscene such as are offensive to chastity, demoralizing and sensual in their character by exposing what purity and decency forbid to be shown, and productive of libidinous and lewd thoughts and emotions. *People v. Muller*, 32 Hun, 211; 2 N. Y. Cr., 283; 19 W. Dig., 256.

This section makes the selling of an obscene and indecent picture a misdemeanor. *People v. Muller*, 96 N. Y., 413; 2 N. Y. Cr., 380.

There is no exception by reason of any special interest in making the sale. *Id.*

The statute does not undertake to define obscene or indecent pictures or publications. *Id.*

The words are themselves descriptive. *Id.*

**Object.**—The object of this section was to suppress the traffic in obscene publications, and to protect the community against the contamination and pollution arising from their exhibition and distribution. *Id.*

**Construction.**—This section, while it should have a reasonable and not a strained construction, ought, at the same time, to have a practical interpretation by the court and jury, as will subserve the important purpose of its enactment. *Id.*

**Test.**—The test of an obscene book is whether the tendency of the matter is to deprave or corrupt those whose minds are open to such immoral influences and who might come into contact with it. *Id.*

A proper test of obscenity in a painting or statue, *it seems*, is whether its motive, so to speak, as indicated by it, is pure or impure; whether it is naturally calculated to excite in a spectator impure imaginations, and whether the

other incidents and qualities, however attractive, are merely accessory to this as the primary or main purposes of the representation. *Id.*

As to the test of obscenity, see *United States v. Bennett*, 2 N. Y. Cr., 284, note.

See note in 2 N. Y. Cr., 381.

Mere nudity of the human form in painting or sculpture is not obscenity. *People v. Muller, ante.*

Whether a publication is obscene or not, may, in some cases, depend on circumstances. *Id.*

**Expert.**—The question of obscenity or indecency is one falling within the range of ordinary intelligence and so does not require an expert in literature or art to determine. *Id.*

**Question for jury.**—The pictures or photographs are to be exhibited to the jury. *People v. Muller*, 32 Hun, 211; 2 N. Y., Cr., 283; 19 W. Dig., 256.

Whether or not they are obscene is a question for the jury. *Id.*

**Defense.**—It is no defense to show that they are photographs of pictures publicly exhibited in other countries. *Id.*

It is no defense that the obscene matter was sold to a person not liable to be injured by it, or that it was a picture, in respect to execution, of distinguished merit. *People v. Muller*, 96 N. Y., 413; 2 N. Y. Cr., 380.

**Indictment.**—As to the sufficiency of an indictment for uttering, writing and publishing a lewd and indecent paper, see *People v. Hallenbeck*, 52 How., 502.

In an indictment under this section, it is not enough to characterize the publication complained of, but the contents of the publication must be set forth in order that it may appear on the face of the indictment that it is of the character charged. *People v. Dahany*, 45 St. Rep., 98; 63 Hun, 580; 18 N. Y. Supp., 467.

It is no objection to a count otherwise correct that the printed matter is shown to have been printed in a newspaper. *Id.*

### **§ 318. Advertising, selling, etc., recipes, drugs, etc., to cause abortion or prevent conception, etc., prohibited.**

—A person who sells, lends, gives away, or in any manner exhibits or offers to sell, lend or give away, or has in his possession with intent to sell, lend or give away, or advertises, or offers for sale, loan or distribution, any instrument or article, or any recipe, drug or medicine for the prevention of conception, or for causing unlawful abortion, or purporting to be for the prevention of conception, or for causing unlawful abortion, or advertises, or holds out representations that it can be so used or applied, or any such description as will be calculated to lead another to so use or apply any such article, recipe, drug, medicine or instrument, or who writes or prints or causes to be written or printed, a card, circular, pamphlet, advertisement or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means such an instrument, article, recipe, drug or medicine can be purchased or obtained, or who manufactures any such instrument, article, recipe, drug or medicine, is guilty of a misdemeanor, and shall be liable to the same penalties as provided in section three hundred and seventeen of this Code.

Am'd by chap. 692 of 1887.

This amendment enlarged the scope of the original section so as to include "recipe" and the representing or influencing the use of the prohibited articles; and also annexed a punishment.

Mailing a circular, recommending and advertising articles for the prevention of conception and for procuring abortions, and stating where the articles can be purchased, is an offense under this and the following section. *Halstead v. Nelson*, 36 Hun, 153.

**§ 319. Mailing, carrying obscene print, etc.**—A person who deposits, or causes to be deposited, in any postoffice within the state, or places in charge of an express company, or of a common carrier, or other person, for transportation, any of the articles or things specified in the last two sections, or any circular, book, pamphlet, advertisement, or notice relating thereto, with the intent of having the same conveyed by mail or express, or in any other manner, or who knowingly or willfully receives the same, with intent to carry or convey, or knowingly or willfully carries or conveys the same, by express, or in any other manner except in the United States mail, is guilty of a misdemeanor.

See note under preceding section.

**§ 320. Warrant to sheriff to search, etc.**—A magistrate having jurisdiction to issue warrants in criminal cases, upon complaint that any person within his jurisdiction is offending against the provisions of this chapter, supported by oath or affirmation, must issue a warrant, directed to the sheriff or to any constable, marshal, or police officer within the county, directing him to search for, seize, and take possession of any of the articles specified in this chapter, in the possession of the person against whom complaint is made. The magistrate must immediately transmit every article seized by virtue of the warrant to the district attorney of the county, who must, upon the conviction of the person from whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had.

**§ 321. Physician's instruments.**—An article or instrument, used or applied by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease, is not an article of indecent or immoral nature or use, within this chapter. The supplying of such articles to such physicians, or by their direction or prescription, is not an offense under this chapter.

**§ 322. Keeping disorderly houses, et cetera.**—A person who keeps a house of ill-fame or assignation of any description, or a house or place for persons to visit for unlawful sexual intercourse, or for any lewd, obscene or indecent purpose, or disorderly house, or a house commonly known as a stale beer dive, or any place of public resort by which the peace, comfort, or decency of a neighborhood is habitually disturbed, or who requests, advises or procures any female to become an inmate of any such house or place, or who as agent or owner, lets a building or any portion of a build-

ing, knowing that it is intended to be used for any purpose specified in this section, or who permits a building or a portion of a building to be so used, is guilty of a misdemeanor. This section shall be construed to apply to any part or parts of a house used for any of the purpose herein specified.

Am'd by chap. 270, Laws 1905. Takes effect Sept. 1, 1905.

Am'd by chap. 690 of 1887.

This amendment introduced, into the original section, after the words "disorderly house," the words, "or a house commonly known as a stale beer dive," and added the provision as to construction.

See section 621, *post*; section 899 of Code of Criminal Procedure.

**Before Code.**—Prior to the enactment of the Penal Code, the keeping of a disorderly house was a misdemeanor, at common law. *People v. Hatter*, 23 N. Y. Supp., 690.

The Penal Code made it a statutory offense. *Id.*

**Disorderly house.**—This section forbids the keeping of disorderly houses. *People v. Klock*, 16 St. Rep., 565; 48 Hun, 277.

In order to constitute a disorderly house, it is not necessary that it is so kept as to disturb the peace of the general public or of the particular neighborhood. *Barnesciotta v. People*, 10 Hun, 139, *aff'd* in 69 N. Y., 612, without opinion.

It is not necessary, in order to constitute the offense of keeping a disorderly house, that the public should be disturbed by noise. *King v. People*, 83 N. Y., 590, or that the immoral practice should be open to public observation. *Id.*

An opera house may be so conducted as to render its owner indictable for keeping a disorderly house under this section. *Berry v. People*, 1 N. Y. Cr., 43. It is not necessary to show that it is a nuisance, by reason of noise, etc., to the whole neighborhood. It is enough if it is shown that it is so kept as to be injurious to public morals. *Id.*

The recorder of the city of Gloversville has jurisdiction to hear and determine a charge of keeping a disorderly house. *People v. Hulett*, 39 St. Rep., 647; 15 N. Y. Supp., 630.

**Bawdy house.**—A bawdy house may be a disorderly house, and it is so whenever it is shown to be a house of prostitution, open promiscuously to the public, and to which large numbers of persons resort for purposes of prostitution. *Barnesciotta v. People*, 10 Hun, 139; *Jacobowsky v. People*, 6 *id.*, 524.

If a house is the resort of prostitutes plying their vocation there, to the knowledge of the owner or occupant, the house is a bawdy house. *King v. People*, 83 N. Y., 591.

The keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house. *Id.*

The keeping of a bawdy house was a misdemeanor at common law, and is now made so by this section. *People ex rel. Van Houten v. Sadler*, 97 N. Y., 146; 3 N. Y. Cr., 473; *People v. Miller*, 34 Hun, 83; 3 N. Y. Cr., 480.

A person, who keeps a bawdy house, can be arrested, and dealt with as a disorderly person, under section 899 of Code of Criminal Procedure, or can be indicted for keeping such house under this section. *People ex rel. Van Houten v. Sadler*, *ante*. Both proceedings can be taken for same act. *Id.* See also *People v. Miller*, 38 Hun, 84; 3 N. Y. Cr., 481.

The destruction of a bawdy house and its furniture is an unlawful mode of abating it. *Ely v. Supervisors, etc.*, 36 N. Y., 297; *Lawton v. Steele*, 29 St. Rep., 581; 119 N. Y., 239.

It is competent to prove the character of the persons who were in the habit of visiting the house by reputation. *People v. Hulett*, 39 St. Rep., 648; 15 N. Y. Supp., 630. Their characters are proper evidence to be considered by the jury in determining the character of the house. *Id.*

**Gambling house.**—The playing of cards in a house does not, of itself, make it a gambling house, unless such playing is for money. *King v. People*, 83 N. Y., 591.

A house, where gamblers resort to play for money and do so play, to the knowledge of the keeper, is a gambling house. *Id.*

**Landlord.**—Whether a person keeps the house himself, or leases it to another to be used as a house where people can have unlawful sexual intercourse he is equally guilty. *People v. O'Melia*, 51 St. Rep., 333; 22 N. Y. Supp. 465.

In order to charge the principal under this section, it must be shown that he had personal knowledge of the facts. *Arras v. Richardson*, 24 St. Rep., 742; 5 N. Y. Supp., 755. That the tenant previously told the agent that he intended to make an unlawful use of the property is not sufficient, unless the lessor had knowledge of, or was privy in some way to the wrong. *Id.*

The owner's guilty knowledge of such use must be shown. *People v. Wallach*, 39 St. Rep., 531; 15 N. Y. Supp., 226. It may be shown by circumstantial evidence. *Id.*

The evidence was held, in this case, to be sufficient to charge defendant with knowledge of the use to which the premises were put.

**Jurisdiction.**—Local statutes, applicable to a city, will not affect the authority of the grand jury of the county, in which such city is situated, to indict, or the court of sessions to try, a person for keeping a disorderly house in such city in violation of a statute of the state. *People v. Hatter*, 22 N. Y. Supp., 688.

**Indictment.**—The indictment, in *People v. Klock*, 16 St. Rep., 565; 4 Hun, 277, was held not to contain facts sufficient to charge a crime under this section.

A complaint charging a person with keeping a house for persons to visit for obscene and indecent purposes, and by which the peace, comfort and decency of the neighborhood is habitually disturbed, is sufficient under this section. *People v. Hulett*, 39 St. Rep., 647; 15 N. Y. Supp., 630.

## CHAPTER VIII

### *Lotteries.*

**SECTION 323.** "Lottery" defined.

324. Lottery declared a public nuisance.

325. Contriving, drawing, etc., lottery.

326. Selling lottery tickets.

327. Advertising lotteries.

328. Offering property for disposal dependent upon the drawing of any lottery.

329. Keeping office, etc., for registry.

330. Insuring lottery tickets, etc.

331. Advertising offers to insure lottery tickets.

332. Property offered for disposal in lotteries, forfeited.

333. Letting building for lottery purposes.

334. Lotteries out of this state.

335. Advertisements by persons out of this state.

335a. Offers of gifts, etc., as inducement for sale of articles of food prohibited.

**§ 323. "Lottery" defined.**—A lottery is a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise or by some other name.

**Definition.**—This section defines a lottery with all needful accuracy and precision. *People v. Noelke*, 94 N. Y., 141; 1 N. Y. Cr., 497.

The offenses defined in this and the following sections of this chapter are entirely distinct from those specified in section 344, *post*. *People v. Dewey*, 1 St. Rep., 427.

**Object.**—The object of the statute is to prevent everything in the way of a lottery, raffle or gift enterprise, or kindred subject, by whatever name it may be known, whether it is for children or adults, or designed for any particular class of persons.

ticular season of the year, or however innocent it may be assumed to be in character and effect by the contriver. *People v. Runge*, 3 N. Y. Cr., 88.

**Constitutional.**—The sale in this state of a ticket in a lottery, lawful under the law of another state, and whose tickets under that law may represent value and be property, can be prohibited without violating the provisions of the Federal Constitution. *People v. Noelke*, 94 N. Y., 137; 1 N. Y. Cr., 498.

These provisions do not preclude this state from prohibiting the making, within its jurisdiction, of certain contracts deemed immoral and against public policy. *Id.*

**Lottery, what is.**—The word "lottery" is used, in the statutes forbidding the same, in the ordinary and popular sense. *People v. Noelke*, 29 Hun, 469; 1 N. Y. Cr., 257.

The word "lottery" indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance. *People v. Noelke*, 94 N. Y., 141; 1 N. Y. Cr., 497.

Lotteries, which are the subject of condemnation under the constitution and laws of this state, are schemes where money is paid for the chance of receiving money in return. *Kohn v. Koehler*, 96 N. Y., 367.

A lottery, game or device in the nature of a lottery, is not excluded from the operation of the statute because it also partakes of the nature of a wager. *Wilkinson v. Gill*, 74 N. Y., 67.

Where the design of a contrivance is to distribute by chance, among the people who paid for the chance, the property described, it is a lottery. *People v. Runge*, 3 N. Y. Cr., 88.

For instance, to sell a piece of chewing gum for a penny, which secures a chance to draw a prize in value according to the number upon it. *Id.*

Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, it is a lottery. *Hull v. Ruggles*, 56 N. Y., 427; *Kohn v. Koehler*, 96 *id.*, 367.

Where the purchaser, in consideration of a sum of money paid by him, is permitted to select certain numbers, which, if drawn in the lottery designated, entitles him to a larger sum, such species of gaming or dealing in chances has been held to be in the nature of a lottery, within the prohibition of the statute. *Almy v. McKinney*, 5 St. Rep., 268; *Wilkinson v. Gill*, 74 N. Y., 63; *People v. Noelke*, 94 *id.*, 137.

A concert scheme, devised for the purpose of realizing funds for charities, each ticket to which, by its express terms, entitles the bearer to admission to the concert, and to whatever gift may be awarded to its number, is a lottery. *Negley v. Devlin*, 12 Abb. N. S., 210.

Where a government, for the purpose of obtaining a loan, issues certain bonds by which it obligates itself to pay the principal with interest and a premium named, and also any additional sum which the holder may become entitled to in case the number of his bond draws a prize in a drawing to be had as specified, it is not a lottery. *Kohn v. Koehler*, 96 N. Y., 362.

**Another state.**—Lotteries, authorized by the laws of another state, are unlawful here. *Grover v. Morris*, 73 N. Y., 473.

All lottery schemes are illegal under our statute, whether they originate in this or another state. *People v. Noelke*, 1 N. Y. Cr., 252; 29 Hun, 469.

**§ 324. Lottery declared a public nuisance.**—A lottery is unlawful and a public nuisance.

See notes under preceding section.

See section 385, *post*; section 10, art. 1 of State Constitution.

This section applies to lotteries drawn in another state, whether authorized or not by such state. *Goodrich v. Houghton*, 55 Hun, 529; 29 St. Rep., 907; 9 N. Y. Supp., 215. See section 334, *post*; *People v. Noelke*, 94 N. Y., 137.

Any agreement made in this state to gamble in the legalized lotteries of another state is void in this state. *Goodrich v. Houghton*, 134 N. Y., 115; 45 St. Rep., 764; *People v. Noelke*, 94 N. Y., 137.

See *People v. Dewey*, 33 St. Rep., 427.



**§ 325. Contriving, drawing, etc., lottery.**—A person who contrives, proposes or draws a lottery, or assists in contriving, proposing or drawing the same, is punishable by imprisonment for not more than two years, or by fine of not more than one thousand dollars, or both.

See notes under sections 323 and 324, *ante*.

When a person is indicted under this section for contriving a lottery, it is not necessary to show that any person paid, or agreed to pay, anything for any chance for which the lottery provides. *People v. Runge*, 3 N. Y. Cr., 88.

See *Goodrich v. Houghton*, 134 N. Y., 115; 45 St. Rep., 764.

**§ 326. Selling lottery tickets.**—A person who sells, gives, or in any way whatever furnishes or transfers, to or for another, a ticket, chance, share, or interest, or any paper, certificate, or instrument, purporting to be or to represent a ticket, chance, share, or interest, in or dependent upon the event of a lottery, to be drawn within or without this state, is guilty of a misdemeanor.

Any person, who in any way furnishes to another a share or interest in a lottery, to be drawn within or without the state, is guilty of a misdemeanor. *Goodrich v. Houghton*, 55 Hun, 529; 29 St. Rep., 907; 9 N. Y. Supp., 215; *aff'd*, 134 N. Y., 115; 45 St. Rep., 764.

**Purchase, not an offense.**—This statute does not make the purchase of a lottery ticket a criminal act. *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18. The prohibition is directed against the selling, the advertising or offering for sale, or the insuring of lottery tickets, etc. *Id.*

**Accomplice**—The purchaser of a lottery ticket is not an accomplice of the seller. *People v. Emerson*, 6 N. Y. Cr., 157; 20 St. Rep., 18; 5 N. Y. Supp., 376.

A witness, who has purchased a ticket in a lottery for the purpose of proving the fact of its sale in violation of law, is not an accomplice. *People v. Noelke*, 29 Hun, 469; 1 N. Y. Cr., 252; *aff'd* in 94 N. Y., 137; 1 N. Y. Cr., 498.

**§ 327. Advertising lotteries.**—A person who, by writing or printing, or by circular or letter, or in any other way, advertises or publishes an account of a lottery, whether within or without the state, stating how, when or where the same is to be, or has been, drawn, or what are the prizes therein, or any of them, or the price of a ticket, or any share or interest therein, or where or how it may be obtained, is guilty of a misdemeanor.

See section 334, *post*.

A stockholder of a newspaper corporation cannot be convicted for the publication in its paper of an advertisement of illegal lottery, unless it is shown that he actually and personally did the acts which constituted the offense, or that they were done by the corporation with his permission or by his direction. *People v. England*, 27 Hun, 140.

**Constitutional.**—The act prohibiting the advertisement of lotteries is not unconstitutional. *Hart v. People*, 26 Hun, 396.

**Another state.**—Publishing in this state an account of a lottery to be drawn in another state or country is indictable under the statute, though the lottery is lawful in the place where it is drawn. *People v. Charles*, 3 Denio, 212.

A contract made in this state to advertise a lottery in other states, in the absence of proof that such advertisement is in violation of the laws of those other states, will not be held illegal. *Ormes v. Dauchy*, 82 N. Y., 448. The publi-

cation outside of the state is not within the prohibition of the statute of this state. *Id.*

See *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 5 N. Y. Supp., 876; *Goodrich v. Houghton*, 134 N. Y., 115; 45 St. Rep., 764.

**§ 328. Offering property for disposal dependent upon the drawing of any lottery.**—A person who offers for sale or distribution, in any way, real or personal property, or any interest therein, to be determined by lot or chance, dependent upon the drawing of a lottery within or without this state, or who sells, furnishes, or procures, or causes to be sold, furnished or procured, in any manner, a chance or share, or any interest in property offered for sale or distribution, in violation of this chapter, or a ticket or other evidence of such a chance, share, or interest, is guilty of a misdemeanor.

See *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 5 N. Y. Supp., 876; *Goodrich v. Houghton*, 134 N. Y., 115; 45 St. Rep., 764.

**§ 329. Keeping office, etc., for registry.**—A person who opens, sets up, or keeps, by himself or another person, an office or other place for registering the numbers of tickets in a lottery within or without this state, or for making, receiving or registering any bets or stakes for the drawing, or result of such a lottery, or who advertises or in any way publishes any account of an opening, setting up or keeping of such an office or place, is guilty of a misdemeanor.

In *People v. Jackson*, 3 Denio, 101, it was held that the keeping of a room or place for the sale of tickets in lotteries not authorized by law, was not indictable. But see this section.

See *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 5 N. Y. Supp., 876; *Goodrich v. Houghton*, 134 N. Y., 115; 45 St. Rep., 746.

**§ 330. Insuring lottery tickets, etc.**—A person who insures, or receives any consideration for insuring, for or against the drawing of a ticket, share, or interest in a lottery, or of a number of such a ticket, share or interest, or who receives any valuable consideration upon an agreement to pay money, or deliver property, in the event that a ticket, share, or interest, or a number of such a ticket, share, or interest in a lottery, shall prove fortunate or unfortunate, or shall be drawn or not drawn in a particular way or in a particular order, or who promises or agrees, or offers to pay money, or to deliver property, or to do or forbear to do, any thing for the benefit of any person, with or without consideration, upon any accident or contingency dependent on the drawing thereof, or of any number or ticket therein, is guilty of a misdemeanor.

The insurance of a lottery ticket, though the insurer acts for another merely, is indictable under the statute. *Kemney's case*, 3 C. H. Rec., 58; *Baldwin's case*, *id.*, 96.

See *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 5 N. Y. Supp., 876; *Goodrich v. Houghton*, 134 N. Y., 115; 45 St. Rep., 764.

**§ 331. Advertising offers to insure lottery tickets.—**

A person who, by writing or printing, or by circular or letter, or in any other way, advertises or publishes an offer, notice or proposition, in violation of the last section, is guilty of a misdemeanor.

See *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 5 N. Y. Supp., 876; *Goodrich v. Houghton*, 134 N. Y., 115; 45 St. Rep., 764.

**§ 332. Property offered for disposal in lotteries, forfeited.—**All property offered for sale, or distribution, in violation of the provisions of this chapter, is forfeited to the people of this state, as well before as after the determination of the chance on which the same was dependent. And it is the duty of the respective district attorneys, to demand, sue for and recover, in behalf of the people, all property so forfeited, and to cause the same to be sold when recovered, and to pay the proceeds of the sale of such property, and any moneys that may be collected in any such suit, into the county treasury, for the benefit of the poor.

Order of arrest cannot be granted in an action to recover property, forfeited because used for lottery purposes. *People v. Phillips*, 30 Hun, 554.

See *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 5 N. Y. Supp., 876. *Goodrich v. Houghton*, 134 N. Y., 115; 45 St. Rep., 746.

**§ 333. Letting building for lottery purposes.—**A person who lets or permits to be used any building or portion of a building, knowing that it is intended to be used for any of the purposes declared punishable by this chapter, is guilty of a misdemeanor.

A lease for premises to be used for the sale of lottery tickets is void, and the rent reserved thereon cannot be recovered. *Edelmuth v. McGarren*, 4 Daly, 467.

See *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 5 N. Y. Supp., 876. *Goodrich v. Houghton*, 134 N. Y., 115; 45 St. Rep., 764.

**§ 334. Lotteries out of this state.—**The provisions of this chapter are applicable to lotteries drawn or to be drawn out of this state, whether authorized or not by the laws of the state where they are drawn or to be drawn, in the same manner as to lotteries drawn or to be drawn within this state.

See notes under sections 326 and 327, *ante*.

See *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 5 N. Y. Supp., 876. *Goodrich v. Houghton*, 55 Hun, 529; 29 St. Rep., 907; 9 N. Y. Supp., 215; *aff'd*, 134 N. Y., 115; 45 St. Rep., 764.

**§ 335. Advertisements by persons out of the state.—**The provisions of sections 327 and 331 are applicable, whenever the advertisement was published, or the letter or circular sent or delivered through or in this state, though the person causing or procuring the same to be published, sent or delivered, was out of the state at the time of so doing.

See *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 5 N. Y. Supp., 876.

**§ 335a. Offer of gifts, etc., as inducement for sale of articles of food, prohibited.**—No person shall sell, exchange or dispose of any article of food or offer or attempt to do so upon any representation, advertisement, notice or inducement that any thing other than what is specifically stated to be the subject of the sale or exchange, is or is to be delivered or received or in any way connected with or a part of the transaction as a gift, prize, premium or reward to the purchaser.

Any person violating any of the provisions of the foregoing section shall be deemed guilty of a misdemeanor and, in addition thereto, shall be liable to a penalty of twenty-five dollars, to be recovered with costs by any person suing therefor in his own name.

This section was added by chapter 691, of 1887.

This section made it a misdemeanor to sell an article of food with an understanding or promise that something else is to be given to the purchaser by way of reward. *People v. Gillson*, 109 N. Y., 389; 16 St. Rep., 185; *People v. Rosenberg*, 67 Hun, 53; 51 St. Rep., 189. It was held to be unconstitutional and void. *Id.*

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## CHAPTER IX.

### *Gaming.*

- SECTION 336.** Keeping gambling apparatus in certain places.  
**337.** Punishment.  
**338.** Gambling apparatus declared a nuisance.  
**339.** Winning at play by fraudulent means.  
**340.** Exacting payment of money won at play.  
**341.** Winning or losing upward of twenty-five dollars.  
**342.** Witness' privilege.  
**343.** Keeping place for gambling or making wagers depending on chance or lot, or on future price of stocks, etc., a misdemeanor.  
**344.** Common gambler, etc.  
**345.** Seizure of gambling implements authorized.  
**346.** Such implements to be destroyed or delivered to district attorney.  
**347.** Such implements to be destroyed upon conviction.  
**348.** Persuading another person to visit gambling places.  
**349.** Certain officers directed to prosecute offenses under this chapter.  
**350.** Duty of masters to suppress gambling on board their vessels.  
**351.** Bets, etc., on horse races, etc.  
**352.** Racing of animals for stake.

The meaning of the word "gaming," as defined in this chapter, was considered in *People v. Todd*, 51 Hun, 446; 21 St. Rep., 400; 4 N. Y. Supp., 26; N. Y. Cr., 220.

Sections 336-342, inclusive, separately and collectively, relate to games, *nomine*, games of chance, wholly fortuitous and not connected in any other way than with the factors of the game itself, and illegal, *per se*, without reference to the intention. Id.

It does not follow that a wager, though void and non-enforceable as a contract, constitutes a crime under this chapter, or becomes a criminal offense and punishable as such, under its provisions. Id.

**§ 336. Keeping gambling apparatus in certain places.**— It is unlawful to keep or use any table, cards, dice or any other article or apparatus whatever, commonly used or intended to be used in playing any game of cards or faro, or other game of chance, upon which money is usually wagered, at any of the following places:

1. Within a building, or the appurtenances or grounds connected with any building, in which a court of justice usually holds its sessions; or a building, any part of which is usually occupied by a religious corporation, or an incorporated benevolent, charitable, scientific or missionary society, or an incorporated academy, high school, college or other institution of learning, a library company, or building and mutual loan company;

2. Within any building, or the appurtenances or grounds connected with any building, while votes are received or canvassed therein at any election for an officer of this state, or of the United States; or while any public meeting is held therein;

3. Within the distance of one mile from the grounds upon which any training, review, drill or exercise of a military organization, created or permitted by the laws of this state, is proceeding or upon which any public fair, exhibition, exercise or meeting is held in the open air; or

4. Within any vessel lying in, or navigating, any of the waters of this state; or owned or navigated by, or for account of, any corporation created by the laws of this state.

See subd. 3 of section 275, *ante*.

See notes under section 240, *post*.

**Crime.**—Gambling is forbidden, and is a crime within the meaning of this term as defined by section 8, *ante*. *Steinhart v. Farrell*, 8 St. Rep., 292.

**Re-enactment.**—This Code, in reference to gaming, is substantially a re-enactment of the provisions of the Revised Statutes upon this subject. *People v. Todd*, 51 Hun, 450; 21 St. Rep., 400; 6 N. Y. Cr., 220; 4 N. Y. Supp., 26.

The provisions of section 9 of 3 R. S. (7th ed.), 1962, are not inconsistent with this section and section 240, *post*. *Rockwood v. Oakfield*, 2 St. Rep., 335.

**What is.**—Playing games for beer and cigars, is gambling. *Hitchins v. People*, 29 N. Y., 456. So is playing pool and bagatelle upon terms that the loser should pay for the use of the gaming apparatus, or for drinks. *People v. Cutler*, 28 Hun, 465; 1 N. Y. Cr., 178.

Playing the rub to determine which party shall pay for the use of the table, was held, in *People v. Sergeant*, 8 Cow., 189, not to be gaming.

Dealing in options is not *per se* gaming or betting. *Story v. Solomon*, 71 N. Y., 420.

**§ 337. Punishment.** A person who knowingly violates the last section is guilty of a misdemeanor.

See *People v. Todd*, 51 Hun, 448; 21 St. Rep., 401; 4 N. Y. Supp., 26.

**§ 337a. Keeping slot machines.**—Any person who has in his possession, or under his control, or who permits to be placed, maintained or kept in any room, space, inclosure or building, owned, leased or occupied by him, or under his management or control, any machine, apparatus or device, into which may be, or might have been, inserted any piece of money or other object, and from which, as a result of such insertion, or as a result of such insertion and the application of physical or mechanical force, may issue, or might have issued, any piece or pieces of money, or any check or memoranda calling for any money, and which machine, apparatus or device is commonly known as a slot machine, is guilty of a misdemeanor.

Added by chap. 655 of 1899. In effect May 25, 1899.

**§ 337b. Seizures of slot machines and arrests thereon.**—It shall be the duty of every officer authorized to make arrests to



seize every machine, apparatus or device answering to the description contained in the last section and to arrest the person actually or apparently in possession or control thereof or of the premises in which the same may be found, if any such person be present at the time of the seizure, and to bring the machine, apparatus or device, and the prisoner, if there be one, before a committing magistrate.

Added by chap. 655 of 1899. In effect May 25, 1899.

**§ 337c. Slot machines to be destroyed by magistrates in certain cases.**—The magistrate before whom any machine, apparatus or device is brought pursuant to the last section must, if there be a prisoner, and if he shall hold such prisoner, cause the machine, apparatus or device to be delivered to the district attorney of the county to be used as evidence on the trial of the said prisoner. If there be no prisoner or if the magistrate does not hold the prisoner, he must cause the immediate destruction of the machine, apparatus or device.

Added by chap. 655 of 1899. In effect May 25, 1899.

**§ 337d. Slot machines to be destroyed by the trial court in certain cases.**—It shall be the duty of the district attorney of the county to see that every person held in pursuance of the last section shall be brought to trial within thirty days from the date of his final examination before the magistrate; and the machine, apparatus or device shall be produced in court on the trial. It shall be the duty of the trial court, after the disposition of the case, and whether the defendant be convicted, acquitted or fails to appear for trial, to cause the immediate destruction of the machine, apparatus or device.

Added by chap. 655 of 1899. In effect May 25, 1899.

**§ 338. Gambling apparatus declared a nuisance.**—An article or apparatus maintained or kept in violation of section three hundred and thirty-six, is a public nuisance.

See *People v. Todd*, 51 Hun, 448; 21 St. Rep., 401; 4 N. Y. Supp., 26.

**§ 339. Winning at play by fraudulent means.**—A person who, by any fraud, or false pretense whatsoever, while playing at any game, or while having a share in any wager played for, or while betting on the sides or hands of such as play, wins or acquires to himself, or to any other, a sum of money or other valuable thing, is guilty of a misdemeanor.

See section 57 of Code of Criminal Procedure.

See *People v. Todd*, 51 Hun, 449; 21 St. Rep., 401; 4 N. Y. Supp., 26.

**§ 340. Exacting payment of money won at play.**—A person who exacts or receives from another, directly or indirectly, any money or other valuable thing, by reason of the same having been won by playing at cards, faro or any other game of chance, or any bet or wager whatever upon the hands or sides of players, forfeits five times the value of the money or thing so exacted or received, to be recovered in a civil action, by the persons charged with the support of the poor in the place where the offense was committed, for the benefit of the poor.

The provisions of this section and section 336, *ante*, are not inconsistent with section 9 of 3 R. S. (7th Ed.), 1962. *Rockwood v. Oakfield*, 2 St. Rep., 835.

Nor is said section of the Revised Statutes repealed by sections 725 and 726, *post*. *Id*.

See *Gilpin v. Daly*, 59 Hun, 418; 36 St. Rep., 669; 13 N. Y. Supp., 393; *People v. Todd*, 51 Hun, 449; 21 St. Rep., 401; 4 N. Y. Supp., 26.

**§ 341. Winning or losing upward of twenty-five dollars.**—A person who wins or loses at play or by betting, at any time, the sum or value of twenty-five dollars or upwards, within the space of twenty-four hours, is punishable by a fine not less than five times the value or sum so lost, or won, to be recovered in a civil action, by the persons charged with the support of the poor in the place where the offense was committed, for the benefit of the poor.

See section 57 of Code of Criminal Procedure.

As to the sufficiency of a complaint in such an action, see *Arrieta v. Morrissey*, 1 Abb. N. S., 439; *Langworthy v. Broomley*, 29 How., 92.

See *People v. Todd*, 51 Hun, 449; 21 St. Rep., 401; 4 N. Y. Supp., 26; *Steinhart v. Farrell*, 3 St. Rep., 292.

**§ 342. Witnesses' privilege.**—No person shall be excused from attending and testifying or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this chapter, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

Amended chap. 649, Laws 1904. Took effect May 9, 1904.

See *Steinhart v. Farrell*, 3 St. Rep. 292.

**Effect.**—This section does not, in any effect, abridge the efficiency of what

had previously been enacted upon this subject. *Glavin v. Daly*, 59 Hun, 418; 36 St. Rep., 668; 13 N. Y. Supp., 892.

The intention was to combine in one general section all that had previously existed in sections 18 and 19 of 1 R. S., 668. *Id.*

This section, by its general language, was made to include all the participants in, and parties to, gaming transactions. *Id.*

It includes all possible investigations and proceedings. *Id.*

In what cases.—The investigation or proceeding mentioned in the last clause of this section can only be such as may be taken for the examination, indictment or punishment of crime. *Id.*

An action to recover moneys wrongfully taken and lost by the treasurer of a corporation at a gambling house conducted by the defendant, constitutes an investigation or proceeding within the meaning of this section. *Id.*

In such action, the defendant may be examined before the trial. *Id.*

He is not excused, on the ground that his answers will criminate him, from answering the questions put to him upon such examination. *Id.*

The testimony obtained cannot be used to bring about his conviction of a criminal offense. *Id.*

See *People v. Todd*, 51 Hun, 449; 21 St. Rep., 401; 4 N. Y. Supp., 26.

### § 343. Keeping Gaming and Betting Establishments.—

Any corporation or association, or the officers thereof, or any co-partnership or individual, who keeps a room, shed, tent, tenement, booth, building, float or vessel, or any part thereof, to be used for gambling or for any purpose or in any manner forbidden by this chapter, or for making any wagers or bets made to depend upon any lot, chance, casualty, unknown or contingent event or on the future price of stocks, bonds, securities, commodities or property of any description whatever, or for making any contract or contracts for or on account of any money, property or thing in action, so bet or wagered, or being the owner or agent, knowingly lets or permits the same to be so used, is guilty of a misdemeanor. This section shall not be extended so as to prohibit or in any manner affect any insurance made in good faith, for the security or indemnity of the party insured and which is not otherwise prohibited by law nor to any contract on bottomry or respondentia. [Am'd by chap. 571 of 1895; took effect May 9, 1895.]

This amendment omitted last sentence of former section.

Am'd by chap. 428 of 1889.

This amendment substituted the present, for the former, section upon the same subject.

Extent.—The language employed in this section consists of words of general import, and is designed to cover all the prohibited games enumerated in the preceding sections. *People v. Todd*, 51 Hun, 450; 21 St. Rep. 401; 4 N. Y. Supp. 25.

The word "gambling" occurs in this section for the first time, and is un-

doubtedly intended to relate to the games prohibited in the preceding sections and to embrace them only. *Id.*

Keeping a room where wagers are made as to the fluctuations in the price of stocks bought and sold in the New York Stock Exchange, as indicated by a stock quotation ticker, does not violate this section. *Id.*

Where the only evidence to connect defendant with the gambling rooms in the rear of a building was that he occasionally waited on customers in the cigar store in front belonging to his son, and which connected with the rear rooms by a door, and that he said that business was good, and that a sign on the sidewalk bore his name, it was held that such evidence was insufficient to warrant a conviction of keeping a gambling house. *People v. Mitchell*, 49 St. Rep., 528; 21 N. Y. Supp., 166.

See *Gilpin v. Daly*, 59 Hun, 418; 36 St. Rep., 669; 18 N. Y. Supp., 898; *People v. Emerson*, 53 Hun, 439, 440; 7 N. Y. Cr., 105; 25 St. Rep., 468; 6 N. Y. Supp., 276.

**§ 344. Common gambling, etc.**—A person who is the owner, agent or superintendent of a place, or of any device or apparatus, for gambling; or who hires or allows to be used a room, table, establishment or apparatus for such a purpose, or who engages as dealer, game keeper or player, in any gambling or banking game, where money or property is dependent upon the result; or who sells, or offers to sell, what are commonly called lottery policies, or any writing, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery; or who indorses or uses a book, or other document, for the purpose of enabling others to sell, or offer to sell, lottery policies or other such writings, papers or documents, is a common gambler, and punishable by imprisonment for not more than two years, or by a fine not exceeding one thousand dollars, or both.

The case of *People v. Dunn*, 27 Hun, 272, was reversed in 90 N. Y., 104.

**Definition.**—This section contains no definition of the term "lottery policies." *People v. Emerson*, 6 N. Y. Cr., 161; 20 St. Rep., 18; 6 N. Y. Supp., 276; 5 *id.*, 875.

Where the papers themselves are not before the court, it is competent to show, by one familiar therewith, what a lottery policy is. *Id.*

The class of offenses defined in this section are entirely distinct from those specified in sections 823, 824 *et seq. ante.* *People v. Dewey*, 33 St. Rep., 428; 11 N. Y. Supp., 603.

**Form.**—For a sufficient indictment for selling lottery policies, see *Pickett v. People*, 8 Hun, 83; *aff'd*, 67 N. Y., 609, without opinion.

**What constitutes.**—A person, who keeps a place for gambling, or allows a room to be used for gambling, is guilty of an offense under this section. *People v. Emerson*, 53 Hun, 440; 7 N. Y. Cr., 105; 25 St. Rep., 468; 6 N. Y. Supp., 276.

**Common gambler.**—The words "common gambler," as used in former statutes, were a general nomenclature, under which to class and designate persons guilty of various specific offenses, and did not bear upon the punishment to which the offenders might have been subjected, or degree of crime to which the offenses belonged. *People v. Borges*, 6 Abb. 132.

**§ 344a. Keeping of place for game of policy.**—A person who keeps, occupies or uses, or permits to be kept, occupied or used, a place, building, room, table, establishment or apparatus for policy playing or for the sale of what are commonly

called lottery policies, or who delivers or receives money or other valuable consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a lottery policy, or for any writing, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery; or who shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, or in what is commonly called policy, or in the nature of a bet, wager or insurance, upon the drawing or drawn numbers of any public or private lottery; or any paper, print, writing, numbers, device, policy slip, or article of any kind such as is commonly used in carrying on, promoting or playing the game commonly called policy; or who is the owner, agent, superintendent, janitor, or caretaker of any place, building or room where policy playing or the sale of what are commonly called lottery policies is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, or who aids, assists, or abets in any manner, in any of the offenses, acts or matters herein named, is a common gambler, and punishable by imprisonment for not more than two years, and in the discretion of the court, by a fine not exceeding two thousand dollars, or both.

[Inserted by L. 1901, ch. 190, taking effect September 1, 1901.]

**§ 344b. Possession of policy slips.**—The possession, by any person other than a public officer, of any writing, paper, or document representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, in what is commonly called policy, or in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery, or any paper, print, writing, numbers or device, policy slip, or article of any kind, such as is commonly used in carrying on, promoting or playing the game commonly called policy, is presumptive evidence of possession thereof knowingly and in violation of the provisions of section three hundred and forty-four-a.

[Inserted by L. 1901, ch. 190, taking effect September 1, 1901.]

**§ 344c. Removal of tenants using premises for game of policy.**—Any person having information of any place, building or room where policy playing or the sale of what are commonly called lottery policies is carried on, may serve personally upon the owner, landlord, agent, superintendent, janitor or caretaker of the premises, so used or occupied, a written notice, requiring the owner, landlord, agent, superintendent, janitor or caretaker, to make an application for the removal of the person so using or occupying the same. If the owner, landlord, agent, superintendent, janitor or caretaker, does not make such an application within five days thereafter, or, having made it, does not in good faith diligently prosecute it, the person giving the notice may make such an application, stating in his petition the facts so entitling him to make it. Such an application has the same effect, as if the applicant was the landlord or lessor of the premises. The omission, or neglect of the owner, landlord, agent, superintendent, janitor or caretaker, to make such an application, or, having made it, the omission or neglect to in good faith diligently prosecute it, shall be presumptive evidence against the person on whom such notice shall be served of a violation of the provisions of section three hundred and forty-four-a. And in case the person giving said notice shall make an application as hereinbefore provided, and a final order shall be made as specified in section twenty-two hundred and forty-nine of the code of civil procedure, such order shall be evidence of a violation of the provisions of section three hundred and forty-four-a by the occupant of said premises and by the person on whom the notice herein provided for shall have been served. For the purpose of such applications, summary proceedings to recover possession of the premises so used or occupied may be maintained under the provisions of chapter seventeen, title two, of the code of civil procedure.

[Inserted by L. 1901, ch. 190, taking effect September 1, 1901.]

**§ 345. Seizure of gambling implements authorized.**—A person, who is required or authorized to arrest any person for a violation of the provisions of this chapter, is also authorized and required to seize any table, cards, dice or other apparatus



or article, suitable for gambling purposes, found in the possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person arrested is required to be taken.

**Seizure.**—In *Willis v. Warren*, 17 How., 100; 1 Hilton, 590, it was held that, where an arrest for gambling is made by a justice of the peace and his attendants, the gambling implements may be rightfully seized and legally retained in the custody of the law until after trial and conviction.

The seizure is for the two-fold object of using them as evidence of the charge and of destroying them if conviction follows. *Id.*

**Unconstitutional.**—A statute, which authorized the police to seize gambling tables and devices, and made it the duty of the president of the police to cause them to be publicly destroyed, without providing for notice to the owner or any semblance of judicial investigation, was held, in *Lowry v. Rainwater*, 21 Abb. L. J., 72, to be unconstitutional.

See *People v. Todd*, 51 Hun, 450; 4 N. Y. Supp., 27; 21 St. Rep., 402; 6 N. Y. Cr., 222.

**§ 346. Such implements to be destroyed or delivered to district attorney**—The magistrate, to whom any thing suitable for gambling purposes is delivered pursuant to the last section, must, upon the examination of the defendant, or if such examination is delayed or prevented, without awaiting such examination, determine the character of the thing so delivered to him, and whether it was actually employed by the defendant in violation of the provisions of this chapter; and if he finds that it is of a character suitable for gambling purposes, and that it has been used by the defendant in violation of this chapter, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice may, in his opinion, require.

See *People v. Todd*, 5 Hun, 450; 21 St. Rep., 402; 4 N. Y. Supp., 27; 6 N. Y. Cr., 222.

**§ 347. Such implements to be destroyed upon conviction.**—Upon the conviction of the defendant, the district attorney must cause to be destroyed everything suitable for gambling purposes, in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney.

Under the act of 1857, it was held that such implements could not be destroyed before, but only after, conviction. *Willis v. Warren*, 17 How., 100; 1 Hilton, 590.

See *People v. Todd*, 51 Hun, 450; 21 St. Rep., 402; 4 N. Y. Supp., 27; 6 N. Y. Cr., 222.

**§ 348. Persuading another person to visit gambling places**—A person who persuades another to visit any building or part of a building, or any vessel or float, occupied or used for the purpose of gambling, in consequence whereof such other person gambles therein, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, is liable to such other person

in an amount equal to any money or property there lost by him at play, to be recovered in a civil action.

See *People v. Todd*, 51 Hun, 450; 21 St. Rep., 402; 4 N. Y. Supp., 27; 6 N. Y. Cr., 222.

**§ 349. Certain officers directed to prosecute offenses under this chapter.**—It is the duty of all sheriffs, constables, police officers, and prosecuting or district attorneys to inform against, and prosecute, all persons whom they have reason to believe offenders against the provisions of this chapter; and any omission so to do is punishable by a fine not exceeding five hundred dollars.

See *People v. Todd*, 51 Hun, 450; 21 St. Rep., 402; 4 N. Y. Supp., 27; 6 N. Y. Cr., 222.

**§ 350. Duty of masters to suppress gambling on board their vessels.**—If the commander, owner or hirer of any vessel or float, knowingly permits any gambling for money or property on board such vessel or float, or if he does not, upon his knowledge of the fact, immediately prevent the same, he is punishable by a fine not exceeding five hundred dollars; and in addition thereto is liable to any party losing money or property by means of gambling in violation of this section, in a sum equal to the money or property, to be recovered in a civil action.

See *People v. Todd*, 51 Hun, 450; 21 St. Rep., 402; 4 N. Y. Supp., 27; 6 N. Y. Cr., 222.

**§ 351. Pool-selling, book-making bets and wagers, et cetera.**—Any person who engages in pool-selling, or book-making at any time or place; or any person who keeps or occupies any room, shed, tenement, tent, booth, or building, float or vessel, or any part thereof, or who occupies any place, or stand of any kind, upon any public or private grounds, within this state, with books, papers, apparatus or paraphernalia, for the purpose of recording or registering bets or wagers, or of selling pools, and any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill, speed or power of endurance, of man or beast, or upon the result of any political nomination, appointment or election; or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever; or any person who receives, registers, records or forwards, or purports or pretends to receive, register, record or forward, in any manner whatsoever, any money, thing or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person, or sells pools, upon any such result; or any person who, being the owner, lessee, or occupant of any room, shed, tenement, tent, booth or building, float or vessel, or part thereof, or of any grounds within this state, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary for gain, hire or reward, of any money, property or thing of value, staked, wagered or pledged, or to be wagered or pledged upon any such result; or any person who aids, assists or abets in any manner in any of the said acts, which are hereby forbidden, is guilty of a felony, except when another penalty is provided by law, and upon conviction is punishable by imprisonment in the state prison for a period not more than two years, or by a fine not exceeding two thousand dollars. When an exclusive penalty is provided by law for an act hereby prohibited, the permitting of the use of premises for the doing of the act in such case shall not be deemed a violation hereof, or of section three hundred and forty-three of this Code.

Am'd by chap. 636, Laws 1901. Took effect May 2nd, 1901.

**What criminal.**—At common law, bets or wagers upon a horse race were legal, and it required a statute to make them unlawful. *Corrigan v. Coney I. J. Club*, 40 St. Rep., 144; 27 Abb. N. C., 300; 15 N. Y. Supp., 706. The statute was aimed at a race in which the competitors put up the money, where one had the chance of winning from the other. *Gibbons v. Gouverneur*, Denio, 170, and did not apply where the stake was put up by an outsider. The statute provisions were substantially re-enacted in sections 351 and 352 of the Penal Code. *Id.* By chapter 479 of 1887, they are made inapplicable to racing associations between stated periods, May 15th and October 15th, in each year. *Id.*

This section makes either of three things criminal. (1.) If a person keeps or occupies a place with the requisite apparatus to record bets; (2.) If a person in fact does record bets; or, (3.) If an owner or occupant of premises knowingly permits the same to be used for these purposes, such acts are made misdemeanors. *People v. Kelly*, 3 N. Y. Cr., 273; 22 W. Dig., 64.

A bet at a legally authorized race course is illegal. *People v. Kelly*, 3 N. Y. Cr., 274; 22 W. Dig., 64; *Ruckman v. Pitcher*, 1 N. Y., 392.

**What not.**—This statute does not refer to transactions where the stake is put up by a stranger. *Corrigan v. Coney I. J. Club*, 27 Abb. N. C., 300; 40 St. Rep., 144; 15 N. Y. Supp., 706.

A corporation may give premiums or prizes to be won by superiority in speed or endurance, when it is incorporated for such a purpose. *People v. Kelly*, 3 N. Y. Cr., 274; 22 W. Dig., 64. The words "bets or wagers" are not similar in meaning to the words "purses, prizes or premiums." *Id.* See *Harris v. White*, 81 N. Y., 532.

An agreement by a horse racing association by which it offers a prize to the owner of the winning horse entered for a race, though such prize is in part made up from the entrance fees paid by the competitors, is not in violation of this statute. *Corrigan v. Coney I. J. Club*, 27 Abb. N. C. 300; 40 St. Rep., 144.

**Pool selling.**—Pool-selling at horse races was declared to be void by the Revised Statutes. *Brennan v. Brighton B. R. Ass'n*, 56 Hun, 189; 24 Abb. N. C., 309; 30 St. Rep., 407; 7 N. Y. Supp., 221. This remained the law until the enactment of the Penal Code. *Id.* The Code was not intended to, and did not, legalize such a transaction unless permitted by special laws. *Id.*

Chapter 479 of 1887, though it does not expressly declare that pool-selling at the times and places therein specified shall be legal, inferentially shows the intention of the legislature to have been to legalize such sales. *Brennan v. Brighton B. R. Ass'n*, 56 Hun, 188; 24 Abb. N. C., 309; 30 St. Rep., 407; 7 N. Y. Supp., 221.

The effect of chap. 479 of 1887 is that sales of pools may be made between May 15 and October 15, but they must be confined to the tracks where the races take place, and on the same day as the races for which the sales may be made. *Brennan v. Brighton B. R. Ass'n*, 56 Hun, 191; 24 Abb. N. C., 309; 30 St. Rep., 407; 7 N. Y. Supp., 221. This and the next section are suspended by this act for the period mentioned, without restoring the preceding law, and are thus rendered, for such time, inapplicable to such racing. *Id.*

This section is still in force except so far as it has been modified or suspended by chap. 479 of 1887. *People ex rel. Ottolengui v. Barbour*, 5 N. Y. Cr., 384. This act limited the number of days to thirty in each year, during which races may be conducted upon any race track of an incorporated racing association. *Id.* But all racing and pool-selling are confined to the period between May 15 and October 15 in each year. *Id.*

The case of *Jerome Park Company v. Board of Police*, 11 Abb. N. C., 84, arose under the law as it existed in 1882, before the enactment of chap. 479 of 1887, and is inapplicable to subsequent transactions.

In *People ex rel. Ottolengui v. Barbour*, 5 N. Y. Cr., 381, an agreement, by which one party sent through another to a third party at a race track, a sum of money to be invested by the latter on a race to be run on that day, was held to constitute a violation of this section. The law prohibits the keeping of a room for the purpose of recording or registering bets or wagers. *Id.*

See *People v. Bauer*, 37 Hun, 407; 3 N. Y. Cr., 433; *People v. Todd*, 1

Hun, 450; 21 St. Rep., 402; 4 N. Y. Supp., 27; 6 N. Y. Cr., 222; De Lacy v. Adams, 23 N. Y. Supp., 298; 3 Mis. Rep., 432.

§ **352. Racing of animals for stake.**—All racing or trial of speed between horses or other animals for any bet, stake or reward, except such as is allowed by special laws, is a public nuisance; and every person acting or aiding therein, or making or being interested in any such bet, stake or reward is guilty of a misdemeanor; and in addition to the penalty prescribed therefor, he forfeits to the people of this state, all title or interest in any animal used with his privity in such race or trial of speed, and in any sum of money or other property betted or staked upon the result thereof.

See notes under preceding section.

See subd. 3 of section 275, *ante*.

See chap. 296 of 1893, designed to encourage the breeding and improvement of trotting and pacing horses in the state of New York.

**Suspension.**—The operation of this section is suspended during a portion of the year by section 4 of chap. 479 of 1887.

**Definition.**—It was held, in *Harris v. White*, 81 N. Y., 532, that the words "bet or stakes," in the former statute, did not include contests of speed for "purses, prizes or premiums," as those terms were commonly understood. But see this section. *Brennan v. Brighton Beach Racing Ass'n*, 30 St. Rep., 406; 56 Hun, 190; 9 N. Y. Supp., 221; *Corrigan v. Coney Island Jockey Club*, 40 St. Rep., 144; 27 Abb. N. C., 300; 15 N. Y. Supp., 706.

## CHAPTER X.

### *Pawnbrokers.*

**SECTION 353. Pawnbroking without a license.**

354. Refusing to exhibit stolen goods to owner.

355. Selling before time to redeem has expired and refusing to disclose particulars of sale; when to transact business.

§ **353. Pawnbroking without a license.**—A person who carries on the business of a pawnbroker, by receiving goods in pledge for loans at a rate of interest above that allowed by law, except by virtue of a license from a municipal corporation or other authority empowered to grant licenses to pawnbrokers, is guilty of a misdemeanor.

§ **354. Refusing to exhibit stolen goods to owner.**—A pawnbroker, or person carrying on the business of a pawnbroker, or a junk dealer, who having received any goods which have been embezzled or stolen, refuses or omits to exhibit them, upon demand, during the usual business hours, to the owner of said goods or his agent authorized to demand an inspection thereof, is guilty of a misdemeanor.

§ **355. Selling before time to redeem has expired and refusing to disclose particulars of sale; when to transact business.**—A pawnbroker who sells any article received by him

in pledge, before the time to redeem the same has expired, or who willfully refuses to disclose the name of the purchaser and the price received by him in pledge, and subsequently sold, is guilty of a misdemeanor. No pawnbroker shall transact any pawnbroking business or advance any moneys upon goods pawned or received, except between hours of seven o'clock A. M. and six o'clock P. M., on week days, excepting on Saturday, and then only between the hours of seven o'clock A. M. and twelve o'clock midnight, nor shall any business be transacted by pawnbrokers as such between the hours of twelve o'clock midnight on Saturday and seven o'clock A. M. on Monday, and every violation of these prohibitions is a misdemeanor.

Am'd by chap. 709 of 1893.

This amendment added the latter provision of the present section.

## TITLE XI.

### OF OTHER OFFENSES.

#### **SECTION 356. Misconduct of veterinary surgeons.**

357. Acts of intoxicated physicians.

358. Willfully poisoning food, etc.

359. Overloading passenger vessel.

359a. Offenses against the Navigation Law.

359b. Idem.

360. Unauthorized pressure of steam.

361. Generation of unsafe amount of steam.

362. Mismanagement of steam boilers.

363. Fictitious copartnership names.

363a. Conducting business by agents.

364. Offenses against trade-marks, a misdemeanor.

364a. Offenses against marking, etc., with words, "silver," "sterling silver" and "solid silver."

364b. Same.

365. "Article of merchandise," defined.

366. "Trade-mark," defined.

367. When deemed to be affixed.

368. Imitation of trade-mark.

369. Persons engaged in bottling milk, etc., may register trade-mark.

370. Buying and selling with intent to defraud.

371. Search warrant may issue.

372. Defacing marks upon wrecked property.

373. Floating logs and defacing marks thereon.

374. Officer unlawfully detaining wrecked property.

375. Fraud in affairs of limited partnership.

376. Solemnizing unlawful marriages.

377. Unlawful confinement of idiots, insane persons, etc.

378. Taking usury.

379. Reconfining persons discharged upon writ.

380. Concealing persons entitled to writ of deliverance.

381. Innkeepers and carriers refusing to receive guests and passengers.

382. Defrauding of keeper of inn or boarding house, a misdemeanor.

383. Protecting civil and public rights.

384. Acrobatic exhibitions.

384a. Contracts in relation to Indian lands.

384b. Unlawful dealing in convict-made goods.

384c.

384d.

384e.

384f. Failure to furnish statistics to commissioner of labor; statistics.

384g. Refusal to admit inspector to mines and quarries; failure to comply with requirements of inspector.

384h. Hours of labor to be required.

384i. Payment of wages.

384j. Failure to furnish seats for female employes.

384k. No fees to be charged for services rendered by free public employment bureaus.

384l. Violations of provisions of labor law.

384m. Illegal practice of horseshoeing.

384m. Notes given for patent rights.

384n. Notes given for a speculative consideration.

**§ 356 Misconduct of veterinary surgeons.**—A person who presents to a county clerk for registration as a practitioner of veterinary medicine or surgery any diploma or certificate fraudulently obtained, or practices veterinary medicine and surgery without complying with or contrary to law, is guilty of a misdemeanor. This section shall not be construed to prohibit students from prescribing under the supervision of preceptors, or to prohibit gratuitous services in case of an emergency or the services of an authorized practitioner of a neighboring state when incidentally called into requisition.

Section 356, as it originally stood, was repealed by section 9 of chap. 647 of 1887.

After the repeal of this section it has been referred to in *People ex rel. Jones v. N. Y. Homœopathic M. C. & H.*, 47 St. Rep., 396; *People v. Fulda*, 23 id., 410; 52 Hun, 66, 67; 7 N. Y. Cr., 2, 3; 4 N. Y. Supp., 942; *Wiel v. Cowles*, 45 Hun, 308; 12 St. Rep., 427. It was referred to, before its repeal, in *People v. Fulda*, 4 N. Y. Cr., 139; *People v. Nyce*, 34 Hun, 298, 8 N. Y. Cr., 51.

See note in *Stowell v. Amer. Co-operative R. Ass'n*, 1 Silv. (Sup. Ct.), 254.

The present section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

**§ 357. Acts of intoxicated physicians.**—A physician or surgeon, or person practicing as such, who, being in a state of intoxication, administers any poison, drug or medicine, or does any other act as a physician or surgeon, to another person, by which the life of the latter is endangered, or his health seriously affected, is guilty of a misdemeanor.

See section 200, *ante*.

**§ 358. Willfully poisoning food, etc.**—A person who willfully mingles poison with any food, drink or medicine, intended or prepared for the use of human beings, and a person who willfully poisons any spring, well or reservoir of water, is punishable by imprisonment in a state prison not exceeding ten years, or in a county jail, not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

See subd. 2 of section 217; subd. 1 of section 218, *ante*.

**§ 359. Overloading passenger vessel.**—A person navigating a vessel for gain, who willfully or negligently receives so many passengers, or such a quantity of other lading on board the vessel, that by means thereof it sinks or is upset or injured, and thereby the life of a human being is endangered, is guilty of a misdemeanor.

See section 197, *ante*.

**§ 359a. Offenses against the navigation law.**—Any person having the charge, command or control of a steamboat or vessel who,

1. Permits a line used for the purpose of landing or receiving passengers, to be attached in any way to the machinery of any steamboat, or permits a small boat used for the purpose of landing or receiving passengers to be hauled by means of such machinery; or,

2. Carries or permits a steamboat to carry a greater number of passengers than is stated in the certificate of such steamboat issued under the navigation law; or,



3. Willfully violates any of the provisions of section eleven of the navigation law, relating to the sailing rules; or,

4. Neglects to carry and show on a vessel the lights required by section twelve of the navigation law; or,

5. Neglects to carry on a vessel the life boats and life preservers required by sections fourteen and fifteen of the navigation law; or,

6. Neglects to carry on a vessel the steam fire pump required by section thirteen of the navigation law; or,

7. Intentionally loads or obstructs or causes to be loaded or obstructed in any way the safety valve of the boiler of any steamboat or naphtha launch, or employs any other means or device whereby the boiler of such vessel may be subjected to a greater pressure than is allowed by the inspectors' certificate, or intentionally deranges or hinders the operation of any machinery or device employed to denote the stage of the water or steam in any boiler or to give warning of approaching danger, or intentionally permits the water to fall below the prescribed low water limit of the boiler; or,

8. Acts or permits another person to act as officer of a vessel without having the license required by section seventeen of the navigation law, except as permitted by the provisions of section thirty of the navigation law; or,

9. Uses or permits to be used in lamps, lanterns or other lights on a vessel, any oil which will not stand a fire test of at least three hundred degrees Fahrenheit; or,

10. After employing a steam vessel for towing, receives any commission or compensation for orders given to the owner, captain or agent of any vessel for towage; or interferes with or hinders any such owner, captain or agent, while in the prosecution of his business; or,

11. Neglects to cause the dampers in the pipes or chimneys of a steamboat to be closed, or to otherwise prevent the escape of sparks and coals therefrom while passing near any of the villages or cities situated on the Hudson river, or while landing or receiving passengers or freight, or while lying at the docks or wharves thereof,

Is guilty of a misdemeanor.

Added ch. 584, 1897.

**359b.** A person who violates any other provision of the navigation law for which no other punishment is prescribed is guilty of a misdemeanor.

Added ch. 584, 1897.

**§ 360. Unauthorized pressure of steam.**—A person who applies, or causes to be applied, to a steam boiler a higher pressure of steam than is allowed by law, or by the inspector, officer or person authorized to limit the pressure of steam to be applied to such boiler, is guilty of a misdemeanor.

See section 198, *ante*.

The case of *Landers v. Staten I. R. R. Co.*, 13 Abb. N. S., 338, was reversed in 53 N. Y., 450; 14 Abb., N. S., 346.

**§ 361. Generation of unsafe amount of steam.**—A cap-

tain or other person having charge of the machinery or boiler of a steamboat, used for the conveyance of passengers, in the waters of this state, who from ignorance or gross neglect, or for the purpose of increasing the speed of the boat, creates, or causes to be created, an undue and unsafe pressure of steam, is guilty of a misdemeanor.

§ 362. **Mismanagement of steam boilers.**—An engineer or other person having charge of a steam boiler, steam engine, or other apparatus for generating or employing steam, employed in a railway, manufactory, or other mechanical works, who, willfully or from ignorance or gross neglect, creates or allows to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or cause any other accident whereby human life is endangered, is guilty of a misdemeanor.

See section 198, *ante*.

§ 363. **Fictitious copartnership names.**—A person who transacts business, using the name, as partner, of one not interested with him as partner, or using the designation “and company,” or “& Co.,” where no actual partner or partners are represented thereby, is guilty of a misdemeanor. But this section does not apply to any case, where it is specially prescribed by statute that a partnership name may be continued in use by a successor, survivor or other person.

See chap. 263 of 1893, amending chap. 256 of 1868, relative to partnerships and the use by new partnerships of the names of former partnerships.

**Construction.**—The act of 1833 was held to be highly penal and not to be extended by implication or construction to cases not within the terms of the act fairly interpreted. *Wood v. Erie Railway Co.*, 72 N. Y., 196.

This section is highly penal in its provisions and cannot be extended, by the construction of its words, to include a case which is not within them, or within any fair significance which can be assigned to them. *Rosenheim v. Rosenfield*, 37 St. Rep., 552; 13 N. Y. Supp., 721.

The use of a firm name by an individual is not a violation of this section, where he precedes such name with his own “as sole proprietor.” *Id.*

A violation of this section is made a criminal offense, except in case of the use of such names when authorized by statute. *Matter of Randall*, 8 N. Y. Supp., 655.

This section and chap. 661 of 1880, as amended by chap. 389 of 1881, must be construed together. *Id.*

It is not every case of transacting business under a fictitious name that is within the statute. *Barron v. Yost*, 35 St. Rep., 381; 12 N. Y. Supp., 455.

To make the act illegal, it must appear that credit was given to, and reliance placed upon, the false designation, and that credit was given to the person, or persons, using the false designation. *Id.*

**When not criminal.**—The purpose of the statute was to protect persons giving credit to the fictitious firm on the faith of the fictitious designation. *Gay v. Seibold*, 97 N. Y., 472.

It was not needed for the protection of those who obtained credit from such a firm. *Id.*

A foreign co-partnership, using the words “and company,” who do not represent actual partners, are not guilty of an infraction of this section. *Cohn v. Gottschalk*, 16 St. Rep., 824.

§ 363a. **Conducting business by agents.**—1. Any person now carrying on or conducting a general mercantile or manufacturing business within this state, or hereafter commencing such business at or in a fixed location, as agent or manager for another or others, shall, within thirty days after the passage of this act, or the commencement of such business, file a sworn statement, veri-

fied by such agent and principal or principals, in the county office of the county within which said business is carried on, stating the nature of the business and the full name and residence of such principal or principals.

2. Any person or persons, principal or principals, may be relieved from all liability for the future act of such agent or manager by filing in the office of the county clerk where the original statement appointing such agent or manager is filed, a statement revoking such agency or managership, to take effect ten days after the filing thereof; provided he shall, at or before the date of filing serve either personally or by mail, in the manner prescribed in the Code of Civil Procedure for service of papers in civil actions, a copy of such revocation statement on each person or with whom such principal shall have transacted any business through such agent or manager within six months previous to such filing. But failure to make service of such statement shall not invalidate such revocation except as to persons not so served. Said statement to be acknowledged before an officer authorized to take acknowledgments of deeds and to be published in at least three consecutive issues of the newspaper published in the county and nearest to the place where the business of said agent or manager is carried on; but if no newspaper is published in said county then said statement shall be published in the newspaper published nearest to the place where such business shall be carried on.

3. The county clerk shall keep a register of the names of such agents in alphabetical order, and of their principals, for which registering and filing shall receive a fee of one dollar; and copies of such certificate and register attested by him and the affidavit of such publication, shall be evidence.

4. Any person or persons failing to make and file the statement required by the first paragraph of this act, as therein required, shall be guilty of a misdemeanor. [Am'd by chap. 890 of 1895. To take effect September 1, 1895.]

This section was added by chap. 708 of 1893.

The amendment of 1895 added to this subdivision latter part, beginning with the word "provided" down to words "said statement, and in the words" "and nearest to the place where," and "nearest to the place where such business shall be carried on."

**§ 363-b.** 1. No person or persons shall hereafter carry on or conduct or transact business in this state under any assumed name or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual persons or persons conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct, or transact, or intend to conduct or transact such business, a certificate setting forth the name under which such business is, or is to be conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting the same, with the postoffice address or addresses of said person or persons. Such certificate shall be executed and duly acknowledged by the person or persons so conducting, or intending to conduct said business.

2. Persons now conducting such business under an assumed name, or under any such designation referred to in subdivision one, shall file such certificate as hereinbefore prescribed, within thirty days after this act shall take effect, and persons hereafter conducting or transacting business as aforesaid shall, before commencing said business, file such certificate in the manner hereinbefore prescribed.

3. The several county clerks of this state shall keep an alphabetical index of all persons filing certificates, provided for herein and for the indexing and filing of such certificates, they shall receive a fee of twenty-five cents. A copy of such certificate duly certified to by the county clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this state of the facts therein contained.

4. This act shall in no way affect or apply to any corporation duly organized under the laws of this state, or to any corporation organized under the laws of any other state and lawfully doing business in this state, nor shall this act be deemed or construed to prevent the lawful use of a partnership, name or designation, provided that such partnership name or designation shall include the true or real name of at least one of such persons transacting such business.

5. Any person or persons carrying on, conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this act, shall be guilty of a misdemeanor.

Added by ch. 216 of 1900. In effect Sept. 1, 1900.

**§ 364. Offenses against trade-marks, a misdemeanor.**—A person who knowingly, in a case where provision for the punishment for the offense is not otherwise specially made by statute:

1. Falsely makes or counterfeits a trade-mark; or
2. Affixes to any article of merchandise, a false or counterfeit trade-mark, knowing the same to be false or counterfeit, or the genuine trade-mark, or an imitation of the trade-mark of another, without the latter's consent; or
3. Sells or keeps, or offers for sale, an article of merchandise to which is affixed a false or counterfeit trade-mark, or the genuine trade-mark, or an imitation of the trade-mark of another, without the latter's consent; or
4. Has in his possession a counterfeit trade-mark, knowing it to be counterfeit, or a die, plate, brand or other thing for the purpose of falsely making or counterfeiting a trade-mark; or
5. Makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, an article of merchandise with such a trade-mark as to appear to indicate the quantity, quality, character, place of manufacture or production, or persons manufacturing or producing the article, but not indicating it truly; or
6. Who knowingly sells, offers or exposes for sale, any goods, which are represented in any manner, by word or deed, to be the manufacture or product of any person, firm or corporation, other than himself, unless such goods are contained in the original packages and under the labels, marks or names placed thereon by the manufacturer who is entitled to use such marks, names, brands or trade-marks; or
7. Who shall sell or shall expose for sale any goods in bulk, to which no label or trade-mark shall be attached, and shall, by representation, name or mark written or printed thereon, represent that such goods are the production or manufacture of a person who is not the manufacturer;  
Is guilty of a misdemeanor.
8. Any person, firm, corporation, association, or any employee thereof, who, in a newspaper, circular or other publication, published in this state, knowingly makes or disseminates any statement or assertion of fact concerning the quantity, the quality, the value, the method

of production or manufacture, or the reason for the price of his or their merchandise, or the manner or source of such merchandise, or the possession of rewards, prizes or distinction conferred on account of such merchandise or the motive or purpose of the sale, intended to give the appearance of an offer advantageous to the purchaser which is untrue or calculated to mislead, shall be guilty of a misdemeanor.

§ 2. Any person, firm, corporation or association, or any employee thereof who violates any provision of this act shall be liable to a fine of not less than twenty-five nor more than one hundred dollars for each offense. Amended Laws 1904, chap. 423. Took effect April 27, 1904.

Amended by chap. 884 of 1882.

This amendment was made before the Code went into operation.

Am'd by chap. 45 of 1889.

This amendment somewhat modified the original section and added subdivisions 5, 6 and 7 thereto.

See section 56 of Code of Criminal Procedure.

See chap. 219 of 1893, for the better protection of skilled labor in the use or labels, marks, names, brands and devices designating the product of skilled labor.

**Assignment.**—A trade-mark which has been transferred or assigned must, to be capable of forgery, have upon it a statement of the fact of the assignment. *People v. Molins*, 7 N. Y. Cr., 51.

**Intent.**—The jury must be satisfied beyond reasonable doubt that the act was done with intent to defraud, and, to show such intent, that the defendant knew the rights of the party intended to be defrauded. *Id.*

They must also be satisfied that the alleged trade-mark was the exclusive property of the defendant, and had not been abandoned by acquiescence in its use by others. *Id.*

**Jurisdiction.**—The courts of this state have jurisdiction to try a defendant for counterfeiting a foreign trade-mark. *Id.*

**Trade union.**—A trade-mark, designed by a voluntary trade union association, which neither carries on business nor owns the products to which the trade-mark label is attached, may be counterfeited. *People v. Fisher*, 50 Hun, 552; 20 St. Rep., 538; 3 N. Y. Supp., 787.

**§ 361a. Offenses against marking, etc., words “silver,” “sterling silver,” or “solid silver.”**—Any person, firm, corporation, or association who makes or sells, or offers to sell or dispose of, or has in his or her possession with intent to sell or dispose of, any article of merchandise marked, stamped or branded with the words “sterling” or “sterling silver,” or incased or inclosed in any box, package, cover or wrapper, or other thing in, by or with which the said article is packed, inclosed or otherwise prepared for sale or disposition, having thereupon any engraving or printed label, stamp, imprint, mark or trade mark, indicating or denoting by such marking, stamping, branding, engraving or printing that such article is silver, sterling silver, or solid silver, unless nine hundred and twenty-five one-thousandths of the component parts of the metal of which the said article is manufactured is pure silver, is guilty of a misdemeanor.

Am'd by ch. 330 of 1898. In effect April 20, 1898.

**§ 361b.** Any person, firm, corporation or association who makes or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise marked, stamped or branded with the words “coin” or “coin silver,” or incased or inclosed in any box, package, cover or wrapper or other thing in, by or with which the said article is packed, inclosed or otherwise prepared for sale or disposition, having thereupon any engraving or printed label, stamp, imprint, mark or trade mark indicating or denoting by such marking, stamping, branding, engraving or printing that such article is coin or coin



silver, unless nine hundred one-thousandths part of the component parts of the metal of which the said article is manufactured is pure silver, is guilty of a misdemeanor.

Am'd by chap. 330 of 1898. In effect April 20, 1898.

§ **364c.** Any person, firm, corporation or association who makes or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise, whose component parts are made of the same metal soldered together, which article is marked, stamped, or branded with the words "sterling" or "sterling silver," unless all of said component parts shall contain not less than nine hundred and twenty-five one-thousandths parts of pure silver, is guilty of a misdemeanor.

Am'd by ch. 330 of 1898. In effect April 20, 1898.

§ **364d.** Any person, firm, corporation or association who makes or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise, whose component parts are made of the same metal soldered together, which article is marked, stamped, or branded with the words "coin" or "coin silver," unless all of said component parts shall contain not less than nine hundred one-thousandths parts of pure silver, is guilty of a misdemeanor.

Am'd by ch. 330 of 1898. In effect April 20, 1898.

§ **364e.** Any person, firm, corporation or association who makes or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise composed of leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel, or wood to which is applied or attached a metal mounting marked, stamped or branded with the words "sterling" or "sterling silver," unless said applied or attached metal mounting shall contain not less than nine hundred and twenty-five one-thousandths parts of pure silver, is guilty of a misdemeanor.

Am'd by ch. 330 of 1898. In effect April 20, 1898.

§ **364f.** Any person, firm, corporation or association who makes or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise comprised of leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel or wood to which is applied or attached a metal mounting marked, stamped or branded with the words "coin" or "coin silver," unless said applied or attached metal mounting shall contain not less than nine hundred one-thousandths parts of pure silver, is guilty of a misdemeanor.

Am'd by chap. 330 of 1898. In effect April 20, 1898.

§ **364g.** Any person, firm, corporation or association who makes or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise comprised of works or movements and a case or covering applied or attached thereto, wholly or partially concealing said works or movements marked, stamped or branded with the words



“sterling ” or “sterling silver,” unless said case or covering shall contain not less than nine hundred and twenty-five one-thousandths parts of pure silver, is guilty of a misdemeanor.

Am'd by chap. 830 of 1898. In effect April 20, 1898.

§ 364h. Any person, firm, corporation or association who makes or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise comprised of works or movements and a case or covering applied or attached thereto, wholly or partially concealing said works or movements marked, stamped or branded with the words “coin ” or “coin silver ” unless said case or covering shall contain not less than nine hundred one-thousandths parts of pure silver, is guilty of a misdemeanor.

Am'd by ch. 330 of 1898. In effect April 20, 1898.

§ 364i. Any person, firm, corporation or association who makes or sells or offers to sell or dispose of, or has in his, her, or its possession with intent to sell or dispose of, any collars or cuffs marked, stamped or branded with the words “linen,” “pure linen ” or “all linen ” or incased or enclosed in any box, package, cover or wrapper or other thing in, by or with which the said article is packed, enclosed, or otherwise prepared for sale or disposition, having thereupon any engraving or printed label, stamp, imprint, mark, or trade mark, indicating or denoting by such marking, stamping, branding, engraving or printing, that such article is “linen,” “pure linen,” or “all linen,” unless the material of which the said collars or cuffs are manufactured contains at least one fold or ply which has a flax thread in both its warp and filling, is guilty of a misdemeanor.

Added by chap. 586 of 1900. In effect Oct. 1, 1900.

§ 364j. Any person, firm, corporation or association who or which makes or sells or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise, constructed in whole or in part of gold or of any alloy of gold and having stamped, branded, engraved or imprinted thereon any mark indicating or designed or intended to indicate that the gold or alloy of gold in such article is of a greater degree or karat of fineness by more than one karat than the actual quality or fineness of such gold or alloy, is guilty of a misdemeanor.

Added by chap. 287, Laws 1905. Takes effect Jan. 1, 1906.

## CHAPTER 331.

L. 1898, ch. 331, as am'd by L. 1905, ch. 288.

AN ACT in relation to violations of the provisions of the penal code, relating to the manufacture or sale of spurious silverware or goldware.

Title amended by L. 1905, chap. 288. In effect January 1, 1906.

SECTION 1. Upon any information against a person, firm, corporation or association for violation of sections three hundred and sixty-four-a, three hundred and sixty-four-b, three hundred and sixty-four-c, three hundred and sixty-four-d, three hundred and sixty-four-e, three hundred and sixty-four-f, three hundred and sixty-four-g, three hundred and sixty-four-h, or three hundred and sixty-four-j of the penal code, the magistrate must issue a summons in substantially the form prescribed in section

six hundred and seventy-six, signed by him, with his name of office, requiring the accused to appear before him at a specified time and place to answer the charge; the time to be not more than twenty days after the issuing of the summons.

Amended by L. 1905, chap. 288. In effect January 1, 1906.

§ 2. The summons must be served by delivering a copy thereof and showing the original to the defendant; or, if the defendant be a corporation, by delivering a copy thereof and showing the original to the president or other head of the corporation; or, to the secretary, cashier or managing agent thereof.

§ 3. At the time appointed the magistrate must proceed to investigate the charge, in the manner provided by law for the investigation of a charge against any natural person or corporation, brought before him, so far as those proceedings are applicable, except as provided by sections four, five, six and seven.

§ 4. If it shall appear to the magistrate upon the investigation that the defendant has filed a bond as provided in section five and that the article of merchandise concerning which the charge is brought was not made or altered in any way by the defendant, and that it was acquired by him in good faith as an article of the standard of purity prescribed in sections three hundred and sixty-four-a, three hundred and sixty-four-b, three hundred and sixty-four-c, three hundred and sixty-four-d, three hundred and sixty-four-e, three hundred and sixty-four-f, three hundred and sixty-four-g, three hundred and sixty-four-h, or three hundred and sixty-four-j, of the penal code, and without knowledge or information on the part of the defendant to the contrary, the charge must be dismissed and the defendant discharged, provided the person from whom the defendant acquired the article is within the jurisdiction of the court or has likewise filed a similar bond, which bond is in full force and effect at the time of the sale by said defendant, and provided also the defendant furnish to the magistrate an affidavit stating the name, residence and place of business of the person from whom the article was acquired by the defendant, and the circumstances of its acquisition, together with an undertaking with two sufficient sureties, in a sum to be fixed by the magistrate, conditioned for the appearance of the defendant to testify in any prosecution, action, or proceeding against the person from whom the article was acquired, or in any action or proceeding upon the bond given by such person.

Amended by L. 1905, chap. 288. In effect January 1, 1906.

§ 5. Any manufacturer of silverware or goldware, or any wholesale or retail dealer in silverware or goldware, upon payment of a fee of fifteen dollars, may file in the office of the secretary of state a bond, executed by himself as principal, and by a fidelity or surety company authorized by the laws of this state

to transact business, or by himself as principal and two sufficient sureties, both of whom must be freeholders, and at least one of whom must be a resident of this state and a freeholder therein, which bond shall be approved by a justice of the supreme court, and be subject to the provisions of chapter eight, title six, article fifth, of the code of civil procedure, so far as they are applicable, in the penal sum of five thousand dollars, conditioned for faithful compliance with all the provisions of sections three hundred and sixty-four-a, three hundred and sixty-four-b, three hundred and sixty-four-c, three hundred and sixty-four-d, three hundred and sixty-four-e, three hundred and sixty-four-f, three hundred and sixty-four-g, three hundred and sixty-four-h, or three hundred and sixty-four-j, of the penal code.

Amended by L. 1905, chap. 288. In effect January 1, 1906.

§ 6. Upon satisfactory proof by affidavit to the attorney-general, of a violation of any provisions of sections three hundred and sixty-four-a, three hundred and sixty-four-b, three hundred and sixty-four-c, three hundred and sixty-four-d, three hundred and sixty-four-e, three hundred and sixty-four-f, three hundred and sixty-four-g, three hundred and sixty-four-h, or three hundred and sixty-four-j, of the penal code, it shall be his duty to declare the bond provided for in the preceding section forfeited, and to forthwith proceed on behalf of the people of the state of New York to recover, as liquidated damages, the whole of the sum specified therein from the parties thereto, against whom judgment for the entire amount must be rendered upon proof duly made of a violation by the principal of any provision of the said sections of the penal code, unless the principal shall already have been convicted in a criminal prosecution for the same violation. If, however, at any time before the recovery of judgment upon such forfeiture, the principal shall appear before the magistrate who issued such warrant or summons, so that the charge against him may be duly examined and proceeded with criminally, any proceedings before the attorney-general shall be discontinued, and if the bond shall have been meanwhile forfeited, such forfeiture shall be rescinded by the attorney-general, and any subsequent action thereon thereby rendered null and inoperative.

Amended by L. 1905, chap. 288. In effect January 1, 1906.

§ 7. Proof of the actual recovery by the people of the state of the whole amount named in a bond given pursuant to the provisions of section five, may be pleaded in bar of any subsequent criminal prosecution for the same violation for which the recovery upon the bond was had.

§ 8. This act shall take effect immediately. (April 20, 1898.)

§ 365. "Article of merchandise" defined.—The expres-

sion "article of merchandise," as used in this title, signifies any goods, wares, work of art, commodity, compound, mixture, or other preparation or thing, which may be lawfully kept or offered for sale

Amended by chap. 384 of 1882.

This amendment was made before the Code went into operation.

**§ 366. "Trade-mark" defined.**—A "trade-mark" is a mark used to indicate the maker, owner or seller of an article of merchandise, and includes, among other things, any name of a person, or corporation, or any letter, word, device, emblem, figure, seal, stamp, diagram, brand, wrapper, ticket, stopper, label, or other mark, lawfully adopted by him, and usually affixed to an article of merchandise, to denote that the same was imported, manufactured, produced, sold, compounded, bottled, packed, or otherwise prepared by him; and also a signature or mark, used or commonly placed, by a painter, sculptor, or other artist, upon a painting, drawing, engraving, statue, or other work of art, to indicate that the same was designed or executed by him.

Amended by chap. 384 of 1882.

This amendment was made before the Code went into effect.

**What may be.**—The authorities upon the subject of trade-marks were collated and discussed in *Newman v. Alvord*, 51 N. Y., 189.

Any words selected arbitrarily, not expressive of the quality or character of the article, and not previously appropriated by any other person to designate a similar commodity, may be used as a trade-mark for such article. *Smith v. Sixbury*, 25 Hun, 232.

A person cannot make a trade-mark of his own name and thus debar others, having the same name, from using it in their business. *Meneely v. Meneely*, 63 N. Y., 427.

The name of a place may be adopted and used as a trade-mark. *Newman v. Alvord*, 51 N. Y., 189.

Trade-mark in illustrations, in a book or paper, cannot be established. *Munro v. Smith*, 55 Hun, 419; 29 St. Rep., 100.

Trade-marks may consist of pictures, symbols, or a peculiar form or fashion of label, or they may consist simply of a word or words. *Hier v. Abrahams*, 82 N. Y., 519.

Where the trade-mark is a picture, there must, to constitute an infringement, be such an imitation as to amount to a false representation, liable to deceive the public. *Id.*

A private mark used for office convenience and employed only to indicate size of paper, does not constitute a trade-mark. *Ward & Co. v. Ward*, 40 St. Rep., 792.

The adoption of a fanciful or arbitrary name, to distinguish works from others, will be protected. *Munro v. Beadle*, 55 Hun, 312; 28 St. Rep., 503.

Where the trade-mark consists of a word, it continues to be the distinguishing mark of the manufacture to which it is applied, in whatever form it is printed or represented. *Hier v. Abrahams*, 82 N. Y., 519.

An exclusive right cannot be acquired to the use of the words "gold medal" as a trade mark upon the wrappers of a manufactured article. *Taylor v. Gillies*, 59 N. Y., 331.

It was held, in *Caswell v. Davis*, 58 N. Y., 223, that the phrase "Ferro-Phosphorated Elixir of Calisaya Bark," could be protected as a trade-mark.

Words "International Banking Co." cannot be exclusively appropriated as a trade-mark or name of place of business. *Koehler v. Sanders*, 33 St. Rep., 267.

Words "Compressed Yeast" are not the subject of trade-mark. *Fleischman v. Newman*, 21 St. Rep., 790. Nor can a form of package be appropriated so as to exclude others from using it. *Id.*

The word "Congress," used in connection with the bottling and sale of water flowing from Congress spring, is a proper and legitimate business trade-mark. *Congress Spring Co. v. High Rock Spring Co.*, 45 N. Y., 291.

See *People v. Fisher*, 50 Hun, 554; 20 St. Rep., 538; 3 N. Y. Supp., 787; *Wagner v. Daly*, 50 St. Rep., 841; 22 N. Y. Supp., 495, dissenting opinion.

§ 367. **Affixing defined.**—A trade-mark is deemed to be affixed to an article of merchandise when it is placed in any manner in or upon, either

1. The article itself; or
2. A box, bale, barrel, bottle, case, cask, platter or other vessel or package, or a cover, wrapper, stopper, brand, label or other thing in, by or with which the goods are packed, inclosed or otherwise prepared for sale or disposition.

Amended by chap. 494, Laws 1904. Took effect April 29, 1904.

§ 368. **Imitation of trade-mark.**—An imitation of a “trade-mark” is that which so far resembles a genuine trade-mark as to be likely to induce the belief that it is genuine, whether by the use of words or letters, similar in appearance or in sound, or by any sign, device or other means whatsoever.

Amended by chapter 384 of 1882.

This amendment was made before the Code went into operation.

**What is an imitation.**—As to what amounts to an imitation of a trade-mark, see *Colman v. Crump*, 70 N. Y., 573.

The resemblance of the simulated to the genuine trade-mark must be such as to amount to a false representation, which is liable to deceive the public and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. *Popham v. Cole*, 66 N. Y., 69. When ordinary attention on the part of customers will enable them to discriminate between them, it does not amount to an imitation. *Id.*

This is substantially the rule at common law relating to infringements of trade-marks. *People v. Fisher*, 50 Hun, 554, 20 St. Rep., 538; 3 N. Y. Supp., 787.

See *Wagner v. Daly*, 50 St. Rep., 843; 22 N. Y. Supp., 496; dissenting opinion.

§ 369. **Refilling or selling stamped mineral water bottles, et cetera.**—Any person engaged in making, bottling, packing, selling or disposing of milk, ale, beer, cider, mineral water or other beverage, or in making, selling or disposing of pastry, may register his title as owner of a trade-mark by filing with the secretary of state and the clerk of the county, where the principal place of business of such person is situated, a description of the marks and devices used by him in his business and in case same has not been heretofore published according to the laws existing at the time of publication, causing the same to be published in a newspaper of the county, three weeks daily, if in the city of New York or Brooklyn, and weekly if in any other part of the state; but no trade-mark shall be filed which is and cannot become a lawful trade-mark, or which is merely the name of a person, firm or corporation unaccompanied by a mark sufficient to distinguish it from the same name when used by another person. After such registration, the use without the consent of the owner of the trade-mark so described or the filling of any bottle, siphon, barrel, platter, vessel or thing for the purpose of sale, or for the sale, therein, of any article of the same general nature and quality which said bottle, siphon,

barrel, platter, vessel or other thing before contained without the obliteration or defacement of the trade-mark upon it when such trade-mark can be obliterated or defaced without substantial injury to the bottle, siphon, barrel, platter, vessel or other thing, so as to prevent its wrongful use, shall be deemed a misdemeanor.

Amended by chap. 494, Laws 1904. Took effect April 29, 1904.

Amended by chap. 513 of 1885.

This amendment added "milk" to the articles enumerated in the original section.

See notes under sections 366 and 368, *ante*.

See chaps. 467 and 478 of 1885; chap. 377 of 1887; chap. 181 of 1888.

**Act of 1887.**—The act of 1887, as amended by chap. 181 of 1888, was held, in *People v. Cannon*, 43 St. Rep., 427, to be constitutional.

It does not place unreasonable restrictions upon the lawful business of dealers in bottles, *Id*.

This act was held not to cover the case of printed or lithographed labels. *People v. Elfenbein*, 48 St. Rep., 37.

Upon an indictment under the act of 1887, the fact that the defendant purchased the bottles in the due course of business, and without knowledge as to the true owner, was held to be no defense to him. *People v. Cannon*, 43 St. Rep., 427.

As to the sufficiency of an indictment under chap. 377 of 1887, as amended by chap. 181 of 1888, see *People v. Quinn*, 44 St. Rep., 920.

For a decision under the act of 1877, as amended by chap. 181 of 1888, see *People v. Bartholf*, 49 St. Rep., 368.

See *Mullins v. People*, 24 N. Y. 399; 23 How. 289.

**§ 370. Keeping such bottles, platters, etc., with intent to refill or sell them.**—Any person engaged in the business of buying and selling bottles, siphons, barrels, platters, or other vessels or things, who shall, with intent to defraud the registered owner of the trade-mark, knowingly sell or offer for sale any bottle, siphon, barrel, platter, vessel, or other thing, to any person, who, he has reason to believe, wrongfully intends to use the trade-mark upon it or to refill such bottle, siphon, barrel, platter, vessel, or other thing, in violation of section three hundred and sixty-nine, shall be deemed guilty of a misdemeanor.

Amended by chap. 494, Laws 1904. Took effect April 29, 1904.

**§ 371. Search for bottles, platters, et cetera.**—Whenever a registered owner of a trade-mark or his agent, makes oath before a magistrate that he has reason to believe and does believe, stating the grounds of his belief, that a bottle, siphon, vessel, platter, barrel or other thing to which is affixed the trade-mark belonging to him is being used or filled, or has been sold or offered for sale, by any person whomsoever, in violation of the preceding section, then the magistrate may issue a search warrant to discover the thing and cause the person having it in possession to be brought before him and may thereupon inquire into the circumstances, and if on examina-



tion he finds that such person has been guilty of the offense charged, he may hold the offender to bail to await the action of the grand jury and the offender shall also be liable for all action on the case for damages, for such wrongful use of such trade-mark at the suit of the owner thereof, and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade-mark, and to recover compensation therefor, in any court having jurisdiction over the person guilty of such wrongful use.

Amended by chap. 494, Laws 1904. Took effect April 29, 1904.

**Remedies.**—Under chap. 181 of 1888, the magistrate has the discretion to refuse to bring the person before him for conviction in the summary manner specified in section 4 of the act, or to bring him and proceed in the manner directed by the Code of Criminal Procedure. *People ex rel. Fellows v. Hogan*, 55 Hun, 391; 7 N. Y. Cr., 476; 29 St. Rep., 110; 8 N. Y. Supp., 451. After the person has been brought and examined before him, the magistrate may, *it seems*, impose the punishment in such summary manner, or, under the provisions of the Criminal Code (sections 56 and 64) send the case for trial before the special sessions, if the defendant so elects. *Id.*

The provisions of chap. 377 of 1887, as amended by chap. 181 of 1888, give two separate remedies: (1.) Under section 2, which declares the offense a misdemeanor; (2.) Under section 4 which authorizes the magistrate, issuing the search warrant, to try the offender in a summary manner. *People ex rel. Fellows v. Hogan*, 123 N. Y. 219; 33 St. Rep., 48. The mandatory provisions of section 4 apply only where the magistrate takes jurisdiction under its summary provisions, and do not prevent him from sending the case to the sessions for trial. *Id.*

See *Mullins v. People*, 24 N. Y., 399; 23 How. 289.

**§ 372. Defacing marks upon wrecked property.**—A person who defaces or obliterates the marks upon wrecked property, or in any manner disguises the appearance thereof, with intent to prevent the owner from discovering its identity, or who destroys or suppresses any invoice, bill of lading or other document tending to show the ownership thereof, is guilty of a misdemeanor.

Goods contained in a vessel sunk or abandoned at sea, and which are not cast upon the shore, are not "wrecks." *Baker v. Hoag*, 7 N. Y., 555.

**§ 373. Floating logs and defacing marks thereon.**—A person who:

1. Floats, runs or assists in floating or running any lumber, logs or other timber upon or over any river not excepted by law, within this state, recognized by law or use as a public highway for the purpose of floating and running lumber, logs and other timber therein, without first filing the bond executed and approved as required by law; or

2. Unlawfully cuts out, alters or defaces any mark made upon any log or lumber, whether such mark be recorded or not, or puts a false mark upon any log or lumber floating in any of the waters of this state or lying upon land; is guilty of a misdemeanor.

Am'd by chap. 692 of 1893.

This amendment added subd. 1 of the present section; and will go into effect October 1, 1893.

**§ 374. Officer unlawfully detaining wrecked property.**

—An officer, whose duties pertain in any way to wrecked property, who, without authority of law, detains such property or the proceeds thereof, after the salvage and expenses chargeable thereon have been paid or offered to him, or who is guilty of any fraud, embezzlement or extortion in the discharge of such duties, is guilty of a misdemeanor.

**§ 375. Fraud in affairs of limited partnership.**—A member of a limited partnership, who is guilty of any fraud in the affairs of the partnership, is guilty of a misdemeanor.

**§ 376. Solemnizing unlawful marriages.**—A minister or magistrate who solemnizes a marriage when either of the parties is known to him to be under the age of legal consent, or to be an idiot or insane person, or a marriage to which within his knowledge a legal impediment exists, is guilty of a misdemeanor. Until a marriage has been dissolved or annulled by a proper tribunal or court of competent jurisdiction, any person who shall assume to grant a divorce, in writing, purporting to divorce husband and wife, and permitting them or either of them to lawfully marry again, shall be guilty of a misdemeanor punishable by fine for the first offense not exceeding five hundred dollars, and for the second offense one thousand dollars, or imprisonment not exceeding one year, or both such fine and imprisonment.

Am'd by chap. 461 of 1893.

This amendment added the latter provision of the present section.

See section 301, *ante*.

**Who may solemnize marriages.**—As to who may solemnize marriages for the purpose of registering and authenticating the same, see chap. 415 of 1899.

**Legal consent.**—The age of legal consent for contracting marriage shall be eighteen years, in case of both males and females. Chap. 272 of 1896.

See *In re Hampe*, 2 City Ct., 403, note.

**§ 377. Unlawful confinement of idiots, insane persons, etc.**—A person, who confines an idiot, lunatic or insane person, in any other manner or in any other place than as authorized by law, and a person guilty of harsh, cruel or unkind treatment of, or any neglect of duty towards, any idiot, lunatic or insane person under confinement, whether lawfully or unlawfully confined, is guilty of a misdemeanor.

See subd. 6 of section 223. *ante*.

**§ 378. Taking security for usurious loans.**—A person who takes security, upon any household furniture, sewing machines, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelry, for a loan or forbearance of money, or for the use or sale of his personal credit, conditioned upon the payment of a greater rate than six per centum per annum or, who as security for such loan, use or sale of personal credit as aforesaid, makes a pretended purchase of such property from any person, upon the like condition, and permits the pledgor to retain the possession thereof is guilty of a misdemeanor.

Amended chap. 661, Laws 1904. Took effect May 9, 1904.

A note is not necessarily usurious because on its face it bears interest at seven per cent. *People v. Wheeler*, 47 Hun, 485. To make it usurious, it must have been given for a loan of money, etc., and must be a promise to pay more than the legal rate of interest. *Id.*

**§ 379. Reconfining persons discharged upon writ.**—A person, who either solely, or as a member of a court, or in the execution of a judgment, order or process, knowingly recommit, imprisons or restrains of his liberty, for the same cause, any person who has been discharged from imprisonment upon a writ of *habeas corpus*, or *certiorari*, is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars or by imprisonment not exceeding six months, or both; and in addition to the punishment prescribed therefor, he forfeits to the party aggrieved, one thousand two hundred and fifty dollars, to be recovered in a civil action.

See section 2050 of Code of Civil Procedure.

A re-arrest upon the same sentence upon which the prisoner was imprisoned the first time, after his discharge on *habeas corpus*, is unlawful. *Matter of Crow*, 30 Alb. L. J., 210.

**§ 380. Concealing persons entitled to writ of deliverance.**—A person having in his custody or power or under his restraint, one who would be entitled to a writ of *habeas corpus* or *certiorari*, or for whose relief a writ of *habeas corpus* or *certiorari* has been issued, who, with intent to elude the service of such writ, or to avoid the effect thereof, transfers the party to the custody, or places him under the power or control of another, or conceals or changes the place of his confinement, or who, without lawful excuse, refuses to produce him, is guilty of a misdemeanor, punishable as prescribed in the last section.

A person, who takes a child and conceals him from the custody of its father, is liable to be prosecuted for a misdemeanor. *Rising v. Dodge*, 2 Duer, 42.

**§ 381. Innkeepers and carriers refusing to receive guests and passengers.**—A person who, either on his own account or as agent or officer of a corporation, carries on business as innkeeper, or as common carrier of passengers, and refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor.

See section 383, *post*.

**§ 382. Frauds on hotel-keepers.**—A person who obtains any lodging, food or accommodation at an inn, boarding-house or lodging house, except an emigrant lodging house, without paying therefor, with intent to defraud the proprietor or manager thereof,

or who obtains credit at such an inn, boarding-house or lodging-house, by the use of any false pretense, or who, after obtaining credit or accommodation at such an inn, boarding house or lodging-house, absconds and surreptitiously removes his baggage therefrom without paying for his food, accommodation or lodging, is guilty of misdemeanor. [Am'd by chap. 883 of 1895; to take effect Sept. 1, 1895.]

The first insertion is qualified by the words "except an emigrant boarding-house." Words "or lodging-house" inserted three times after the word "boarding-house" by amendment of 1895.

Am'd by chap. 645 of 1886.

This amendment extended the provisions of the original section to boarding-houses.

See subd. 33, section 56 of Code of Criminal Procedure.

See note in 23 Abb. N. C., 256, 257.

§ 883. Protecting civil and public rights.—Person who:

1. Excludes a citizen of this state, by reason of race, color or previous condition of servitude, from the equal enjoyment of any accommodation, facility or privilege furnished by innkeepers or common carriers, or by owners, managers or lessees of theatres or other places of amusement, or by teachers and officers of common schools and public institutions of learning, or by cemetery associations; or

2. Denies or aids or incites another to deny to any other person because of race, creed or color, full enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, public conveyance on land or water, theatre or other place of public resort or amusement;

Is guilty of a misdemeanor, punishable by fine of not less than fifty dollars nor more than five hundred dollars.

Am'd by chap. 692 of 1893.

This amendment introduced the present subd. 2 into this section, and will go into effect October 1, 1893.

See section 381, *ante*.

See 13th, 14th and 15th amendments to the Federal Constitution.

**Constitutional.**—This section was held, in *People v. King*, 5 St. Rep., 138; 43 Hun, 187, by the supreme court, and in same case on appeal, 18 St. Rep., 353; 110 N. Y., 420, by the court of appeals, to be constitutional.

A state law, excluding colored people from admission to places of public amusement, would be considered as a violation of the Federal Constitution. *People v. King*, 18 St. Rep., 353; 110 N. Y., 426.

**Entertainments.**—This section does not interfere with entertainments, or prevent persons, not engaged in keeping a place of public amusement, from regulating admission to social, public or private entertainments given by them as they may deem best, nor does it seek to compel social equality. *Id.*

**Place of amusement.**—A skating rink is a "place of amusement" within the meaning of this term as used in this section. *People v. King*, 5 St. Rep., 138; 43 Hun, 187.

**Indictment.**—As to the sufficiency of an indictment under this section, see *People v. King*, 18 St. Rep., 353; 110 N. Y., 418.

See *People v. Rosenberg*, 51 St. Rep., 189; 22 N. Y. Supp., 61.

§ 883-a. Discrimination, when prohibited.—If a person who owns, occupies, manages or controls a building, park, enclosure or other place, opens the same to the public generally at stated periods or otherwise, he shall not discriminate against any person or class of persons in the price charged for admission thereto. A person violating the provisions of this section is guilty of a misdemeanor.

New. Added by chap. 724 of 1899. In effect May 27, 1899.

§ 883a. Bicycle race; time of riding limited.—In a bicycle race, or other contest of skill, speed or endurance, wherein one or more persons shall be a contestant or contestants, it shall be unlawful for any contestant to continue in such race or contest for a longer time than twelve hours during any twenty-four hours. The proprietor, occupant or lessee of the place where such race or contest takes place, consenting to, allowing or permitting any violation of the foregoing provisions of this section is guilty of a misdemeanor. The manager or superintendent of such race or contest consenting to, permitting

or allowing any violation of the provisions of the first sentence of this section is guilty of a misdemeanor.

New. Added by chap. 316 of 1899. In effect April 14, 1899.

§ 384. **Acrobatic exhibitions.**—The proprietor, occupant or lessee of a place where acrobatic exhibitions are held, who permits any person to perform on any trapeze, rope, pole or other acrobatic contrivance, without net work or other sufficient means of protection from falling or other accident, and any person who makes or attempts to make an ascension by means of a balloon with a trapeze or parachute attachment, or any other device for the purpose of making a descent from such balloon, is guilty of a misdemeanor, punishable for the first offense by a fine of two hundred and fifty dollars, and for each subsequent offense by a fine of two hundred and fifty dollars and imprisonment not less than three months nor more than one year.

Am'd by chap. 268 of 1892.

This amendment extends the provision to the performer, etc.

§ 384a **Contracts in relation to Indian lands.**—A person who without the authority and consent of the legislature, in any manner or for\* or on any terms, purchases any lands within this state of any Indian residing therein, or makes any contract with any Indian for or concerning the sale of any land within this state, or gives, sells, demises, conveys or otherwise disposes of any such lands, or any interest therein, or offers so to do, or enters upon or takes possession of or settles upon any such lands, by pretext or color of any right or interest in the same, in consequence of any such purchase, or contract made or to be made, since October fourteen, seventeen hundred and seventy-five, is guilty of a misdemeanor.

\* So in the original. "Form" is meant.

This section was added by chap. 692 of 1898, and will go into effect October 1, 1899.

§ 384b. **Unlawful dealing in convict-made goods.**—A person who

1. Sells or exposes for sale convict-made goods, wares or merchandise, without a license therefor, or having such license does not transmit to the secretary of state the statement required by article four of the labor law; or

2. Sells, offers for sale, or has in his possession for sale any such convict-made goods, wares or merchandise without the brand, mark or label required by article four of the labor law; or

3. Removes or defaces or in any way alters such brand, mark or label, is guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not more than one thousand nor less than one hundred dollars, or by imprisonment for not less than ten days, or by both such fine and imprisonment.

Am'd, ch. 416 of 1897.

§ 384c. A person who charges for elevating, receiving or discharging grain by means of floating or stationary elevators a greater sum than is allowed by law is guilty of a misdemeanor.

Added, ch. 551 of 1896. In effect October 1, 1896.

§ 384d. A person who violates any provision of section thirty-nine of the domestic commerce law is guilty of a misdemeanor.

Added, ch. 551 of 1896. In effect October 1, 1896.

§ 384e. **Unlicensed peddlers.**—A person who is found trading as a peddler without a license, or contrary to the terms of his license, or who refuses to produce his license on demand of any officer or citizen is guilty of a misdemeanor.

Added, ch. 551 of 1896. In effect October 1, 1896.

§ 384f. **Failure to furnish statistics to commissioner of labor statistics.**—Any person who refuses, when requested by the commissioner of labor statistics,

1. To admit him or a person authorized by him to a mine, factory, workshop, warehouse, elevator, foundry, machine shop or other manufacturing establishment; or,

2. To furnish him with information relative to his duties which may be in such person's possession or under his control; or,

3. To answer questions put by such commissioner in a circular or otherwise, or shall knowingly answer such questions untruthfully, is guilty of a misdemeanor, and on conviction therefor shall

shed by a fine of not less than fifty nor more than two dollars.

ch. 416 of 1897.

**lg. Refusal to admit inspector to mines and quar-**  
**ilure to comply with requirements of inspector.—**

2,  
refusing to admit the factory inspector, or any person au-  
by him, to a mine or quarry, for the purpose of examina-  
inspection.

glecting or refusing to comply with the provisions of arti-  
of the labor law upon written notice of the factory in-  
is guilty of a misdemeanor, and upon conviction therefor  
punished by a fine of not less than fifty dollars, or by im-  
ment for not less than thirty days.

ch. 416 of 1897.

**lh. Hours of labor to be required.—Any person or**  
**ion,**

no, contracting with the state or a municipal corporation,  
uire more than eight hours work for a day's labor; or,  
no shall require more than ten hours labor, including one-  
r for dinner, to be performed within twelve consecutive  
y the employees of a street surface and elevated railway  
r operated by corporations whose main line of travel or  
e principally within the corporate limits of cities of more  
e hundred thousand inhabitants; or,

no shall require the employees of a corporation owning or  
g a brickyard to work more than ten hours in any one  
to commence work before seven o'clock in the morning,  
y agreement between employer and employee; or,

no shall require the employees of a corporation operating  
railroad of thirty miles in length or over, in whole or in  
ain this state, to work contrary to the requirements of  
one of the labor law, is guilty of a misdemeanor, and on  
on therefor shall be punished by a fine of not less than  
dred nor more than one thousand dollars for each offense.  
ontractor with the state or a municipal corporation shall  
more than eight hours for a day's labor, upon conviction  
in addition to such fine, the contract shall be forfeited at  
on of the municipal corporation.

ch. 416 of 1897.

**li. Payment of wages.—A corporation or joint stock**  
**on or a person carrying on the business thereof, by lease**  
**wise, who does not pay the wages of its employees in**  
**ekly or monthly as provided in article one of the labor**  
**guilty of a misdemeanor, and upon conviction therefor,**  
**ined not less than twenty-five nor more than fifty dollars**  
**offense.**

ch. 416 of 1897.

**lj. Failure to furnish seats for female employees.**  
**erson employing females in a factory or mercantile estab-**  
**who does not provide and maintain suitable seats for the**  
**ich employees and permit the use thereof by such employ-**



ees to such an extent as may be reasonable for the preservation of their health, is guilty of a misdemeanor.

Added, chap. 416 of 1897.

**§ 384k. No fees to be charged for services rendered by free public employment bureaus.**—A person connected with or employed in a free public employment bureau, who shall charge or receive directly or indirectly any fee or compensation from any person applying to such bureau for help or employment, is guilty of a misdemeanor.

Added, chap. 416 of 1897.

**§ 384l. Violations of provisions of labor law.**—Any person who violates or does not comply with:

1. The provisions of article six of the labor law, relating to factories;

2. The provisions of article seven of the labor law, relating to the manufacture of articles in tenements;

3. The provisions of article eight of the labor law, relating to bakeries and confectionery establishments, the employment of labor and the manufacture of flour or meal food products therein;

4. The provisions of article eleven of the labor law, relating to mercantile establishments, and the employment of women and children therein;

5. And any person who knowingly makes a false statement in or in relation to any application made for an employment certificate as to any matter required by article six and eleven of the labor law to appear in any affidavit, record, transcript or certificate therein provided for, is guilty of a misdemeanor and upon conviction shall be punished for a first offense by a fine of not less than twenty nor more than one hundred dollars; for a second offense by a fine of not less than fifty nor more than two hundred dollars, or by imprisonment for more than thirty days or by both such fine and imprisonment; for a third offense by a fine of not less than two hundred and fifty dollars, or by imprisonment for not more than sixty days, or by both such fine and imprisonment.

Chap. 416, L. 1897, as am'd by L. 1903, chap. 380. In effect Oct. 1, 1903.

**§ 384m. Illegal practice of horseshoeing.**—A person who presents to a county clerk, for the purposes of registration, a certificate purporting to qualify him to practice horseshoeing in a city of the first or second class, which has been fraudulently obtained, or practices as a horseshoer in any such city without complying with the provisions of article twelve of the labor law.

violates or neglects to comply with any of such provisions is guilty of a misdemeanor.

Added, ch. 416 of 1897.

**§ 384m. Notes given for patent rights.**—A person who takes, sells or transfers a promissory note or other negotiable instrument, knowing the consideration of such note or instrument to consist in whole or in part, of the right to make, use or sell any patent invention or inventions, or any invention claimed or represented to be patented, without having the words “given for a patent right” written or printed legibly and prominently on the face of such note or instrument above the signature thereto, is guilty of a misdemeanor.

Added, ch. 613, 1897. To take effect Oct. 1, 1897.

**§ 384n. Notes given for a speculative consideration.**—A person who takes, sells or transfers a promissory note or other negotiable instrument, knowing the consideration of such note or instrument to consist in whole or in part of the purchase price of any farm product at a price greater by four or more times than the fair market value of the same product at the time in the locality, or in which the consideration shall be in whole or in part, membership of and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at such a rate, without having the words “given for a speculative consideration,” or other words clearly showing the nature of the consideration prominently and legibly written or printed on the face of such note or instrument above the signature thereof is guilty of a misdemeanor.

Added, ch. 613, 1897. To take effect Oct. 1, 1897.

**§ 384o. Fraudulent entries and practices in contests of speed.**—Any person who :

1. Knowingly enters for competition for any purse, prize, premium, stake or sweepstakes offered or established by any person, association or corporation, any trotting or pacing horse, mare, gelding, colt or filly under an assumed name, or out of its proper class, or that has been painted or disguised or represented to be any other or different horse, mare, gelding, colt or filly from the

one which is purported to be entered where such prize, purse, premium, stake or sweepstakes is to be decided by a contest of speed; or

2. Being the owner, trainer, or other person having the control of the racing qualities of any trotting or pacing horse, mare, gelding, colt or filly, knowingly allows the same to compete for any such prize, purse, premium, stake or sweepstakes under an assumed name, or out of its proper class, or as any other or different horse, mare, gelding, colt or filly than the one it actually is; or

3. In any competition for any such purse, prize, premium, stake or sweepstakes, knowingly drives any trotting or pacing horse, mare, gelding, colt or filly which has been entered under an assumed name, or out of its proper class or which has been painted or disguised, or represented to be any other or different horse, mare, gelding, colt or filly than the one it actually is

Shall be guilty of a misdemeanor, punishable by a fine of not less than five hundred nor more than fifteen hundred dollars, or by imprisonment for not more than one year, or both.

The class to which any such animal belongs for the purpose of the entry in any such contest of speed shall be determined by the public performance thereof in former contests or trials of speed, as provided by the printed rules of the person, association or corporation under which the proposed contest is advertised to be conducted.

Am'd by ch. 394 of 1898. In effect April 22, 1898.

**§ 384p. Issue of trading stamps and other devices.**—A person who shall:

1. Issue trading stamps or other devices to any person engaged in any trade, business or profession, with the promise, express or implied, that he will give to the person presenting to him such stamps or other devices, money or anything of value, without receiving from such person the value thereof, or make to any such person any concession or preference in any way, on account of the presentation of such trading stamps or other devices; or

2. Being engaged in any trade, business or profession, shall distribute or present to any person dealing with him, any such trading stamp or other device, in consideration of any article or thing purchased of, or any services performed by him, shall be guilty of a misdemeanor.

3. It shall not be unlawful for any merchant or manufacturer to place his own tickets, coupons or other vouchers in or upon packages of goods sold or manufactured by him. Such tickets, coupons or other vouchers to be redeemed by such merchant or manufacturer either in money or merchandise, whether such packages are sold directly to the consumer or through retail merchants. Nor shall it be unlawful for any person to issue with such packages tickets, coupons or other voucher so issued by such merchant or manufacturer.

Added by chap. of 1900. In effect Sept. 1, 1900.

**§ 384q. Issue and redemption of trading stamps and other devices.**

1. No person shall sell or issue any stamp, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device, which will entitle the holder thereof, on presentation thereof either singly or in definite number to receive either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices shall have legibly printed or written upon the face thereof the redeemable value thereof in lawful money of the United States.

2. Any person who shall sell or issue to any person engaged in any trade, business or profession, any stamp, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device, which will entitle the holder thereof, on presentation thereof either singly or in definite number to receive either directly from the vender or indirectly through any other person, money or goods, wares or merchandise shall, upon presentation redeem the same either in goods, wares, or merchandise or in lawful money of the United States, at the option of the holder thereof, at the value in lawful money printed on the face thereof, provided the same be presented for redemption in number or quantity aggregating in money value not less than five cents in each lot.

3. Any person engaged in any trade, business, or profession who shall distribute, deliver or present to any person dealing with him, in consideration of any article or thing purchased, any stamp, trading stamp, cash discount stamp, check, ticket, coupon or other similar device which will entitle the holder thereof on presentation thereof either singly or in definite number, to receive either directly from the person issuing or selling same as set forth in the second paragraph hereof, or indirectly through any other person, shall, upon the refusal or failure of the said person issuing or selling same to redeem the same as set forth in the second paragraph hereof, be liable to the holder thereof for the face value thereof and shall upon presentation of the same in lots or number aggregating in money value not less than five cents in each lot, redeem the same either in goods, wares or merchandise, or in lawful money of the United States, at the option of the holder thereof, at the value in lawful money printed upon the face thereof.

4. Any person, firm or corporation who shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor.

5. This act shall not apply to tickets, coupons or other vouchers placed by any merchant or manufacturer in or upon packages or goods sold or manufactured by him if such tickets, coupons or other vouchers are issued by such merchant or manufacturer in his own name, to be redeemed by him.

Added by chap. 657, Laws 1904. Takes effect June 1, 1904.

**§ 384r. Corrupt influencing of agents, employees or servants.—** Whoever gives, offers or promises to an agent, employee or servant, any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence his action in relation to his principal's, employer's or master's business; or an agent, employee or servant who without the knowledge and consent of his principal, employer or master, requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner to his principal's, employer's or master's business; or an agent, employee or servant, who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus shall be guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than five hundred dollars, or by such fine and by imprisonment for not more than one year.

Am'd by ch. 136, Laws 1905. To take effect Sept. 1, 1905.

## TITLE XII.

### OF CRIMES AGAINST THE PUBLIC HEALTH AND SAFETY.

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§ 385. "**Public nuisances**" defined.—A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission:

1. Annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons; or

2. Offends public decency; or

3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, a lake, or a navigable river, bay, stream, canal or basin, or a stream, creek or other body of water which has been dredged or cleared at public expense, or a public park, square, street or highway; or,

4. In any way renders a considerable number of persons insecure in life, or the use of property.

Am'd by chap. 367 of 1901. To take effect April 17, 1901.

See sections 324 and 323, *ante*.

The reference to this section in *People v. King*, 110 N. Y., 426, is to section 383, *ante*.

See sections 324 and 323, *ante*.

The reference to this section in *People v. King*, 110 N. Y., 426, is to section 383, *ante*.

**Agent.**—A husband, while acting as the agent of his wife, cannot be made liable and punished for continuing a nuisance upon her lands. *People v. Crouse*, 51 Hun, 494; 7 N. Y. Cr., 17; 21 St. Rep., 692; 4 N. Y. Supp., 266; *People v. Livingston*, 27 Hun, 105.

**Conviction.**—What acts must be shown to justify a conviction for a public nuisance under this section. *People v. Monteverde*, 6 St. Rep., 759; 43 Hun, 447.

**Jointly and severally liable.**—Persons who, by their several acts or omissions, maintain a public or common nuisance, are jointly and severally liable. *Simmons v. Everson*, 124 N. Y., 323; 36 St. Rep., 267.

**Limitation.**—No length of time will legalize a nuisance. *Rochester v. Erickson*, 46 Barb., 92; *Ogdensburgh v. Lovejoy*, 2 T. & C., 83; *aff'd* 58 N. Y., 62; *Campbell v. Seaman*, 68 N. Y., 568.

**What necessary.**—In this state, no person can commit a public nuisance without being guilty of an unlawful act or omission to perform some duty. *People v. Monteverde*, 6 St. Rep., 759; 43 Hun, 448.

There must be something more than mere negative, tacit permission or allowance to constitute the crime of nuisance. *Id.*

There must be some unlawful action or participation. *Id.*

A person is not guilty, under section 1 of chap. 646 of 1892, of the offense specified therein, unless he carried on the business in such a way as to be a public nuisance. *People v. Rosenberg*, 53 St. Rep., 4; *rev'g* 51 St. Rep., 189.

The words "as a public nuisance," in section 1, chap. 646 of 1892, relate to and qualify all the preceding acts or kinds of business made unlawful, as well as the phrase "any business," immediately preceding them. *People v. Rosenberg*, 53 St. Rep., 61; *rev'g* 51 *id.*, 189.

**Instances.**—Area in rear of store, when not nuisance. *Bond v. Smith*, 118 N. Y., 378; 22 St. Rep., 666.

Awning over sidewalk. *Farrell v. Mayor, etc.*, 20 St. Rep., 12.

The navigation of an unlicensed steamboat by the use of an uninspected boiler is, *it seems*, to maintain a nuisance. *Van Norden v. Robinson*, 10 St. Rep., 648; 45 Hun, 567.

Bowling alley. *Tanner v. Albion*, 5 Hill, 121; *Updike v. Campbell*, 4 E. D. Smith, 570.

Bridge. *Chenango Bridge v. Lewis*, 63 Barb., 111; *Binghamton Bridge*. 3 Wall., 51; *Murphy v. Suburban R. T. Co.*, 40 St. Rep., 228.

Bridge over highway. *Knox v. New York*, 55 Barb., 404.

By clergyman in church, *Broad's case*. 3 C. H. Rec., 7.

Coal hole. *Clifford v. Dam*, 81 N. Y., 52.

Coal hole in sidewalk. *Irvin v. Wood*, 51 N. Y., 224.

Dam. *Adams v. Popham*, 76 N. Y., 410; *Brown v. Bowen*, 80 id., 513.

Disorderly house. *People v. Carey*, 1 Sheld., 573.

Filthy tenement house. *Meeker v. Van Rensselaer*, 15 Wend., 397.

An exhibition of fireworks on a public street is *per se* a public nuisance. *Spier v. City of Brooklyn*, 45 St. Rep., 262; 18 N. Y. Supp., 170.

Gaming. *People v. Livingston*, 27 Hun, 105.

Gas pipes. *McCamus v. Citizens' Gas-light Co.*, 40 Barb., 380.

Highway. *Osborn v. Union Ferry Co.*, 53 Barb. 629.

A highway, not in a condition to be safely traveled, by reason of non-repair, is a public nuisance. *Syracuse & T. P. R. Co. v. People*, 66 Barb., 81.

Unlawfully doing an act, which unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, the highway, constitutes a nuisance. *People v. Crouse*, 51 Hun, 494; 7 N. Y. Cr., 18; 21 St. Rep., 692; 4 N. Y. Supp., 269.

A party is not indictable for a public nuisance caused by an obstruction of the highway on private property, created by direction of the commissioner of highways. *Id.*

Though the commissioner fails in judgment, the act done in pursuance to his directions cannot be punished criminally. *Id.*

Where acceptance of a highway by dedication is shown, there need be no regular record of the road or judgment establishing it, before an obstruction can be prevented or punished. *People v. Loehfelm*, 102 N. Y., 1; 4 N. Y. Cr., 158.

Legislature may legalize. *People v. N. Y. Gas Co.*, 6 Lans., 467; *Delaney v. Blizzard*, 7 Hun, 7; *Patten v. N. Y. E. R. Co.*, 3 Abb. N. C., 306.

Lime kiln. *Hutchins v. Smith*, 63 Barb., 251.

Livery stable. *Robinson v. Smith*, 25 St. Rep., 647; *Filson v. Crawford*, 22 id., 335.

Manufacture of naphtha gas. *Bohan v. P. J. G. L. Co.*, 122 N. Y., 18; 33 St. Rep., 246.

Municipal corporation. *Babcock v. Buffalo*, 1 Sheld., 317; *People v. Albany*, 11 Wend., 539.

Obstruction of sidewalk. *Flynn v. Taylor*, 25 St. Rep., 338; *aff'd*, 127 N. Y., 590; 40 St. Rep., 187.

The act of a party, in placing an obstruction at a point where there was no public highway or street, is not a violation of this section. *People v. Kellogg*, 51 St. Rep., 102.

A person doing business on a street, in a populous city, has the right to place a pair of skids across the sidewalk temporarily for the purpose of removing cases of merchandise, but such right must be exercised in a reasonable manner, so as not unnecessarily to incumber and obstruct the sidewalk. *Welsh v. Wilson*, 1 St. Rep., 19; 101 N. Y., 254.

Pool playing. *People v. Cutler*, 28 Hun, 465.

The draining of privies into a brook constitutes a public nuisance, detrimental to life and to public health. *Board of Health v. Casey*, 18 St. Rep., 251.

Railroad depot. *Phoenix v. Com'rs of Emigration*, 12 How., 1.

River. *Moore v. Com'rs of Pilots*, 32 How., 182.

Sluice-way. *Thompson v. Allen*, 7 Lans., 459.

Stable. *Fish v. Dodge*, 4 Denio, 311.

State dam. *Harris v. Thompson*, 9 Barb., 350.

Steam motor in switching cars. *Hussner v. Brooklyn, C. R. R. Co.*, 114 N. Y., 433; 23 St. Rep., 856.

Any obstruction of a street or encroachment thereto which interferes with its use by the public for travel and transportation, is a public nuisance. *Callanan v. Gilman*, 12 St. Rep., 21; 107 N. Y., 365. There are exceptions to this rule born of necessity and justified by public convenience. *Id.* An abutting owner, engaged in building, may temporarily encroach upon the street by the deposit of building materials. *Id.* A tradesman may convey goods in the street to or from his adjoining store. *Id.* A coach or omnibus may stop in the street to take up or set down passengers. The use of the street for public travel may be temporarily interfered with, in a variety of other ways, without the creation of what in the law is deemed to be a nuisance. *Id.* Such obstruction must not only be necessary with reference to the business of the tradesman, but reasonable with reference to the rights of the public. *Id.*

Any unnecessary or unreasonable use of a street or sidewalk, to the serious inconvenience of the public, is a public nuisance, and is declared by statute to be a crime against the order and economy of the state. *Flynn v. Taylor*, 127 N. Y., 599; 40 St. Rep., 188. Whether a particular use of a street is an unreasonable use or not, is a question of fact depending on all the circumstances of the case. *Id.*

Street railroad. *Wetmore v. Story*, 22 Barb., 414.

Subterranean stream. *Ellis v. Duncan*, 21 Barb., 220; 29 N. Y., 466.

Swamp lands. *Woodruff v. Fisher*, 17 Barb., 224.

Sewer. *Ballou v. People*, 111 N. Y., 496; 19 St. Rep., 82.

The discharge, through sewers, of surface water and sewage from houses and water closets into stream, constitutes a nuisance. *Chapman v. City of Rochester*, 13 St. Rep., 133; 110 N. Y., 273.

Theatre. *People v. Baldwin*, 1 Wh. Cr. Cas., 279; *Berry v. People*, 1 N. Y. Cr., 43, 57; 77 N. Y., 588.

Tow-path. *Conklin v. Phoenix Mills*, 62 Barb., 299.

A dangerous wall, remote from the public street, is not a public nuisance. *Cain v. City of Syracuse*, 29 Hun, 105. A wall standing in a dangerous condition, next to the street, is a public nuisance. *Id.* So, where the wall of a burnt brick building, standing upon private property upon the line of the street, is permitted to stand in a dangerous condition for the space of several weeks, it was held to be a public nuisance. *Id.*

A dangerous wall or structure of any kind, which is so near the public highway or street as to menace the safety of persons lawfully traveling or being thereupon, is a public nuisance. *Simmons v. Everson*, 124 N. Y., 823; 36 St. Rep., 267. An owner, who suffers portions of four-story brick walls, standing on his premises after a fire, to remain unsupported after they have visibly begun to incline towards the street, creates and continues a public nuisance, which is an indictable misdemeanor under the statutes of this state. *Id.*

Discharging surface water. *Deigleman v. N. Y., L. & W. R. R. Co.*, 34 St. Rep., 4.

Water standing in pits in hot weather. *Busch v. N. Y., L. & W. R. R. Co.*, 34 St. Rep., 7.

Wharf. *People v. Vanderbilt*, 26 N. Y., 287; 28 *id.*, 396.

See *People v. Klock*, 16 St. Rep., 565; 48 Hun, 277.

**§ 386. Unequal damage.**—An act which affects a considerable number of persons, in either of the ways specified in the last section, is not less a nuisance because the extent of the damage is unequal.

**§ 387. Maintaining a nuisance, a misdemeanor.**—A person, who commits or maintains a public nuisance, the punishment for which is not specially prescribed, or who willfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor.

He who knowingly maintains a nuisance is just as responsible as he who created it. *Wasmer v. D., L. & W. R. R. Co.*, 80 N. Y., 216; *Moshier v. Utica & S. R. R. Co.*, 8 Barb., 427; *Brown v. Cayuga & S. R. R. Co.*, 12 N. Y., 486. See *Simmons v. Everson*, 124 N. Y., 323; 36 St. Rep. 267.

**§ 388. Letting or permitting use of buildings for public nuisances; opium smoking a nuisance.**—A person who:

1. Lets, or permits to be used, a building, or portion of a building, knowing that it is intended to be used for committing or maintaining a public nuisance, or

2. Opens or maintains a place where opium, or any of its preparations, is smoked by other persons, or

3. At such place sells or gives away any opium, or its said preparations, to be there smoked or otherwise used, or

4. Visits or resorts to any such place for the purpose of smoking opium or its said preparations,

Is guilty of a misdemeanor.

Am'd by ch. 8 of 1889.

**§ 389. Keeping gunpowder unlawfully.**—A person who makes or keeps gunpowder, nitro-glycerine, or any other explosive or combustible material, within a city or village, or carries such materials through the streets thereof, in a quantity or manner prohibited by law or by ordinance of the city or village, is guilty of a misdemeanor. A person who manufactures gunpowder, dynamite, nitro-glycerine, liquid or compressed air or gases, except acetylene gas or other gases used for illuminating purposes, naphtha, gasoline, benzine, or any explosive articles or compounds, or manufactures ammunition, fireworks or other articles of which such substances are component parts, in a cellar, room or apartment of a tenement or dwelling house or any building occupied in whole or in part by persons or families for living purposes, [ ] is guilty of a misdemeanor. And a person who, by the careless, negligent, or unauthorized use or management of gunpowder or other explosive substances, injures or occasions the injury of the person or property of another, is punishable by imprisonment for not more than two years. Any person or persons who shall knowingly present, attempt to present, or cause to be presented or offered for shipment to any railroad, steamboat, steamship, express or other company engaged as common carrier of passengers or freight, dynamite, nitro-glycerine, powder or other explosives dangerous to life or limb, without revealing the true nature of said explosives or substance so offered or attempted to be offered to the company or carrier to which it shall be presented, shall be guilty of a felony, and upon conviction, shall be fined in any sum not exceeding one thousand dollars and not less than three hundred dollars, or imprisonment in a state prison for not less than one nor more than five years, or be subject to both such fine and imprisonment. Nothing in this section contained shall be construed to prohibit or forbid the manufacture and sale of soda-water, seltzer-water, ginger ale, carbonic or mineral water, or the charging with liquid carbonic acid gas of such waters or ordinary waters, or of beer, wines, ales or other malt and vinous beverages in such cellar, room or apartment of a tenement or dwelling house, or any building occupied in whole or in part by persons or families for living purposes.

As am'd. by ch. 486, Laws 1902. Took effect April 10, 1902.

Previously amended by chap. 494, Laws 1900. In effect May 1, 1900. Chap. 689, Laws 1887. See sec. 201 *ante*, sections 636 and 645 *post*.

The careless or negligent keeping of gunpowder in large quantities near

dwelling-houses, or where the lives of persons are thereby endangered, is a nuisance at common law. *Bradley v. People*, 56 Barb., 73; *Myers v. Malcolm*, 6 Hill, 292; *People v. Sands*, 1 John., 78.

The storage of gunpowder, no matter how carefully, in densely populated places, is a nuisance. *Heeg v. Licht*, 80 N. Y., 579; *Van Norden v. Robinson*, 45 Hun, 570; 10 St. Rlp., 643.

**§ 390. Throwing gas tar, etc., into public waters.**—A person, who throws or deposits gas tar, or the refuse of a gas-house or gas-factory, or offal, refuse or any other noxious, offensive or poisonous substance into any public waters, or into any sewer or stream running or entering into such public waters, is guilty of a misdemeanor.

See section 444, *post*.

Chap. 604 of 1875, which prohibits the deposit of carrion, offal or dead animals in the rivers and bays therein mentioned, was held not to be unconstitutional as encroaching upon the powers of Congress to regulate commerce. *Mayor, etc. v. Fergusson*, 23 Hun, 594.

**§ 391. Violation of quarantine laws.**—A master of a vessel subject to quarantine or visitation by the health officer, arriving in the port of New York, who refuses or omits:

1. To proceed to and anchor his vessel at the place assigned for quarantine, at the time of his arrival; or

2. To submit his vessel, cargo and passengers, to the examination of the health officer, and to furnish all necessary information to enable that officer to determine the length of quarantine and other regulations to which they ought respectively to be subject; or

3. To remain with his vessel at quarantine during the period assigned for her quarantine, and while at quarantine to comply with the directions and regulations prescribed by law, and with such as any of the officers of health, by virtue of the authority given to them by law, shall prescribe in relation to his vessel, his cargo, himself, his passengers or crew, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

**§ 392. Giving false information relative to vessel or permitting person to land before visit of health officer.**—A master of a vessel hailed by a pilot who:

1. Gives false information to such pilot, relative to the condition of his vessel, crew or passengers, or the health of the place or places from whence he came, or refuses to give such information as shall be lawfully required; or,

2. Lands any person from his vessel or permits any person, except a pilot to come on board of his vessel, or unlades or tranships any portion of his cargo, before his vessel has been visited and examined by the health officers; or,

3. Approaches with his vessel nearer the city of New York

than the place of quarantine to which he may be directed, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or by both.

**§ 393. Landing from vessel before visit of health officers.**

—A person who, being on board any vessel at the time of her arrival at the port of New York, lands from such vessel, or unloads, or tranships, or assists in unloading or transshipping any portion of her cargo, before such vessel has been visited and examined by the health officers, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

**§ 394. Going on board vessel at quarantine grounds, or entering quarantine grounds, without leave.**—A person who

goes on board of, or has any communication or intercourse with any vessel at quarantine, or with any of the crew or passengers of such vessel, without the permission of the health officer, and every person who, without such authority, enters the quarantine grounds or anchorage, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars, or both; and in addition thereto he may be detained at quarantine so long as the health officer directs, not exceeding twenty days. And in case such person shall be taken sick of any infectious, contagious or pestilential disease, during such twenty days, he may be detained at the marine hospital, for such further time as the health officer directs.

**§ 395. Violating quarantine regulations.**—A person who, having been lawfully ordered by a health officer to be detained in quarantine, and not having been discharged, leaves the quarantine grounds or anchorage, or willfully violates any quarantine law or regulation, is guilty of a misdemeanor.

The reference in *People v. Runge*, 3 N. Y. Cr., 87, is to this section of the Criminal Code.

The reference to this section, in *People v. Mondon*, 4 N. Y. Cr., 561; 103 N. Y., 211, should be to same section in Code of Criminal Procedure.

**§ 396. Obstructing health officer in performance of his duty.**—A person who willfully opposes or obstructs a health officer or physician charged with the enforcement of the health laws, in performing any legal duty, is guilty of a misdemeanor.

**§ 397. Wilful violation of health laws.**—1. A person who wilfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor.

2. A person who wilfully violates any provision of the health laws, or any regulation lawfully made or established by any public officer or board under authority of the health laws the



punishment for violating which is not otherwise prescribed by those laws, or by this code, is punished by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both.

Am'd by chap. 590, Laws 1905. Takes effect Sept. 1, 1905.

**§ 398. Penalty for unlawful piloting.**—A person other than a lawfully authorized branch Hell Gate pilot, who pilots, or offers to pilot, or tows or offers to tow, any boat or vessel (except barges, vessels under fifty-five tons burthen, and canal boats actually used in navigating the canals), through that part of the East river commonly called Hell Gate, is guilty of a misdemeanor. But no pilotage shall be charged to any vessel under a coasting license on entering or departing from the port of New York by way of the East river, called Hell Gate, unless such vessel actually employs a pilot, and the making such such\* charge or demand without such employment shall be deemed a misdemeanor.

\* So in original.

Amended by chap. 384 of 1882.

This amendment was made before the Code went into operation.

See chap. 115 of 1865; chap. 493 of 1881.

See chap. 202 of 1889.

**Constitutional.**—The act concerning the pilots of the part of East river, commonly called Hell Gate, was held, in *Stillwell v. Raynor*, 1 Daly, 47, to be constitutional and valid.

Under the act of 1865, it was held that the Federal Constitution does not in terms exclude the exercise of any authority by the states to regulate pilots and that the above statute was not in conflict with the provision of such constitution which grants to Congress the power to regulate commerce. *People v. Sperry*, 50 Barb., 170.

Notwithstanding the United States pilotage act, sea-going vessels in the harbor of New York are subject to pilotage under the state law. *Henderson v. Spofford*, 10 Abb. N. S., 140.

**Extent.**—The protection of an enrollment and coasting license does not extend beyond the vessel licensed, so as to authorize the towing of other vessels. *People v. Sperry*, 50 Barb., 170.

**Who is such pilot.**—A pilot, within the meaning of chap. 69 of 1847, regulating Hell Gate pilots, is the person piloting and directing the vessel while on board of it. *Francisco v. People*, 4 Park., 139; 18 How., 475. It is no offense against the act for the pilot of a steam tug to take a schooner through Hell Gate, lashed to the side of the steam tug, where he remains on the steam tug and makes signals to those on board the schooner to change their helm to conform to the movements of the steamer. *Id.*

**§ 399. Coasting steamers excepted.**—The last section does not apply to vessels propelled wholly or partly by steam, owned or belonging to citizens of the United States, and licensed and engaged in the coasting trade.

It was the intention of the legislature, by chap. 243 of 1853, to confine the exemption contained in said act, to vessels, propelled wholly or in part by steam, which have taken out a coasting license as provided by the act of Congress, by which their business would be limited exclusively to the coasting trade. *Sturges v. Spofford*, 52 Barb., 436; 45 N. Y., 446.

**§ 400. Acting as port-warden without authority.**—A person who, not being a port-warden, assumes or undertakes to

act as such, or undertakes the performance of any of the duties prescribed by law, as pertaining to the office of port-warden; and a person who knowingly employs any other than the wardens for the performance of such duties; and a person who issues any certificate of a survey on vessels, materials or goods damaged, with intent to avoid the provisions of any statute, is guilty of a misdemeanor.

**Port-warden.**—Under chap. 405 of 1857, it was held that it was a violation of the act for any other than the port-wardens to perform any of the duties prescribed for them thereby, though the port-wardens have not been requested to act in the case. *Tinkham v. Tapscott*, 17 N. Y., 141. But that the act did not prohibit any person interested in a vessel or cargo from procuring an examination thereof, for his own information or benefit, by any agent he may select. *Id.*

Chap. 87 of 1881, prohibiting the assumption of the title of port-warden by persons not appointed to that office, is not a violation of the Federal Constitution. *Curtin v. People*, 26 Hun, 564; *aff'd*, 89 N. Y., 621, without opinion.

**§ 401. Apothecary, druggist or pharmacist, omitting to label drugs, or labeling them wrongly.**—An apothecary, or licensed druggist, or licensed pharmacist, or a person employed as clerk or salesman by an apothecary or licensed druggist or licensed pharmacist, or otherwise carrying on business as a dealer in drugs or medicines, who, in putting up any drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, wilfully, negligently or ignorantly omits to label the same, or puts any untrue label, stamp or other designation of contents upon any box, bottle or other package containing a drug or medicine, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is in danger, is guilty of a misdemeanor.

*Am'd* by chap. 442, Laws 1905. Takes effect Sept. 1, 1905.

**§ 402. Selling poison without labeling and recording the sale.**—It shall be unlawful for any person to sell at retail or furnish any of the poisons named in the schedules hereinafter set forth, without affixing or causing to be affixed, to the bottle, box, vessel or package, a label containing the name of the article and the word "poison" distinctly shown, with the name and place of business of the seller, all printed in red ink, together with the name of such poisons printed or written thereupon in plain, legible characters, which schedules are as follows, to wit:

**Schedule A.**—Arsenic, cyanide of potassium, hydrocyanic acid, cocaine, morphine, strychnia and all other poisonous vegetable alkaloids and their salts, oil of bitter almonds, containing hydrocyanic acid, opium and its preparations, except paregoric and such others as contain less than two grains of opium to the ounce.

*Schedule B.*—Aconite, belladonna, cantharides, colchicum, conium, cotton root, digitalis, ergot, hellebore, henbane, phyto-lacca, strophanthus, oil of tansy, veratrum viride and their pharmaceutical preparations, arsenical solutions, carbolic acid, chloral hydrate, chloroform, corrosive sublimate, creosote, croton oil, mineral acids, oxalic acid, paris green, salts of lead, salts of zinc, white hellebore or any drug, chemical or preparation which, according to standard works on medicine or materia medica, is liable to be destructive to adult human life in quantities of sixty grains or less, and such other poisons as the state board of pharmacy, under the authority given to it by the public health law, may from time to time add to either of said schedules. Every person who shall dispose of or sell at retail or furnish any poisons included under schedule A shall, before delivering the same, make or cause to be made an entry in a book kept for that purpose, stating the date of sale, the name and address of the purchaser, the name and the quantity of the poison, the purpose for which it is represented by the purchaser to be required and the name of the dispenser, such book to be always open for inspection by the proper authorities, and to be preserved for at least five years after the last entry. He shall not deliver any of said poisons without satisfying himself that the purchaser is aware of its poisonous character and that the said poison is to be used for a legitimate purpose. The foregoing portions of this section shall not apply to the dispensing of medicines or poisons on physicians' prescriptions. Wholesale dealers in drugs, medicines, pharmaceutical preparations or chemicals shall affix or cause to be affixed to every bottle, box, parcel or outer enclosure of an original package containing any of the articles enumerated under said schedule A, a suitable label or brand in red ink with the word "poison" upon it. Any person who violates any of the provisions of this section shall be guilty of a misdemeanor.

Am'd by chap. 442, Laws 1905. Takes effect Sept. 1, 1905.

§ 403. The provisions of section four hundred and one shall not apply to the practice of a practitioner of medicines who is not the proprietor of a store for the dispensing or retailing of drugs, medicines and poisons, or who is not in the employ of such a proprietor, and shall not prevent practitioners of medicine from supplying their patients with such articles as they may deem proper, and except as to the labeling of poisons shall not apply to the sale of medicines or poisons at wholesale when not for the use or consumption of the purchaser; provided, however, that the sale of medicines or poisons at wholesale shall continue to be subject to such regulations as from time to time may be lawfully made by the board of pharmacy or by any competent board of health.

Am'd by chap. 442, Laws 1905. Takes effect Sept. 1, 1905.

§ 404. Any person who violates any provision of article eleven of the public health law for which no other penalty is imposed, is guilty of a misdemeanor.

Am'd by chap. 442, Laws 1905. Takes effect Sept. 1, 1905.

This section relates to persons who are employed in a drug store or apothecary shop, and not to the proprietors. *People v. Rontey*, 6 N. Y. Cr., 259; 21 St. Rep., 175; 4 N. Y. Supp., 235; aff'd, without opinion, in 117 N. Y., 624.

This section does not render it unlawful for a person to open or conduct a store for dispensing or compounding medicines or poisons, nor refer to the competency and qualifications of the heads of establishments. *Id.*

It was designed only to secure the attendance of competent clerks in such places, and to render it unlawful for any employe to accept such a position unless he possesses the requisite qualifications. *Id.*

It is no excuse for the practice of an unregistered pharmacist that there is no board in existence to give him his certificate. *Id.*

His duty in such case is to apply to the proper authorities to appoint the proper board of pharmacy, that he may procure from it the necessary qualifications to enable him to transact his business. *Id.*

Sections 2015 to 2024, inclusive of the consolidation act were not expressly repealed by this section and sections 725 and 726 of Penal Code. *Id.*

**§ 405. Regulations as to prescriptions of opium and morphine.**

—A person who, except on the written or verbal order of a physician, refills more than once prescriptions containing opium, morphine, or preparations of either, in which the dose of opium exceeds one-fourth grain or morphine one-twentieth grain, is guilty of a misdemeanor.

Sec. 405a changed to 405 by chap. 442, Laws 1905.

**§ 405b. Careless distribution of medicines, drugs and chemicals.**

—Any person, firm, or corporation, who distributes, or causes to be distributed, any free or trial samples of any medicine, drug, chemical or chemical compound, by leaving the same exposed upon the ground, sidewalk, porch, doorway, letter-boxes, or in any other manner, that children may become possessed of the same, shall be guilty of a misdemeanor punishable by a fine not exceeding twenty-five dollars for each offense, but this section shall not apply to the direct delivery of any such article to an adult.

Added by L. 1903, chap. 494. In effect May 9, 1903.

**§ 406. Concealing foreign matter in merchandise.**—A person who, with intent to defraud, while putting up in a barrel, bag, bale, box, or other package, cotton, hops, hay, or any other article of merchandise whatever, usually sold by weight in such packages, places or conceals therein any other substance or thing whatever, in a case where special provision for the punishment thereof is not otherwise made by statute, is guilty of a misdemeanor. (See sec. 580, *post.*)

**§ 407. Adulteration of food, drugs, etc.**—A person who, either,

1. With the intent that the same may be sold as unadulterated or undiluted, adulterates or dilutes wine, milk, distilled spirits or malt liquor, or any drug, medicine, food or drink, for man or beast; or,

2. Knowing that the same has been adulterated or diluted, offers for sale or sells the same as unadulterated or undiluted, or without disclosing or informing the purchaser that the same has been adulterated or diluted, in a case where special provision has not been made by statute, for the punishment of the offense, or,

3. Sells or offers to sell, or stores or transports with intent to sell for any purpose other than cooling beer in casks, ice cut from any canal or from the wide waters or basins of any canal, unless the ice so sold, or offered for sale or stored or transported,

is contained in a building, cart, car, sleigh, float or receptacle upon which is plainly marked in Roman or capital letters, not less than eight inches square, the words, "canal ice;" or,

4. Who shall adulterate maple sugar, maple syrup or honey with glucose, cane sugar or syrup, beet sugar or syrup, or any other substance for the purpose of sale, or who shall knowingly sell or offer for sale maple sugar, maple syrup or honey that has been adulterated in any way, shall be deemed guilty of a misdemeanor.

§ 5. Violate any provision of section 30 of the domestic commerce law, relating to canned and preserved food.

Added by chap. 551 of 1896. In effect October 1, 1896.

Am'd by chap. 141 of 1889.

This amendment added a third subdivision to the original section.

Am'd by chap. 634 of 1892.

This amendment inserted in subd. 3, after the word "Roman" the word "or," and added the fourth subdivision of the present section.

See chap. 364 of 1893, for the prevention of butterine, oleomargarine or adulterated or imitation dairy products in certain institutions within this state.

**Power of legislature.**—The legislature has undoubted power to prohibit the adulteration of food. *People v. Gillson*, 16 St. Rep., 185; 109 N. Y., 403.

The legislature may prohibit the manufacture or sale of an article deemed by it to be injurious to public health. *People v. McGann*, 34 Hun, 358; 3 N. Y. Cr., 1.

**Constitutional.**—The act of 1885, as amended by chap. 458 of same year and chap. 477 of 1886, is constitutional. *People v. Briggs*, 114 N. Y., 63; 22 St. Rep., 317; *People v. Arensberg*, 6 St. Rep., 789; 105 N. Y., 123; *People v. West*, 8 St. Rep., 713; 106 N. Y., 293; *People v. Kibler*, 8 St. Rep., 707; 106 N. Y., 321.

In *People v. McGann*, 34 Hun, 358; 3 N. Y. Cr., 1, it was held that the prohibition of section 6, chap. 202 of 1884, was absolute, and that the act was constitutional. But see *People v. Marx*, 99 N. Y., 377; *People v. Arensberg*, 6 St. Rep., 789; 103 N. Y., 393.

Under chap. 183 of 1885, it was held that a statute, which makes the possession of an article conclusive evidence of an intent to sell the same, in an action for a penalty, is constitutional. *People v. Hill*, 9 St. Rep., 336; 44 Hun, 472.

Under the act of 1885, it has been held that the question whether the milk was adulterated was to be determined from the chemical analysis alone, showing whether it was above or below the statutory standard. *People v. Kibler*, 106 N. Y., 323; 8 St. Rep., 707; *People v. West*, 106 N. Y., 293; 8 St. Rep., 713; *People v. Cipperly*, 37 Hun, 324; 101 N. Y., 634, *People v. Eddy*, 35 St. Rep., 146; *People v. Hodnett*, 51 id., 895; 68 Hun, 341. The question as to whether the analysis is correct, or is made from a fair sample of the milk, is still left open for the determination of the jury from the evidence in the case. *People v. Hodnett*, *ante*.

It was held, under chap. 183 of 1885, that the analysis, which determines the question whether the milk is adulterated, must be made from a fair sample of the milk, and that a sample taken from the milk after the cream has separated from it, is not a fair sample. *People v. Hodnett*, 51 St. Rep., 895; 68 Hun, 341.

In such case, the defendant is entitled to introduce evidence tending to show that the milk was pure and had not been tampered with, and that the analysis had been made from a sample taken from the milk after the cream had separated from it. *Id.*

**Intent.**—It was held, in *People v. Fulle*, 1 N. Y. Cr., 152; 12 Abb. N. C., 196, that, before a person could be convicted of a crime for the violation of chap. 407 of 1881, it was necessary to establish either that he was actuated by a criminal intent or was guilty of such negligence in the doing of the act as supplied the place of the criminal intent.



**Proof.**—Under the act of 1881, it was held that food to be adulterated, within the meaning of the law, must contain poison, and that this fact must be proved to sustain the charge; *People v. Bischoff*, 14 St. Rep., 581; and that section 7 of such act, requiring labels, did not apply to the ordinary articles of food, provided they were not injurious to health. *Id.*

**Penalty.**—The right to bring an action to recover a penalty for a violation of section 7, chap. 183 of 1885, as amended by chap. 458 of 1885, does not depend upon a conviction having been first had in a criminal action. *People v. Waterbury*, 9 St. Rep., 5; 44 Hun, 493.

**Butter.**—Chap. 246 of 1882, condemns the sale, not only of the various kinds of manufactured spurious butter, but also of adulterated butter. *People v. Mahaney*, 2 St. Rep., 663; 41 Hun, 28.

To justify a conviction under chap. 246 of 1882, it is not necessary to prove that the seller intended to deceive, or that he knew that the article sold was not butter. *Id.*

He subjects himself to the penalties of the statute by making the representation, not knowing it to be true. *Id.*

Section 4 of chap. 202 of 1884, prohibiting the manufacture or sale as an article of food of any substitute for butter or cheese produced from pure, unadulterated milk or cream, was held to be unconstitutional. *People v. Marx*, 99 N. Y., 377. See *People v. Arensberg*, 6 St. Rep., 789; 103 *id.*, 393.

The object of chap. 183 of 1885, as amended by chap. 458 of the same year, was to punish the fraudulent simulation of the article manufactured out of animal fat, or animal or vegetable oils, for butter manufactured from unadulterated milk or cream, and for adding to it such coloring matter as will enable dealers in it to deceive the public by selling it for a genuine, when, in fact, it is a spurious, article. *People v. Waterbury*, 9 St. Rep., 5; 44 Hun, 497.

The offense of manufacturing or selling any article not made from pure milk or cream, under section 7, chap. 183 of 1885, as amended by chap. 458 of 1885, lies not in the simple manufacture and sale of the article, but depends upon whether it was manufactured in imitation or semblance of butter. *People v. Arensberg*, 6 St. Rep., 789; 103 N. Y., 388.

The manufacture of an article, "designed to take the place of butter," does not constitute the offense. *Id.*

**Milk.**—The adulteration of milk was made a misdemeanor by chap. 467 of 1862. *People v. Harris*, 123 N. Y., 73; 33 St. Rep., 168.

Under chap. 202 of 1892, it was held that the legislature may prohibit the sale of milk below a certain standard, whether such milk is, or is not, wholesome. *People v. Cipperly*, 101 N. Y., 634, without opinion; 4 N. Y. Cr., 69; *rev'g* 3 *id.*, 385; 37 Hun, 324. The decision of the court of appeals was based upon the dissenting opinion of Justice Learned in the court below.

Under chap. 202 of 1884, it was held in *People v. Eddy*, 35 St. Rep., 146; 12 N. Y. Supp., 628, that guilty knowledge or criminal intent need not be shown to establish the offense. The chemical analysis was deemed to be conclusive of guilt, provided it showed that the ratio of fluids to solids is contrary to that which is prescribed by the terms of the statute.

The offense of selling adulterated milk contrary to the provisions of chap. 202 of 1884, and chaps. 183 and 458 of 1885, is established by the proof of a sale of milk, which is shown to be adulterated when tested by the standard set up by the act. *People v. Schaeffer*, 41 Hun, 25. To constitute the offense, neither knowledge nor intent need be shown. *Id.* See *People v. Cipperly*, 3 Eastern Rep., 558; *rev'g* 37 Hun, 319.

Under chap. 183 of 1885, as amended, the keeping of skimmed milk was held not to be made an offense, where it was for use in the county where the same was produced. *People v. Thompson*, 38 St. Rep., 317.

Under the act of 1885, as amended by chapter 458 of that year, it was held that criminal knowledge or intent formed no element of the offense. *People v. Kibler*, 8 St. Rep., 707; 106 N. Y., 321. All that was requisite to establish the offense was to show a sale of milk falling below the standard fixed by the act and coming within its definition of adulterated milk. *Id.*

The provision of section 3, chap. 183 of 1885, does not make a fraudulent



intent a necessary ingredient of the crime. *People v. West*, 8 St. Rep., 718; 106 N. Y., 298. It does not extend so far, *it seems*, as to make it criminal for a dairyman conducting a butter or cheese factory and manufacturing from milk exclusively furnished by himself, to supply the factory with milk from his own cows mixed with water. *Id.* This provision was held to be a valid exercise of the legislative power. *Id.*

The act of 1884 was superseded by the later act of 1885. *People v. Harris*, 123 N. Y., 75; 88 St. Rep., 168. But *quaere*. See subsequent amendment, chap. 193 of 1885.

See chap. 407 of 1881; chap. 246 of 1882; chap. 202 of 1884; chap. 176 of 1885; chap. 477 of 1886; chaps. 183 and 458 of 1885; chap. 140 of 1891; chap. 550 of 1888; chaps. 228, 403 and 583 of 1887; chaps. 427 and 193 of 1885.

**§ 407a.** Any person who shall knowingly sell, offer or expose for sale, or give away, any compound or preparation composed in whole or in part, of any unwholesome, deleterious or poisonous acid, or other unwholesome, deleterious or poisonous substance, as a substitute for the pure, unadulterated and unfermented juice of lemons, limes, oranges, currants, grapes, apples, peaches, plums, pears, berries, quinces, or other natural fruits, representing such compound or preparation to be the pure, unadulterated and unfermented juice of any of such fruits; or who, in the mixing, decoction, or preparation of food or drink, shall knowingly use any such compound or preparation in the place of, or as a substitute for, the pure, unadulterated and unfermented juice of one or more of such fruits, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than two hundred and fifty dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment.

Added by chap. 843 of 1899. In force Sept. 1, 1899.

**§ 408.** Disposing of tainted food.—A person who with intent that the same may be used as food, drink, or medicine, sells, or offers or exposes for sale, any article whatever which, to his knowledge, is tainted or spoiled, or for any cause unfit to be used as such food, drink, or medicine, is guilty of a misdemeanor.

**Knowledge.**—Under an indictment for selling unwholesome beef, it was held, in *People v. Parker*, 38 N. Y., 85, that the offense is complete if the unwholesome meat is knowingly sold as and for human food. The gist of the crime is the commission of the injury without regard to the particular persons against whom the act is directed. *Id.* Undoubtedly if the unwholesome meat is sold, generally, as merchandise, without any knowledge on the part of the seller that it is to be used for human food, the offense is not indictable. *Id.*

**Proof.**—It was held, in *Goodrich v. People*, 19 N. Y., 580; 8 Park., 622, that it was not indispensable, in proving the offense of selling diseased flesh for food, to show that the taint could be perceived by the senses or that bad effects had been developed in the use of the food. It was further held, in this case, that guilty knowledge that a disease, which had been apparent and increasing for some months, would render the flesh of an animal unwholesome, may be inferred from circumstances without proving the defendant an expert in the matter.

**§ 408a.** Violations of agricultural law.—Any person who disregards, disobeys or violates any proclamation, notice, order or regulation, lawfully issued or prescribed by the commissioner of agriculture for the suppression or prevention of the spread of infectious or contagious diseases among domestic animals, or who violates any of the provisions of sections eighty and eighty-two of article five of the agricultural law is guilty of a misdemeanor.

Am'd ch. 554, 1897.

This section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

**§ 409. Making, et cetera, dangerous weapons.**—A person who manufactures, or causes to be manufactured, or sells or keeps for sale, or offers, or gives, or disposes of any instrument or weapon of the kind usually known as a slungshot, billy, sandclub or metal knuckles, to any person or a person who offers, sells, loans, leases or gives any gun, revolver, pistol or other firearm or any air-gun, spring-gun or other instrument or weapon in which the propelling force is a spring or air or any instrument or weapon commonly known as a toy pistol or in or upon which any loaded or blank cartridges are used, or may be used, or any loaded or blank cartridges or ammunition therefor to any person under the age of sixteen years is guilty of a misdemeanor.

Am'd by ch. 92, Laws 1905. Takes effect June 1, 1905.

Am'd by chap. 222 of 1900. In effect Sept. 1, 1900.

Am'd by chap. 603 of 1899. In effect May 17, 1899.

Am'd by chap. 46 of 1884.

This amendment added a provision as to the sale or gift of any pistol or other firearm to a person under 18 years of age.

Am'd by chap. 140 of 1889.

This amendment inserted twice in the section, as amended in 1884, after the word "city," the words "or incorporated village," and added the last sentence of the present section.

**§ 410. Carrying, et cetera, dangerous weapons.**—A person who attempts to use against another, or who carries, or possesses any instrument or weapon of the kind commonly known as a slungshot, billy, sandclub or metal knuckles, or who with intent to use the same against another, carries or possesses a dagger, dirk or dangerous knife is guilty of a felony. Any person under the age of sixteen years, who shall have, carry or have in his possession in any public place any of the articles named or described in the last section which it is forbidden therein to offer, sell, loan, lease or give to him, shall be guilty of a misdemeanor. Any person over the age of sixteen years, who shall have or carry concealed upon his person in any city or village of this state, any pistol, revolver or other firearm without a written license therefor, theretofore issued to him by a police magistrate of such city or village, or in such manner as may be prescribed by ordinance of such city or village shall be guilty of a misdemeanor. No person not a citizen of the United States, shall have or carry firearms or dangerous weapons in any public place at any time. This section shall not apply to the regular and ordinary transportation of firearms as merchandise, nor to sheriffs, policemen or to other duly appointed peace officers, nor to duly authorized military or civil organizations when parading, nor to the members thereof when going to and from the places of meeting of their respective organizations.

Am'd by ch. 92, Laws 1905. Takes effect June 1, 1905.

Am'd by chap. 46 of 1884.

This amendment added a provision as to persons under eighteen years of age, and another as to the application of the section.

Am'd by chap. 140 of 1889.

This amendment made the provision as to persons under 18 years of age applicable to incorporated villages, and added, after the word "city" in the last sentence, the words "or village."

It is a matter of every day occurrence, *it seems*, to show, by one familiar with the facts, the nature and description of a weapon commonly known as a "slungshot." *People v. Emerson*, 6 N. Y. Cr., 160; 20 St. Rep., 18; 5 N. Y. Supp., 875.

See *People v. Izzo*, 89 St. Rep., 166; 14 N. Y. Supp., 907.

**§ 411. Possession, presumptive evidence.**—The possession, by any person other than a public officer, of any of the weapons specified in the last section, concealed or furtively carried on the person, is presumptive evidence of carrying, or concealing, or possessing, with intent to use the same in violation of that section.

The case of *People ex rel. Miller v. Ryder*, 58 Hun, 411; 34 St. Rep., 324; 12 N. Y. Supp., 50, was reversed in 36 St. Rep., 468; 124 N. Y., 500.

The possession of various weapons concealed upon the person is, *it seems*, made presumptive evidence of carrying them with intent to use the same in violation of the statute. *People ex rel. Miller v. Ryder*, 58 Hun. 411; 84 St. Rep., 324; 12 N. Y. Supp., 50. This case was reversed in 86 St. Rep., 468; 124 N. Y., 500.

The finding of a dagger upon the defendant's person raises the presumption declared by this section. *People v. Izzo*, 89 St. Rep., 167; 14 N. Y. Supp., 907.

The defendant's effort to rebut that presumption should not be nullified or weakened by the declaration of a third person, which, though the former heard, he did not understand. *Id.*

**§ 412, subdivision 1.** A person (other than a duly licensed physician or surgeon engaged in the lawful practice of his profession) who has in his possession any narcotic or anaesthetic substance, compound or preparation, capable of producing stupor or unconsciousness, with intent to administer the same or cause the same to be administered to another, without the latter's consent, unless by direction of a duly licensed physician, is guilty of a felony, punishable by imprisonment in the state prison for not more than ten years.

2. The possession by any person (other than as exempted in the foregoing subdivision) of any such narcotic or anaesthetic substance or compound, concealed or furtively carried on the person, is presumptive evidence of an intent to administer the same or cause the same to be administered in violation of the provisions of this section.

Added March 9, 1897.

**§ 413. Negligently managing and refusing to extinguish fires.**—A person who:

1. Willfully or negligently sets fire to, or assists another to set fire to any waste or forest lands belonging to the state or to another person whereby such forests are injured or endangered; or

2. Negligently sets fire to his own woods, by means whereof the property of another is endangered; or

3. Negligently suffers any fire upon his own land to extend beyond the limits thereof; or

4. Having been lawfully ordered to repair to a place of a fire in the woods, and to assist in extinguishing it, omits, without lawful excuse, to comply with the order;

Is guilty of a misdemeanor.

By chap. 692 of 1892, the then section 414 was absorbed into, and made a part of, this section.

Am'd by chap. 692 of 1893.

This amendment introduced subd. 1 of the present section, and will go into effect October 1, 1893.

See subd. 21, section 56 of Code of Criminal Procedure.

See note in 22 Abb. N. C. 384.

**§ 414. Obstructing attempts to extinguish fires.**—A person who at any burning of a building is guilty of any disobedience to lawful orders of a public officer or fireman, or of any resistance to, or interference with, the lawful efforts of a fireman or company of firemen, to extinguish the same, or of any disorderly conduct likely to prevent the same from being extinguished, or who forbids, prevents or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

By chap. 692 of 1892 the then section 415 was transferred to this number.

**§ 415. Ferries.**—A person who:

1. Maintains a ferry for profit or hire upon any of the waters of this state without authority of law; or

2. Having entered into a recognizance to keep or maintain a ferry, violates the condition of such recognizance;

Is guilty of a misdemeanor.

Where such ferry is upon waters dividing two counties, the offender may be prosecuted in either county.

By chap. 692 of 1892, the then sections 416 and 417 were combined and transferred to this number.

No one has the right to set up a public ferry and charge tolls for the transportation of person and property without the license of the sovereign. Mayor, etc., *v. Starin*, 8 St. Rep., 655; 106 N. Y., 11.

To maintain a ferry upon Niagara river, unless authorized by law, will subject the offender to punishment as for a misdemeanor. *People v. Babcock*, 11 Wend., 587.

The maintaining by the railroad corporation of a ferry, upon which it regularly and constantly transports gratuitously persons not passengers nor in its service, is an invasion of the right of the proprietor of a ferry franchise. *Aikin v. Western R. R. Co.*, 20 N. Y., 370.

**§ 415a. Penalty for neglect to post schedule of ferry rates.**—A person, corporation or association operating any ferry in this state, or between this state and any other state, operating from or to a city of five hundred thousand inhabitants or over, posting a false schedule of ferry rates, or neglecting to post in a conspicuous and accessible place in each of its ferry-houses, in plain view of the passengers, a schedule, plainly printed in the English language, of the rates of ferriage charged thereon and authorized by law to be charged for ferriage over such ferry, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

**§ 416. Unlawful acts of and neglect of duty by railroad officials.**—An officer, agent, attorney or employe, of a railroad corporation, who :

1. Offers a place, appointment, position or any other consideration to a railroad commissioner or to a secretary, clerk, agent, employe or expert employed by the board of railroad commissioners ; or

2. After due notice, neglects or refuses to make or furnish any statement or report lawfully required by the board of railroad commissioners or willfully hinders, delays or obstructs such commissioners in the discharge of their official duties,

Is guilty of a misdemeanor.

Added by chap. 692 of 1892.

Am'd by chap. 692 of 1893.

This amendment added the present subd. 2 to the section, and will go into effect October 1, 1893.

The use of a small steam yacht in conveying passengers for hire on Sundays and holidays, when not otherwise engaged by excursion parties, from a village to private grounds used for picnic purposes, and not connected with any highway, does not constitute a maintenance of a ferry within the meaning of this section. *People v. Mago*, 53 St. Rep., 307.

**§ 417. Misconduct of railroad commissioners and of their employes.**—Any railroad commissioner, or any secretary, clerk, agent, expert or other person employed by the board of railroad commissioners, who :

1. Directly or indirectly solicits or requests from or recommends

to any railroad corporation, or to any officer, attorney or agent thereof, the appointment of any person to any place or position ; or,

2. Accepts, receives or requests, either for himself or for any other person, any pass, gift or gratuity from any railroad corporation ; or,

3. Secretly reveals to any railroad corporation, or to any officer, member, or employe thereof, any information gained by him from any other railroad corporation ;

Is guilty of a misdemeanor.

Added by chap. 692 of 1892.

**§ 418. Person unable to read not to act or be employed as engineer.**—Any person unable to read the time tables of a railroad and ordinary handwriting, who acts as an engineer or runs a locomotive or train on any railroad in this state ; or any person who, in his own behalf, or in the behalf of any other person or corporation, knowingly employs a person so unable to read to act as such engineer or to run any such locomotive, is guilty of a misdemeanor ; or who employs a person as a telegraph operator who is under the age of eighteen years, or who has less than one year's experience in telegraphing, to receive or transmit a telegraphic message or train order for the movement of trains, is guilty of a misdemeanor. [Am'd by chap. 892 of 1895 ; to take effect Sept. 1, 1895.]

This amendment adds the last clause of the present section.

The amendment of chap. 692 of 1892 substantially united the then subsequent section with this, and made one section of them.

**§ 419. Misconduct of officials or employes on elevated railroads.**—Any conductor, brakeman, or other agent or employe of an elevated railroad, who :

1. Starts any train or car of such railroad, or gives any signal or order to any engineer or other person to start any such train or car, before every passenger therein who manifests an intention to depart therefrom by arising, or moving toward the exit thereof, has departed therefrom ; or before every passenger on the platform or station at which the train has stopped, who manifests a desire to enter the train, has actually boarded or entered the same, unless due notice is given by an authorized employe of such railroad that the train is full, and that no more passengers can then be received ; or,

2. Obstructs the lawful ingress or egress of a passenger to or from any such car ; or

3. Opens a platform gate of any such car while the train is in motion, or starts such train before such gate is firmly closed ;

Is guilty of a misdemeanor.

Am'd by chap. 692 of 1892.

**§ 420. Intoxication or other misconduct of railroad or steamboat employes.**—1. Any person who, being employed upon any railway as engineer, conductor, baggagemaster, brakeman, switch-tender, fireman, bridge-tender, flagman, signal man, or having charge of stations, starting, regulating or running trains *upon a railroad*, or, being employed as captain, engineer or other

officer of a vessel propelled by steam, is intoxicated while engaged in the discharge of any such duties; or

2. An engineer, conductor, brakeman, switch-tender, or other officer, agent or employe of any railroad corporation, who willfully violates or omits his duty as such officer, agent or employe, by which human life or safety is endangered, the punishment of which is not otherwise prescribed;

Is guilty of a misdemeanor.

By chap. 692 of 1892, the then section 424, was substantially combined with this section.

See subd. 9 of section 56 of Code of Criminal Procedure.

**§ 421. Penalty for failure to ring bell, etc.**—A person, acting as engineer, driving a locomotive engine on any railway in this state, who fails to sound the whistle, at least fifteen hundred feet from any place where such railway crosses a traveled road or street at grade (except in cities or villages), or who fails to ring the bell on the locomotive, or fails to cause the same to be rung from such point until the crossing is passed; or any officer or employe of a corporation in charge of a locomotive, train or car, who shall willfully obstruct, or cause to be obstructed, any farm or highway crossing with any locomotive, train, or car for a longer period than five consecutive minutes, is guilty of a misdemeanor.

Am'd by ch. of 1900. In effect July 1, 1900.

**§ 2.** This act shall take effect on the first of July, nineteen hundred.

Am'd by chap. 358 of 1891.

This amendment added the provision of the present section relative to obstruction of highways.

The reference to this section in *Powell v. Railroad Co.*, 2 Silv. (Ct. App.), 10; 14 St. Rep., 912, is found in the dissenting opinion.

The provision of section 38, chap. 140 of 1850, was repealed by chap. 593 of 1886.

**Duty.**—This section imposes a burden or duty upon an engineer driving a locomotive on any railway in this state, but does not impose a duty upon the corporation itself. *Petrie v. N. Y. C. & H. R. R. Co.*, 49 St. Rep., 283; 66 Hun, 287.

The statute should be construed to contain an implied requirement for the performance of the duty to sound the bell or whistle at a highway crossing. *Vandewater v. N. Y. & N. E. R. R. Co.*, 43 St. Rep., 421; 63 Hun, 187; 17 N. Y. Supp., 652.

This section imposes no affirmative duty upon an engineer driving a locomotive, but pronounces him guilty of a misdemeanor, if he fails to ring the bell or sound the whistle. *Id.* His guilt does not follow as the result of an affirmative act, but upon his failure to do a certain thing. *Id.*

**§ 422. Placing passenger car in front of baggage car.**—A person, being an officer or employe of a railway company, who knowingly places, directs, or suffers a freight, lumber, merchandise or oil car to be placed in rear of a car used for the convenience of passengers in a railway train, is guilty of a misdemeanor.



Am'd by chap. 267 of 1889.

This amendment expunges the word "baggage" from the original section.

This section points out the place which the "lumber cars" shall occupy in the making up of certain trains. *Bushby v. N. Y., L. E. & W. R. R. Co.*, 107 N. Y., 850; 12 St. Rep., 9.

**§ 423. Platforms and heating apparatus of passenger cars.**—A railway corporation, or any officer or director thereof having charge of its railroad, or any person managing a railroad in this state, or any person or corporation running passenger cars upon a railroad into or through this state, who:

1. Fails to have the platforms or ends of the passenger cars run upon such railroad constructed in such manner as will prevent passengers falling between the cars when in motion; or,

2. Except temporarily, in case of accident or emergency, heats any passenger car, while in motion, on any such railroad more than fifty miles in length, except a narrow-gauge railroad which runs only mixed trains, between October fifteenth and May first, by any stove or furnace inside of or suspended from such car, except stoves of a pattern and kind approved by the board of railroad commissioners for cooking purposes in dining-room cars and except within the extended time allowed by the railroad commissioners in pursuance of law for introducing other heating apparatus;

Is guilty of a misdemeanor.

Amended by chap. 692 of 1892.

This amendment slightly modified the original section and added subd. 2 of the present section.

**§ 424. Guard posts; automatic couplers.**—All corporations and persons other than employes, operating any steam railroad in this state,

1. Failing to cause guard posts to be placed in the prolongation of the line of bridge trusses upon such railroad so that in case of derailment, the posts and not the trusses shall receive the blow of the derailed locomotive or car; or

2. Failing, after November 1, 1892, to equip all of their own freight cars, run and used in freight or other trains on such railroad, with automatic self-couplers, or running or operating on such railroad any freight car belonging to any such person or corporation, without having the same equipped, except in case of accident or other emergency, with automatic self-couplers, and except within the extended time allowed by the board of railroad commissioners, in pursuance of law, for equipping such car with such couplers,

is guilty of a misdemeanor, punishable by a fine of five hundred dollars for each offense.

Am'd by chap. 664 of 1896. In effect May 14, 1896.

Added by chap. 692 of 1892.

**§ 425. Officers of railroad companies to be uniformed**

—A person who,

1. Advises or induces anyone, being an officer, agent or employe of a railway company, to leave the service of such company, because it requires a uniform to be worn by such officer, agent or employe, or to refuse to wear such uniform, or any part thereof; or

2. Uses any inducement with a person employed by a railway company, to go into the service or employment of any other railway company, because a uniform is required to be worn; or

3. Wears the uniform designated by a railway company without authority;

Is guilty of a misdemeanor.

The reference to this section in *People v. Rontey*, 6 N. Y. Cr., 259, should be to section 725, *post*.

**§ 426. Riding on freight trains.**—1. A person who rides on any engine on any freight or wood car of any railway company, without authority or permission of the proper officers of the company or of the person in charge of the said car or engine; or

2. Who gets on any car or train while in motion (for the purpose of obtaining transportation thereon as a passenger); or

3. Who willfully obstructs, hinders or delays the passage of any car lawfully running upon any steam or horse or street railway;

Is guilty of a misdemeanor.

Am'd by chap. 458 of 1890.

This amendment introduced the parenthesis in subd. 2, and inserted, after the word "any" in subd. 3, the words "steam or."

The reference to this section in *People v. Rontey*, 6 N. Y. Cr., 259, should be to section 726, *post*.

Where, in order to make repairs to sewer connections under the authority of a proper permit, it becomes necessary to excavate the street and roadbed in front of the abutting property, and a temporary interference with the passage of cars thereby rendered unavoidable, it is not a willful obstruction under this section. *Kolzem v. B. & S. A. R. R. Co.*, 48 St. Rep., 657.

**§ 427. Dangerous exhibitions. Bathing.**—A person who, being lessee or occupant of any place of amusement, or any plot of ground or building, uses it or allows it to be used for the exhibition of skill, in throwing any sharp instrument at or towards any human being; or aims or discharges any blowgun, pistol or firearm of any description whatever, or allows one to be aimed or discharged at or towards any human being; or who being owner, lessee, proprietor or manager of any surf-bathing place, neglects at any time during the bathing season to maintain surf or life boats, or other life-saving apparatus, duly equipped and manned in the manner and to the extent prescribed by law;

Is guilty of a misdemeanor.

**§ 427a. Unauthorized manufacture, sale or use of illuminating oils.**—A person who violates any provision of the domestic commerce law, relating to the standard, manufacture, sale, use or storage of any oil or burning fluid, wholly or partly composed of naphtha, coal oil, petroleum or products manufactured therefrom, or of other substance or materials which will flash at a temperature below one hundred degrees Fahrenheit, or relating to the burning or carriage of any such oil or fluid which will ignite at a temperature below three hundred degrees Fahrenheit, is guilty of a misdemeanor.

Added by chap. 551 of 1896. In effect October 1, 1896.

**§ 428. Fire and light on vessels in certain counties.**—A person who violates any of the provisions of section twenty-six of the domestic commerce law is guilty of a misdemeanor.

Am'd by chap. 551 of 1896. In effect October 1, 1896.  
See chap 324 of 1879.

**§ 429. Ice cuttings and ice bridges.**—A person or corporation cutting ice in or upon any waters within the boundaries of this state, for the purpose of removing the ice for sale or use, must surround the cuttings and openings made with fences or guards of boards or other material sufficient to form an obstruction to the free passage of persons through such fence or guards into the place where such ice is being cut. Such fences or guard must be erected at or before the time of commencing the cuttings or openings, and must be maintained until ice has again formed therein to the thickness of at least three inches, or until the ice about such openings has melted or broken up. Whoever omits to comply with this section is guilty of a misdemeanor. A person who cuts, loosens or detaches from any bay, estuary, inlet, or main, or island shore of the Saint Lawrence river, within the jurisdiction of this state, any field of ice, or large body of ice, which when so loosened or detached forms or is likely to form a bridge or passageway between an island of the river and the main shore, or between any islands of such river, is guilty of a misdemeanor. The sheriff of the county of Saint Lawrence may appoint one or more deputies to patrol the Saint Lawrence river within the county at such times as shall seem to him proper, and to arrest any persons found engaged in a violation of this section; the fees and expenses of such deputies for such services shall be a county charge against said county, and shall be audited and paid in the same manner as other county charges.

Am'd by chap. 326, Laws 1905. Took effect April 25, 1905.

**§ 429a.** Repealed by chap. 753 of 1894. Took effect May 22, 1894.

**§ 430. Articles in imitation of food.**—A person, who sells or manufactures, exposes or offers for sale as an article of food any substance in imitation thereof, without disclosing the imitation by a suitable and plainly visible mark or brand, is guilty of a misdemeanor.

**§ 431. Noisome or unwholesome substances, etc., in highway.**—A person who deposits, leaves or keeps, on or near a highway or route of public travel, either on the land or on the water, any noisome or unwholesome substance, or establishes, maintains or carries on, upon or near a public highway or route of public travel, either on the land or on the water, any business, trade or manufacture which is noisome or detrimental to public health, is guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars, or by imprisonment not less than three nor more than six months, or both.

**§ 432. Ambulances.**—A person, who willfully stops or obstructs the passage of any ambulance or vehicle used for the transportation of sick or wounded persons or animals upon any public street, highway or place, or who willfully injures the same, or willfully drives any vehicle into collision therewith, is guilty of a misdemeanor. All sheriffs, constables and police officers must

when called upon by the persons in charge of such ambulance or vehicle, aid in placing sick or wounded persons or animals therein, and in enforcing the provisions of this section.

**§ 433. Using net or weir unlawfully in Hudson river.**—A person, who uses any net or weir for setting or attaching nets, or a pole or other fixture in any part of the river Hudson, except as permitted by statute, is guilty of a misdemeanor.

**§ 433a. Lights upon swing bridges.**—A corporation, company or individual, owning, maintaining or operating a swing bridge across the Hudson river, who during the navigation season between sundown and sunrise, neglects to keep and maintain upon every such bridge the lights required by law, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect October 1, 1893.

**§ 434. Exposing person affected with a contagious disease in a public place.**—A person, who willfully exposes himself or another, affected with any contagious or infectious disease, in any public place or thoroughfare, except upon his necessary removal in a manner not dangerous to the public health, is guilty of a misdemeanor.

**§ 435. False rumors as to public funds, etc.**—A person, who, with intent to affect the market price of the public funds of this state or of the United States, or of any state or territory thereof, or of a foreign country or government, or of the stocks, bonds, or other evidences of debt of a corporation or association, or the market price of gold or silver coin or bullion, or any merchandise or commodity whatever,

1. Without lawful authority, falsely signs the name of an officer of a corporation, or of any other person to a letter, message, or other paper; or

2. Utters or circulates such a letter, message, or paper, knowing that the same has been so falsely signed; or

3. Knowingly circulates any false statement, rumor, or intelligence;

Is punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than three years, or both.

**§ 436. Eavesdropping.**—A person, who secretly loiters about a building, with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy or injure others, is guilty of a misdemeanor.

**§ 437. Destroying invoice.**—A person, who willfully destroys or suppresses an invoice, bill of lading, or any other docu-

ment, writing, or thing whatever, which tends to show the ownership of wrecked property, is guilty of a misdemeanor.

**§ 438. Use of false labels, etc.**—A person who, with intent to defraud, either,

1. Puts upon an article of merchandise, or upon a cask, bottle, stopper, vessel, case, cover, wrapper, package, band, ticket, label or other thing, containing or covering such an article, or with which such an article is intended to be sold, or is sold, any false description or other indication of or respecting the kind, number, quantity, weight or measure of such article, or any part thereof, or the place or country where it was manufactured or produced, or the quality or grade of any such article, if the quality or grade thereof is required by law to be marked, branded or otherwise indicated on or with such article; or

2. Sells or offers for sale an article, which to his knowledge is falsely described or indicated upon any such package, or vessel containing the same, or label thereupon, in any of the particulars specified; or

3. Sells or exposes for sale any goods in bulk to which no name or trade-mark shall be attached, and orally or otherwise represents that such goods are the manufacture or production of some other than the actual manufacturer or producer, in a case where the punishment for such offense is not specially provided for otherwise by statute, is guilty of a misdemeanor.

Am'd by chap. 46 of 1889.

This amendment inserted, after the words "respecting the," in subd. 1, the word "kind," and added the 3d subdivision of the present section.

See section 580, *post*.

See subd. 5, section 56 of Code of Criminal Procedure.

**Act of 1862.**—Under the provisions of section 4, chap. 306 of 1862, it was held, in *Low v. Hall*, 47 N. Y., 104, that, to render a person liable to the penalty therein prescribed, the act complained of must have been done with intent to defraud some person or persons, or some body corporate. A misdemeanor was not perpetrated, or a penalty incurred, by a sale free from all intent to injure any one. *Id*.

Prior to the enactment of this section, a contract for the sale of goods to be furnished with deceptive labels, intended by the parties and calculated to deceive customers of the purchaser, was against public policy. *Matrone v. Horwitz*, 101 N. Y., 469.

**Under the Code.**—Under this section, it is made a misdemeanor to sell or offer for sale any package falsely marked, labeled, etc., as to the place where the goods were manufactured, or the quality or grade, etc. *Id*.

**§ 438a. Using false marks as to manufacture.**—A person who, with intent to defraud or to enable another to defraud any person, manufactures or knowingly sells or causes to be manufactured or sold, any article, marked, stamped or branded, or enclosed or inclosed in any box, bottle or wrapper, having thereupon any engraving or printed label, stamp, imprint, mark or trade mark, which article is not the manufacture, workmanship or production of the person named, indicated or denoted by such mark

ing, stamping or branding, or by or upon such engraving, printed label, stamp, imprint, mark or trade mark, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect, October 1, 1893.

**§ 438b. Penalty for selling half wine not labeled. —**

A person who sells, offers for sale or manufactures with intent to sell, any wine known as "half wine," which is not stamped, marked or labeled, as required by law, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect, October 1, 1893.

**§ 439. Skimmed milk. —**A person, who sells or offers for sale, milk from which the whole or a part of the cream has been skimmed or removed, without disclosing the fact, or having a mark or label, plainly and legibly stating the fact, conspicuously affixed to every can or vessel containing the same, under circumstances not constituting an offense, for the punishment of which provision is otherwise specially made by statute, is guilty of a misdemeanor.

See notes under section 407, *ante*.

**Act of 1862. —**Under the former act of 1862, it was held to be necessary to aver and prove that milk was adulterated with the view of offering it for sale or exchange. *People v. Fauerback*, 5 Park., 311.

Omission to state object of the adulteration, rendered the indictment or complaint, insufficient. *Id.*

**Act of 1865. —**Under chap. 36 of 1865, it was held that the intent of the act was to punish an individual only for an actual and intentional violation of its provisions. *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y., 318; The act need not be personally committed by the party charged, but, if authorized by him, he was liable for the penalty. *Id.* He was liable only where the offense was committed by his authority or with his knowledge and assent. *Id.* It was sufficient to prove knowledge by him that his servants did deliver bad milk or a general authority to them to do so. *Id.* This knowledge or authority might be implied from circumstances. *Id.*

**§ 440. Master of vessel bringing foreign convict. —**

A person, being the master or commander of any vessel or boat, arriving from a foreign country, who knowingly brings into this state a person who has been, or is, a foreign convict of any offense, which if committed in this state would be punishable therein, is guilty of a misdemeanor.

See section 153, *ante*.

**§ 441. Non-resident taking or planting oysters. —**A person, who not being at the time an actual inhabitant and resident of this state, plants oysters in the waters of this state, without the consent of the owner of the same, or of the shore, or gathers oysters or other shell fish from their beds of natural growth, in any such waters on his own account or for his own benefit, or the benefit of a non-resident employer, is guilty of a



misdemeanor, punishable by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars, or both.

See subd. 24, section 56 of Code of Criminal Procedure.

The case of *People v. Lowndes*, 55 Hun, 469; 30 St. Rep., 168; 8 N. Y. Supp., 908, was reversed in 130 N. Y., 455; 42 St. Rep., 360.

**Acts of 1866.**—The provisions of section 6, chap. 404 of 1866, though embracing both of the offenses defined in this section, materially differ in structure from those in the latter statute. *People v. Lowndes*, 130 N. Y., 455; 42 St. Rep., 363.

Under chap. 753 of 1866, it was held that any citizen could acquire property in oysters which he had planted upon a bed distinctly designated by stakes, and where no oysters were growing at the time, and that it was a misdemeanor to take and carry away oysters so planted. *McCarty v. Holman*, 10 W. Dig., 501.

**Act of 1870.**—The provisions of the act of 1870 (chap. 234), were held not to apply to persons taking their own oysters out of their private lots or beds in the waters described therein; *People v. Hazen*, 81 St. Rep., 72; 121 N. Y., 317; but to the public waters which included oysters of a natural growth. *Id.*

**Act of 1879.**—Chap. 87 of 1879, which was amendatory of Laws of 1878, had relation only to raking or gathering of oysters or other shell fish by non-residents of the state on their own account and for their own benefit, or on account, or for the benefit, of non-resident employers, and was not confined to taking them from their beds of natural growth. *People v. Lowndes*, 130 N. Y., 455; 42 St. Rep., 363.

This statute did not deny to the owner, though a non-resident, the right of taking his oysters from the waters of this state, if he owned any which he had planted there. *Id.*; *People v. Hazen*, 121 N. Y., 318; 31 St. Rep., 72.

**Under Code.**—This section was enacted with a view to discriminate between those persons who were, and those who were not, residents of the state, in favor of the former to the exclusion of the latter, for the purpose of planting and gathering oysters in its waters. *People v. Lowndes, ante.*

This section creates two offenses; *id.*; one of planting in the waters of the state, and the other of gathering oysters and other shell fish from their natural beds in any such waters. *Id.*

The words "without the consent of the owner of the same or the shore," include the owners, whoever they may be, and are applied to the person planting who is not then an actual inhabitant or resident of the state. *Id.*

The words "on his own account or for his own benefit, or for the benefit of a non-resident employer," are applicable alike to both offenses. *Id.*

The failure to charge this fact in an indictment for either offense under this section, is a substantial omission. *Id.*

**§ 442. Use of certain dredges in taking oysters, a misdemeanor.**—A person who uses a dredge or drag operated by steam, or any dredge or drag weighing over thirty pounds, for the purpose of catching or taking oysters or other shell fish from beds of natural growth in the waters of this state is guilty of a misdemeanor.

Am'd by chap. 526 of 1888.

This amendment inserted, after the word "fish" in the original section, the words "from beds of natural growth."

See *In re Thomas*, 2 N. Y. Sup., 189.

**§ 443. Mock auctions.**—A person who buys or sells, or pretends to buy or sell, any goods, wares, or merchandise, or any species of property, except ships, vessels, or real or leasehold estate, exposed for sale by auction, if an actual sale, purchase, and change of ownership therein does not thereupon take place, is guilty of a misdemeanor, punishable by imprisonment for thirty days, or by fine not exceeding one hundred dollars, or both.


See section 574, *post.*

**§ 444. Interfering with navigation.**—A person who throws, or causes, or permits to be thrown, from any boat, scow or other vessel, or in any other manner, into any of the navigable waters of this state, including bays, sounds and harbors, any earth, ashes, cinders, stone, or other material, or who builds any structure therein, which will in any manner lessen the depth



Opposite page 201.

**§ 447f. Bribery of labor representatives.**—A person who gives or offers to give any money or other things of value to any duly appointed representative of a labor organization with intent to influence him with respect to any of his acts, decisions or other duties as such representative or to induce him to prevent or cause a strike by the employees of any person or corporation is guilty of a misdemeanor, and no person shall be excluded from attending and testifying or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of this section, upon the ground of the reason that the testimony or evidence, documentary or otherwise required of him may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter or proceeding concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

Added by chap. 659, Laws 1904. To take effect Sept. 1, 1904. 

of such waters, or interfere with the free and safe navigation thereof, is guilty of a misdemeanor.

See section 390, *ante*.

§ 445. **Maintaining private insane asylums.**—A person who conducts or maintains a private insane asylum, or institution for the care or treatment of persons of unsound mind, without a license issued and granted to such person according to law, is guilty of a misdemeanor.

§ 446. **Entry into agricultural fair grounds.**—A person who wrongfully and fraudulently enters any agricultural fair grounds, without paying the entrance fee, is guilty of a misdemeanor.

§ 447. **Drugging person, etc.**—A person who administers any drug or stupefying substance to another, with the intent, while such person is under the influence thereof, to induce such person to enter the military or naval service of the United States, of this state, or of any other state, country or government, is guilty of a misdemeanor.

See subd. 2 of section 218, *ante*.

§ 447a. **Negligently furnishing insecure scaffolding.**—A person or corporation employing or directing another to do or perform any labor in the erection, repairing, altering or painting, any house, building or structure within this state, who knowingly or negligently furnishes or erects or causes to be furnished or erected for the performance of such labor, unsafe, unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances; or who hinders or obstructs any officer detailed to inspect the same, destroys or defaces any notice posted thereon, or permits the use thereof after the same has been declared unsafe by such officer contrary to the provisions of article one of the Labor Law, is guilty of a misdemeanor.

Am'd ch. 416 of 1897.

See chap. 715 of 1893, amending chap. 517 of 1891, providing for the examination of scaffolding, ropes, blocks, pulleys and tackle used in the construction, repairing and painting of buildings.

§ 447b. **A person who:**

1. Being the owner, lessee, proprietor or manager of a hotel, fails to comply with the law relative to providing or keeping appliances to be used as fire escapes; or,

2. Being the city engineer or officer, performing the duties of such in any city or village neglects to make or cause to be made the inspection required by law to be made touching fire escapes in hotels, is guilty of a misdemeanor.

Added by chap. 551 of 1896. In effect October 1, 1896.

§ 447c. **Neglect to complete or plank floors of buildings constructed in cities.**—A person, constructing a building in a city, as owner or contractor, who violates the provisions of article one of the labor law, relating to the completing or laying of floors, or the planking of such floors or tiers of beams as the work of construction progresses, is guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine for each offense of not less than twenty-five nor more than two hundred dollars.

Added, ch. 416 of 1897.

§ 447d. **Requiring more than the legal weight for a bushel.**—Where potatoes, grains or other agricultural products are sold by the bushel, without agreement as to the weight, any person requiring a greater number of pounds for a bushel than as prescribed by section eight of the domestic commerce law, is guilty of a misdemeanor.

Added by chap. 515 of 1899. In effect Sept. 1, 1899.

§ 447e. **Contamination of salt wells.**—A person who wilfully places, introduces or causes to flow or enter into any spring, brook or body of water, which is used in the manufacture of salt, or into any salt well, or salt mine, or into any cavity or reservoir beneath the surface of the earth from which salt or brine is taken or used in the manufacture of salt, any impure or deleterious substance or thing whatsoever, which is liable to pollute the waters thereof, or the brine or salt taken or manufactured therefrom, provided that this act shall not interfere with any existing system of drainage or sewerage, is punishable by imprisonment in a penitentiary or State prison for not more than five years, or by a fine of not more than two thousand dollars, or by both such fine and imprisonment.

Added by chap. 528, Laws of 1901, to take effect Sept. 1, 1901.

## TITLE XIII

## OF CRIMES AGAINST THE PUBLIC PEACE.

**SECTION 448. Disturbing lawful meetings.**

449. "Riot" defined.

450. Punishment of riot.

451. Unlawful assemblages.

452. Disguised and masked persons, etc.

453. Allowing masquerades to be held in places of public resort.

454. Remaining present at place of riot, etc., after warning.

455. Remaining present at a meeting, originally lawful, after it has adopted an unlawful purpose.

456. Refusing to assist in arresting rioter.

457. Combinations to resist execution of process.

458. Prize fighting, aiding therein, etc.

459. What is a challenge.

460. Betting or stakeholding on fight.

461. Fight out of state.

462. Indictment.

463. 464. Apprehension of persons about to fight.

465. Forcible entry and detainer.

466. Returning to take possession of lands after being removed by legal process.

467. Unlawful intrusion, etc.

468. Discharging fire-arms.

469. Witnesses' privilege.

**§ 448. Disturbing lawful meetings.**—A person who, without authority of law, willfully disturbs any assembly or meeting, not unlawful in its character, is guilty of a misdemeanor.

See sections 274 and 275, *ante*.

The reference to this section in *People v. Grim*, 3 N. Y. Cr., 319, should be to section 548, *post*.

See note in 21 Abb. N. C., 25.

See *People v. Judson*, 11 Daly, 1, 82.

**§ 449. "Riot" defined.**—Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot.

**Rioter.**—If any person encourages, promotes or takes part in riots, whether by words, signs or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter. *People v. Most*, 128 N. Y., 113; 88 St. Rep., 829; 8 N. Y. Cr., 279.

Where a crowd of three or more persons engage in an attack, with the preconcerted intent to commit an assault and battery, and accomplish the unlawful act, all or any of those participating in the unlawful proceeding are guilty of the crime of riot. *People v. White*, 55 Barb., 613; *aff'd*, 32 N. Y., 465.

See *Hill v. Supervisors, etc.*, 53 Hun, 194; 24 St. Rep., 944; *aff'd*, 119 N. Y., 344; 29 St. Rep., 588; *People v. Judson*, 11 Daly, 1, 83.

**§ 450. Punishment of riot.**—A person guilty of riot, or of participating in a riot, either by being personally present, or by

instigating, promoting, or aiding the same, is punishable as follows:

1. If the purpose of the assembly, or of the acts done or threatened or intended by the persons engaged, is to resist the enforcement of a statute of this state, or of the United States, or to obstruct any public officer of this state, or of the United States, in serving or executing any process or other mandate of a court of competent jurisdiction, or in the performance of any other duty; or if the offender carries, at the time of the riot, fire-arms or any other dangerous weapon, or is disguised; by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment;

2. In any other case, if the offender directs, advises, encourages or solicits other persons, present or participating in the riot or assembly, to acts of force or violence, by imprisonment for not more than two years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment;

3. In any case, not embraced within the foregoing subdivisions of this section, by imprisonment for not more than one year, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

**§ 451. Unlawful assemblages.**—Whenever three or more persons,

1. Assemble, with intent to commit any unlawful act by force; or

2. Assemble, with intent to carry out any purpose, in such a manner as to disturb the public peace; or

3. Being assembled, attempt or threaten any act tending towards a breach of the peace or any injury to person or property, or any unlawful act, such an assembly is unlawful, and every person participating therein, by his presence, aid or instigation, is guilty of a misdemeanor. But this section shall not be so construed as to prevent the peaceable assembling of persons for lawful purposes of protest or petition.

Amended by chap. 384 of 1882.

This amendment was made before the Code went into effect.

**Unlawful assembly.**—Unlawful assembly was an offense well known at common law. *People v. Most*, 128 N. Y., 113; 38 St. Rep., 829; 8 N. Y. Cr., 281.

The offense, under subd. 3 of this section, can only be committed when there is a concert or combination of three or more persons who unite in the attempt, or in the threat, to do one or more of the things specified in the statute. *Id.*

A threat made by one or by two persons only, in which no others participated, is not indictable under this section; though made in an assembly of many persons. *Id.*

Threats of personal violence made in an assembly in this state against residents of another state are within the statute. *Id.*

Utterances, at a public meeting, of words which tend to incite the people assembled to unlawful acts, coupled, not only with expressions of sympathy for the fate of the Chicago anarchists, but with a glorification of their deeds,



and an incitement to murder public officers for discharge of public duty, were held to bring the case directly within the letter and spirit of subdivision 8 of this section. *People v. Most*, 7 N. Y. Cr., 391; 29 St. Rep., 99; 8 N. Y. Supp., 625.

It need not affirmatively appear that other persons, present when the threat was made, uttered or repeated the same words. *People v. Most*, 128 N. Y. 114; 38 St. Rep., 829; 8 N. Y. Cr., 279. Participation in the threat may be shown by the adoption by others of the language used, exhibited by their conduct. *Id.*

Threats relating to acts not presently to be done, but to be performed at some future time, are within the statute. *Id.*

**§ 452. Disguised and masked persons, etc.** — An assemblage in public houses or other places of three or more persons, disguised by having their faces painted, discolored, colored or concealed, is unlawful, and every individual so disguised, present thereat, is guilty of a misdemeanor; but nothing contained in this section shall be construed as prohibiting any peaceful assemblage for a masquerade or fancy dress ball or entertainment, or any assemblage thereof of persons masked, or as prohibiting the wearing of masks, fancy dresses, or other disguise by persons on their way to or returning from such ball or other entertainment; if, when such masquerade, fancy dress ball or entertainment is held in any of the cities of this state, permission is first obtained from the police authorities in such cities respectively for the holding or giving thereof, under such regulations as may be prescribed by such police authorities.

**§ 453. Allowing masquerades to be held in places of public resort.** — A person being a proprietor, manager or keeper of a theatre, circus, public garden, public hall, or other place of public meeting, resort or amusement, for admission to which any price or payment is demanded, who permits therein any assemblage of persons masked, prohibited in this title, is guilty of a misdemeanor, punishable by imprisonment in a state prison not exceeding two years, or in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars and not less than one thousand dollars, or by both such fine and imprisonment.

**§ 454. Remaining present at place of riot, etc., after warning.** — A person, remaining present at the place of an unlawful assembly or riot, after the persons assembled have been warned to disperse by a magistrate or public officer, is guilty of a misdemeanor, unless as a public officer, or at the request or command of a public officer, he is endeavoring or assisting to disperse the same, or to protect persons or property, or to arrest the offenders.

**§ 455. Remaining present at place of meeting, originally lawful, after it has adopted an unlawful purpose.** — Where three or more persons assemble for a lawful purpose, and afterwards proceed to commit an act that would amount to

a riot, if it had been the original purpose of the meeting, every person who does not retire when the change of purpose is made known, or such act is committed, except public officers and persons assisting them in attempting to disperse the assembly, is guilty of a misdemeanor.

**§ 456. Refusing to assist in arresting rioter.**—A person, present at the place of an unlawful assembly or riot, who, being commanded by a duly authorized public officer to act or aid in suppressing the riot, or in protecting persons or property, or in arresting a person guilty of or charged with participating in the unlawful assembly or riot, neglects or refuses to obey such command, is guilty of a misdemeanor.

See section 108 of Code of Criminal Procedure.

**§ 457. Combinations to resist execution of process.**—A person, who enters into a combination with another to resist the execution of any legal process, or other mandate of a court of competent jurisdiction, under circumstances not amounting to riot, is guilty of a misdemeanor.

See sections 102 and 108 of the Code of Criminal Procedure.

**§ 458. Prize fighting and sparring exhibitions, aiding therein, et cetera.**—A person who, within this state, engages in, instigates, aids, encourages or does any act to further a contention, or fight, without weapons, between two or more persons, or a fight commonly called a ring or prize fight, either within or without the state, or who engages in a public or private sparring exhibition, with or without gloves, within the state, at which an admission fee is charged or received, either directly or indirectly, or who sends or publishes a challenge, or acceptance of a challenge for such a contention, exhibition or fight, or carries or delivers such a challenge or acceptance, or trains or assists any person in training or preparing for such a contention, exhibition or fight, is guilty of a misdemeanor.

Am'd by ch. 870 of 1900. In effect Sept. 1, 1900.

**§ 459. What is a challenge.**—Any words spoken or written, or any signs uttered or made to any person, expressing or implying, or intended to express or imply a desire, request, invitation or demand to engage in any fight, such as mentioned in section 458, are to be deemed a challenge within the meaning of that section.

See section 236. *ante*.

Whether the writing was intended for a challenge, is for the jury to determine. Wood's case, 8 C. H. Rec., 139.

**§ 460. Betting or stakeholding on fight.**—A person who bets, stakes, or wagers money or other property, upon the result of such a fight or encounter, or who holds or undertakes to hold money or other property so staked or wagered, to be delivered to or for the benefit of the winner thereof, is guilty of a misdemeanor.

**§ 461. Fight out of state.**—A person who leaves the state, with intent to elude any provision of this title, or to commit any

act without the state, which is prohibited by this title, or who, being a resident of this state, does any act without the state, which would be punishable by the provisions of this title, if committed within the state, is guilty of the same offense and subject to the same punishment, as if the act had been committed within this state.

See sections 185 and 239, *ante*; section 133 of Code of Criminal Procedure.

**§ 462. Indictment.**—An indictment for an offense, specified in the last section, may be tried in any county within the state.

See section 240, *ante*; section 133 of Code of Criminal Procedure.

**§ 463. Apprehension of persons about to fight.**—A magistrate having power to issue warrants in criminal cases, to whom it is made to appear that there is reasonable ground to apprehend that an offense specified in sections 458, 460 and 461 is about to be committed within his jurisdiction, or by any person being within his jurisdiction, must issue his warrant to a sheriff or constable, or other proper officer, for the arrest of the person or persons so about to offend. Upon a person being arrested and brought before him by virtue of the warrant, he must inquire into the matter, and, if it appears that there is reasonable ground to believe that the person arrested is about to commit any offense, the magistrate must require him to give a bond to the people of the state in such sum, not exceeding one thousand dollars, as the magistrate may fix, either with or without sureties in his discretion, conditioned that such person will not, for one year thereafter, commit any such offense.

**§ 464. Apprehension of person about to fight.** — If the person arrested, as prescribed in the last section, does not furnish a bond as prescribed therein, within a time fixed by the magistrate, the latter must commit him to the county jail, there to remain until discharged by a court of record having criminal jurisdiction. A person so committed may, at any time, be discharged upon a writ of *habeas corpus*, upon his executing the bond required by the committing magistrate. If the bond is required to be given with one or more sureties, the surety or sureties must be approved by the officer taking the same.

**§ 465. Forcible entry and detainer.**—A person, guilty of using, or of procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and the manner allowed by law, is guilty of a misdemeanor.

**What constitutes.**—It is an indictable offense, under this section, for any person forcibly to enter upon, or detain, the lands or other possessions of another party. *Cain v. Flood*, 38 St. Rep., 197. It cannot justify or palliate his offense to urge in his behalf that another person had previously committed a like offense. *Id.*

If a person uses any force to gain the entrance against the party in possession, the case comes within the provisions of the statute. *People v. Farrell*, 5 Silv. (Sup. Ct.), 23; 28 St. Rep., 44; 8 N. Y. Supp., 232. The statute says that, if he uses any force to gain an entry, he is guilty. *Id.* The court cannot undertake to weigh or measure, as a matter of law, what particular acts or force were intended. It must, in each case, be a question of fact to go to the jury whether such force or violence was used in a given case as was contemplated by the statute. *Id.*

**Conviction.**—The defendant may be convicted of detainer only on an indictment for forcible entry and detainer. *People v. Anthony*, 4 Johns., 198; *People v. Rickert*, 8 Cow., 226.

**§ 466. Returning to take possession of lands after being removed by legal process.**—A person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal or officer, and who afterwards, without authority of law, returns to settle or reside upon or take possession of such lands, is guilty of a misdemeanor.

**§ 467. Unlawful intrusion, etc.**—A person who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever without such authority; and a person who places, erects or occupies, within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor.

See subd. 9 of section 640, *post*.

**Object.**—This section was intended primarily to define what was previously known in the criminal law as a criminal trespass, as distinguished from a mere civil trespass. *People v. Stevens*, 14 St. Rep., 808; 109 N. Y., 162.

**Re-enactment.**—This section is, in substance, a re-enactment of section 1, chap. 396 of the Laws of 1857. *Id.*

**Intent.**—This section does not, in terms, make the intent a material element of the offense. *Id.*

But the existence of a criminal intent, as a necessary constituent of the crime, must be implied. *Id.*

The fact of becoming a "squatter" is largely one of intent. *O'Donnell v. McIntyre*, 16 Abb. N. C., 87.

The act was and is a wrongful one, and punishable as a misdemeanor. *Id.*

On an indictment under this section, the intention of the defendant is material. *People v. Stevens*, 109 N. Y., 162; 14 St. Rep., 808.

If he enters under a *bona fide* claim of right, which he might reasonably believe entitled him to take possession, it will be a defense. *Id.* But to sustain such a defense, there must be some colorable ground for such a claim. *Id.*

**Intrusion.**—Intrusion on any lands in cities and villages, vacant or not, is doubtless within this section. *Id.*

**Defense.**—Whether advice of counsel, accepted and acted upon in good faith, would constitute a defense, was not passed upon in *People v. Stevens*, *ante*.

**§ 468. Discharging fire-arms.**—A person who, otherwise than in self defense, or in the discharge of official duty,

1. Willfully discharges any species of fire-arms, air-gun or other weapon, or throws any other deadly missile in a public place or

in any place where there is any person to be endangered thereby, although no injury to any person ensues; or

2. Intentionally, without malice, points or aims any fire-arm at or toward any other person; or

3. Discharges, without injury to any other person, fire-arms, while intentionally without malice, aimed at or toward any person; or

4. Maims or injures any other person by the discharge of any fire-arm pointed or aimed intentionally, but without malice, at any such person;

Is guilty of a misdemeanor.

Am'd by chap. 692 of 1893.

This amendment added subds 2, 3 and 4 of the present section, and will go into effect, October 1, 1893.

**§ 469. Witnesses' privilege.**—No person shall be excused from giving evidence upon an investigation or prosecution for any of the offenses specified in this title, upon the ground that the evidence might tend to convict him of a crime. But such evidence shall not be received against him upon any criminal proceeding.

See section 712, *post*.

## TITLE XIV.

### OF CRIMES AGAINST THE REVENUE AND PROPERTY OF THE STATE.

**SECTION 470. Misappropriation, etc, and falsification of accounts by public officers.**

471. Other violations of law.

472. Misappropriation, etc., by county treasurer.

473. Public or school officers, interest of, in contracts, etc., a misdemeanor.

474. County clerks omitting to publish statement required by law.

475. Obstructing officer in collecting revenue.

476. Delivering false bill of lading to canal collector.

477. Weighmaster making false entry of weight of canal boat.

478. Canal officer concealing frauds upon the revenue.

479. Willful injuries to the canals.

480. Drawing off water from canals.

481. Canal officer accepting bribe to allow water to be drawn off from canals.

482. Fraudulent appropriation of lost treasure or waived property.

483. Injuries to salt works.

484. Seizing military stores belonging to the state.

485. Making false statement in reference to taxes.

485a. School district trustee not to draw draft on supervisor in certain cases.

**§ 470. Misappropriation, etc., and falsification of accounts by public officers.**—A public officer, or a deputy, or clerk of any such officer, and any other person receiving money on behalf of, or for account of the people of this state, or of any department of the government of this state, or of any bureau or

§ 468-a. **Criminal anarchy defined.**—Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

Added by ch. 371, Laws 1902. Took effect April 3, 1903.

§ 468-b. **Advocacy of criminal anarchy.**—Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or
2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, documents, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or
3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or
4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine; is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

Added by ch. 371, Laws 1902. Took effect April 3, 1903.

§ 468-c. **Liability of editors and others.**—Every editor or proprietor of a book, newspaper or serial and every manager



of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication and whose act was disavowed by him so soon as known.

Added by ch. 371, Laws 1902. Took effect April 3, 1903.

§ 468-d. **Assemblage of anarchists.**—Whenever two or more persons assemble for the purpose of advocating or teaching the doctrines of criminal anarchy, as defined in section four hundred and sixty-eight-a of this title, such as assembly is unlawful, and every person voluntarily participating therein by his presence, aid or instigation, is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of more than five thousand dollars, or both.

Added by ch. 371, Laws 1902. Took effect April 3, 1903.

§ 468-e. **Permitting premises to be used for assemblages of anarchists.**—The owner, agent, superintendent, janitor, caretaker or occupant of any place, building or room, who wilfully and knowingly permits therein any assemblage of persons prohibited by section four hundred and sixty-eight of this title, or who, after notification that the premises are so used, permits such use to be continued, is guilty of a misdemeanor, and punishable by imprisonment for not more than two years, or by a fine of not more than two thousand dollars, or both.

Added by ch. 371, Laws 1902. Took effect April 3, 1903.

fund created by law, and in which the people of this state are directly or indirectly interested, or for or on account of any city, county, village or town, who

1. Appropriates to his own use, or to the use of any person not entitled thereto, without authority of law, any money so received by him as such officer, clerk or deputy, or otherwise; or

2. Knowingly keeps any false account, or makes any false entry or erasure in any account of, or relating to, any money so received by him, or

3. Fraudulently alters, falsifies, conceals, destroys or obliterates any such account; or

4. Willfully omits or refuses to pay over to the people of this state or their officer or agent authorized by law to receive the same, or to such city, village, county or town, or the proper officer or authority empowered to demand and receive the same, any money received by him as such officer, when it is his duty imposed by law to pay over, or account for, the same;

Is guilty of felony.

See subd. 2 of section 114, *ante*; section 515, *post*.

The case of *People v. Lyon*, 1 N. Y. Cr., 400, was affirmed in 2 id., 485, at general term, but the latter decision was reversed by court of appeals in 99 N. Y., 210.

This section does not require an "intent to deprive or defraud the true owner of his property," to exist in the mind of the defaulting official when he is appropriating public moneys intrusted to him. *People v. Church*, 3 N. Y., 60; 1 How. N. S., 369.

See *Bork v. People*, 91 N. Y., 5; 1 N. Y. Cr., 375, which was decided under chap. 19 of 1875.

**§ 471. Other violations of law.**—An officer or other person mentioned in the last section who willfully disobeys any provision of law regulating his official conduct, in cases other than those specified in that section is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or imprisonment not exceeding two years, or both.

See section 155, *ante*.

**§ 472. Misappropriation, etc., by county treasurer.**—A county treasurer, who willfully misappropriates any moneys, funds or securities, received by or deposited with him as such treasurer, or who is guilty of any other malfeasance or willful neglect of duty in his office, is punishable by a fine not less than five hundred dollars nor more than ten thousand dollars, or by imprisonment in a state prison not less than one year or more than five years, or by both such fine and imprisonment.

**§ 473. Public or school officers, interest of, in contracts, etc., a misdemeanor.**—A public officer or school officer, who is authorized to sell or lease any property, or to make any contract

in his official capacity, or to take part in making any such sale, lease or contract, who voluntarily becomes interested individually in such sale, lease or contract, directly or indirectly, except in cases where such sale, lease or contract, or payment under the same, is subject to audit or approval by the superintendent of public instruction, is guilty of a misdemeanor.

Am'd by chap. 493 of 1888.

This amendment extended the provision to include school officers.

Am'd by chap. 220 of 1890.

This amendment added the exception contained in the present section.

This section is not in derogation of any common law right and should be strictly construed to prevent the evil at which it is aimed. *Beebe v. Board*, etc., 46 St. Rep., 223; 19 N. Y. Supp., 630.

It makes the entering into a contract by a board of supervisors with one of its members, a criminal offense. *Id.*

**§ 474. County clerks omitting to publish statement required by law.**—A county clerk who willfully omits to publish any statement required by law, within the time prescribed, is guilty of a misdemeanor, punishable by a fine of one hundred dollars, or imprisonment for six months, or both.

**§ 475. Obstructing officer in collecting revenue.**—A person who willfully obstructs or hinders a public officer from collecting any revenue, taxes or other sum of money in which, or in any part of which the people of this state are directly or indirectly interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor.

**§ 476. Delivering false bill of lading to canal collector.**—A person whose duty it is to deliver to any collector of tolls upon any of the canals belonging to this state, a bill of lading of any property transported upon such canal, who delivers a false bill of lading as true, or makes or signs a false bill of lading, intending it to be delivered as true, knowing such bill to be false, is punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding three times the value of the property omitted in such bill, or both.

See *Davis v. Bemis*, 40 N. Y., 453, *note*.

**§ 477. Weighmaster making false entry of weight of canal boat.**—A weighmaster upon any of the canals belonging to this state, and a clerk of such weighmaster, who makes a false entry of the weight of any boat, or cargo of any boat, navigating such canal, or who makes a false certificate of the light weight of any boat, knowing such entry or certificate to be false, is guilty of a misdemeanor.

**§ 478. Canal officer concealing frauds upon the revenue.**—A public officer or agent employed by the people of this state in relation to the canals belonging to this state, who knows, or has

good reason to believe that any fraud upon the revenues of the canals has been committed or attempted, and who omits to disclose the same, and enforce the penalties therefor, if within his power, is guilty of a misdemeanor.

**§ 479. Willful injuries to the canals.**—A person who, without authority of law, willfully inflicts an injury upon any of the canals belonging to this state, or disturbs or injures any of the boats, locks, bridges, buildings, machinery or other works or erections connected with any such canal, and in which the people of this state have an interest, is guilty of felony.

See subd. 19 of section 56 of Code of Criminal Procedure.

See *Sipple v. State*, 99 N. Y., 289; 16 Abb. N. C., 434.

**§ 480. Drawing off water from canals.**—A person who draws water from any canal in this state, or from a feeder or reservoir of any canal, during the season of navigation of the canal, and to the detriment or injury of the navigation thereof, without authority of law, is punishable by imprisonment in a county jail not less than one year, and by a fine not less than one thousand dollars.

Except by authority of the legislature, or of the authorized agents of the state, no one has a right to tap the state dam and draw off the waters of the artificial pond which is created by such dam for public purposes. *Varick v. Smith*, 5 Paige, 137; *Lynch v. Stone*, 4 Denio, 356.

See *Sipple v. State*, 99 N. Y., 290; 16 Abb. N. C., 434.

**§ 481. Canal officer accepting bribe to allow water to be drawn off from canals.**—A public officer or agent employed by the people of this state in relation to the canals belonging to the state, or a contractor for canal repairs, or person having charge of any canal, or any part thereof, or of any lock, waste weir, feeder or other work belonging thereto, or being employed thereon, who asks, or accepts or promises to accept any bribe as an inducement to permit water to be drawn from a canal, feeder or reservoir in violation of the last section; and a person who gives, or offers or promises to give to any officer or person above mentioned, any bribe as an inducement to him to permit water to be drawn from any canal, feeder or reservoir in violation of this section, is guilty of a misdemeanor.

**§ 482. Fraudulent appropriation of lost treasure or waived property.**—A person who fraudulently conceals or appropriates to his own use any lost treasure or any waived property belonging to this state by virtue of its sovereignty, is guilty of a misdemeanor.

**§ 483. Injuries to the salt works.**—A person who willfully burns, destroys, or injures any salt manufactory connected with the Onondago salt springs, or any building appurtenant to

such manufactory or any part of such manufactory, or any of buildings, reservoirs, pumps, conductors or water conduits long to this state, used in the raising of salt water for the manufacture of salt, without authority of law, is punishable imprisonment in a state prison not exceeding five years.

**§ 484. Seizing military stores belonging to the state.**  
A person who enters any fort, magazine, arsenal, armory, arsenal or encampment, and seizes or takes away any arms, ammunition, military stores or supplies belonging to the people of the state; and a person who enters any such place with intent to do so, is punishable by imprisonment in a state prison not exceeding ten years.

**§ 485. Making false statement in reference to tax.**  
A person, who, in making any statement, oral or written, which is required or authorized by law to be made as the basis of imposing any tax or assessment, or of an application to receive any tax or assessment, willfully makes, as to any material matter, any statement which he knows to be false, is guilty of a misdemeanor.

**§ 485a. School district trustee not to draw draft on supervisor in certain cases.**—A school district trustee issues an order or draws a draft on supervisor or collector for money, unless there is at the time sufficient money in the hands of such supervisor or collector, belonging to the district, to pay such order or draft, is guilty of a misdemeanor.

This section was added by chap 692 of 1893, and will go into effect, October 1, 1893.

## TITLE XV.

### OF CRIMES AGAINST PROPERTY.

- |                |   |
|----------------|---|
| <b>CHAPTER</b> | <b>I. Arson.</b>  |
|                | <b>II. Burglary and housebreaking.</b>  |
|                | <b>III. Forgery and counterfeiting.</b>   |
|                | <b>IV. Larceny, including embezzlement.</b>   |
|                | <b>V. Extortion.</b>  |
|                | <b>VI. False personation and cheats.</b>  |
|                | <b>VII. Fraudulently fitting out and destroying ships and vessels.</b>                    |
|                | <b>VIII. Fraudulent destruction of property insured.</b>                                  |
|                | <b>IX. False weights and measures.</b>  |
|                | <b>X. Fraudulent insolvencies by individuals.</b>   |
|                | <b>XI. Fraudulent insolvencies by corporations, and other frauds in their management.</b> |
|                | <b>XII. Frauds in the sale of passage tickets.</b>  |
|                | <b>XIII. Frauds relative to documents of title to merchandise.</b>                        |
|                | <b>XIV. Malicious mischief.</b>   |

**Chap. 1, title 15, 486.**—This title treats of crimes against property includes arson, burglary and housebreaking, forgery and counterfeiting, larceny, embezzlement and extortion. *People v. Barondess*, 45 St. Rep., 2 N. Y. Cr., 252.

## CHAPTER I

*Arson.*

- SECTION 486. Arson in first degree defined.  
 487. Id.; in second degree.  
 488. Id.; in third degree.  
 489. Arson, how punished.  
 490. Intent to destroy building requisite.  
 491. Contiguous buildings.  
 492. "Night-time" defined.  
 493. "Building," defined.  
 494. "Inhabited building," defined.  
 495. Ownership of building.

**§ 486. Arson in first degree defined.**—A person who willfully burns, or sets on fire, in the night time, either

1. A dwelling-house in which there is, at the time, a human being; or

2. A car, vessel, or other vehicle, or a structure or a building other than a dwelling-house, wherein, to the knowledge of the offender, there is, at the time, a human being;

Is guilty of arson in the first degree.

See section 637, *post*.

**Application.**—This section, as well as the next two sections, applies to willful acts of burning and setting on fire of buildings. *People v. Fanshawe*, 47 St. Rep., 341; 65 Hun, 91; 8 N. Y. Cr., 345; 19 N. Y. Supp., 868.

Arson in the first degree may be committed by one in burning his own dwelling house. *Shepherd v. People*, 19 N. Y., 537.

**Re-enactment.**—This section is a practical re-enactment of the provisions of section 9, title 1, chap. 1, part 4 of 2 Revised Statutes. *People v. Fanshawe, ante*.

**Definition.**—This section and the following two sections define arson in its three degrees. *Id.*

Section 490, *post*, contains no part of the definition of arson in either degree. *Id.*

In defining the crime of arson in the first degree, the legislature intended to protect the whole building usually occupied by a person lodging therein at night, and all the occupants and lodgers therein without regard to the manner in which it may be used, or the number of occupants. *Levy v. People*, 19 Hun, 386.

At common law, the offense was defined as the willful and malicious burning of another's house. *People v. Fanshawe*, 50 St. Rep., 2; *aff'g* 47 *id.*, 381; 65 Hun, 85; 8 N. Y. Cr., 337.

Prior to the enactment of the Code, arson was defined by statute in this state and divided into four degrees. *Id.* In the Penal Code, the fourth degree has been dropped out, and all acts amounting to arson are concisely stated in three sections, defining three degrees of the crime. *Id.*

**Essentials.**—In order to establish the crime of arson in the first degree, the only elements necessary to be proved are that the prisoner willfully set the premises on fire in the night time, and that the premises were a dwelling house in which there was at the time a human being. *People v. Fanshawe*, 47 St. Rep., 335; 65 Hun, 84; 8 N. Y. Cr., 336.

**Dwelling house.**—As to what is a "dwelling house," see *Levy v. People*, 60 N. Y., 327.

**Tenement house.**—Any occupant of an apartment in a tenement house, by causing the fire to be set in the night on his own premises, so as to break out in the absence of all persons from such apartments, is guilty of arson in the first degree. *Levy v. People*, 19 Hun, 387.



**Intent.**—A design to produce death is not necessary to constitute the offense under this section, either at common law or under the statute. *People v. Orcutt*, 1 Park., 252.

It was never supposed that the particular intent or motive that prompts the act of setting fire to a dwelling house in the night time, in which human beings were lodged, was a necessary element of the crime, so long as the act itself was willful and malicious. *People v. Fanshawe*, 50 St. Rep. aff'g 47 id., 831; 65 Hun, 89; 8 N. Y. Cr., 343.

An intent to destroy the building set on fire was not a necessary element of the crime as it existed at common law, or under any statutory definition prevailing in this state prior to the enactment of the present Penal Code. ]

The fact that defendant set fire to his room in a lodging house for the purpose of destroying his personal effects, in order to defraud an insurance company, and not to destroy the building insured, does not change the character of the offense and constitutes arson in the first degree. *Id.*

**Knowledge.**—Whether the person charged with the offense had knowledge that the building burned had usually or at any time been occupied by human beings lodging therein, is immaterial. *People v. Orcutt*, 1 Park., 252.

**Test.**—This section has made the fact that some human being is in the house at the time it is fired, the test of the peril, and draws no distinction as to its imminency. *Woodford v. People*, 3 Hun, 315.

Arson is an offense against property. *Woodford v. People*, 3 Hun, 315. It is aggravated when, in addition to the destruction of property, human life is thereby in danger of destruction. *Id.* The fact that a party may or may not escape with his life, does not prove that it was not in peril. *Id.*

Where the occupant of the house was aroused by the alarm before the fire had reached her house, and, instead of leaving at once, remained a few moments to collect her things, during which the fire caught her house, the incendiary is guilty of arson in the first degree. *Id.*

Whether the person is asleep or awake, in or out of bed, or whether escape is practicable before the building actually kindles, is not made material by the terms of this section. *Woodford v. People*, 62 N. Y., 132.

A felonious setting fire to one building, which actually communicates and burns another, is sufficient to convict the incendiary of arson in the first degree, although the latter building, irrespective of an intent to do so. *Id.*; *Hennessey v. People*, 21 How., 239.

### § 487. Arson in second degree.—A person who,

1. Commits an act of burning in the day time, which, if committed in the night time, would be arson in the first degree; or

2. Willfully burns, or sets on fire, in the night time, a dwelling-house wherein, at the time there is no human being; or

3. Willfully burns, or sets on fire, in the night time, a building not inhabited, but adjoining or within the curtilage of an inhabited building, in which there is, at the time, a human being, so that the inhabited building is endangered, even though it is not in fact injured by the burning; or

4. Willfully burns, or sets on fire, in the night time, a car, vessel, or other vehicle, or a structure or building, ordinarily occupied at night by a human being, although no person is within at the time;

Is guilty of arson in the second degree.

See notes under preceding section.

Under the former statute, it was necessary to be shown that the building set on fire actually touched an inhabited dwelling, or that it was within the curtilage thereof. *Peverelley v. People*, 3 Park., 59.

Setting fire to a prison by a prisoner, merely for the purpose of effecting escape, is not arson.

his own escape, was held, in *People v. Cotteral*, 18 Johns., 115, not to amount to the crime of arson, nor to a willful burning of an inhabited dwelling house, within the meaning of the first section of chap. 29 of 1 N. R. L., 407; 2 R. S. 657, 666-7.

**§ 488. Arson in third degree.** — A person who willfully burns, or sets on fire, either

1. A vessel, car or other vehicle, or a building, structure, or other erection, which is at the time insured against loss or damage by fire, with intent to prejudice the insurer thereof; or

2. A vessel, car, or other vehicle, or a building, structure, or other erection, under circumstances not amounting to arson in the first or second degree;

Is guilty of arson in the third degree.

See notes under section 486, *ante*.

**Re-enactment.**—Section 5 of 3 R. S., 2483 (7th ed. , is now embodied in this section of the Penal Code.

**Object.**—This section aims to punish offenses against all insurers, and is not limited to such as are natural persons, or organized under the laws of this state. *Carncross v. People*, 1 N. Y. Cr., 520; 17 W. Dig., 384.

**Definition.**—This section gives a new definition of the crime of arson in the third degree, expressed in broad and comprehensive language, which, in the judgment of the legislature, might be construed to include acts which before did not amount to arson, and consequently section 490, *post*, was passed as a precaution against such result. *People v. Fanshawe*, 50 St. Rep., 4; *aff'g* 47 *id.*, 331; 65 Hun, 85; 8 N. Y. Cr., 335.

See *People v. Fanshawe*, 65 Hun, 83, 84, 91, 98; 47 St. Rep., 341; 8 N. Y. Cr., 345; 19 N. Y. Supp., 868.

**§ 489. Arson, how punished.** — Arson is punishable as follows:

1. In the first degree, by imprisonment for a term not exceeding forty years.

2. In the second degree, by imprisonment for a term not exceeding twenty-five years.

3. In the third degree, by imprisonment for a term not exceeding fifteen years. [Am'd, chap. 549 of 1897; to take effect Sept. 1, 1897.]

This amendment changed the term of imprisonment from a term not less than ten to a term not exceeding forty years.

Am'd by chap. 662 of 1892.

This amendment inserted, in subd. 1, the words "any term;" omitted, in subd. 2, the statement of the minimum limit of punishment, and substituted for the words "not more than," in subd. 3, the words "not exceeding."

**§ 490. Intent to destroy building requisite.**—The burning of a building under circumstances which show beyond a reasonable doubt that there was no intent to destroy it, is not arson.

**Application.**—This section has no reference to the crime of arson as defined in sections 486-488, *ante*, but refers to another and distinct class of crimes—namely, non-willful as distinguished from willful acts. *People v. Fanshawe*, 65 Hun, 90, 8 N. Y. Cr., 343; 47 St. Rep., 340; 19 N. Y. Supp., 868.

**Intent.**—It should not be so construed as to give to the crime of arson a new definition or make it depend, not upon the willful burning or setting on fire of a building, but on the presence or absence of an intent to destroy it at the time it was set on fire. *Id.*

Upon the trial of an indictment under section 486, *ante*, this section is avail-

able to a defendant in the event that he can produce evidence to show that there was no intention to destroy the building. *Id.*

**Object.**—The purpose of this section was not to change the nature of the crime of arson in the first degree. *People v. Fanshawe*, 50 St. Rep., 4; *aff'g.* 47 *id.*, 331; 65 Hun, 89; 8 N. Y. Cr., 344.

This section was enacted from abundant caution, in order to exclude from the operation of the previous sections, in which the different degrees of arson are defined, acts which never constituted the offense, and, possibly, some acts which did. *Id.*

It was intended, by this section, to exclude all cases of setting fire to or burning a house by negligence, mischance, or accidentally while in the commission of a mere civil trespass; or while engaged in the commission of a felony, where there was no intent to set the fire or burn the building. *Id.*

This section does not qualify the definition of arson in the first degree, as expressed in section 486, *ante*, but limits and qualifies the broad language of section 488, *ante*, which defines arson in the third degree. *Id.*

**§ 491. Contiguous buildings.**—Where an appurtenance to a building is so situated with reference to such building, or where any building is so situated with reference to another building that the burning of the one will manifestly endanger the other, a burning of the one is deemed a burning of the other, within the foregoing provisions, against any person actually participating in the original setting on fire, as of the moment when the fire from the one communicates to and sets on fire the other.

See *Woodford v. People*, 62 N. Y., 117.

The word "contiguous," when used in a policy of fire insurance in reference to a building, means in close proximity, in actual close contact. *Arkell v. Commerce Ins. Co.*, 69 N. Y., 193.

**§ 492. "Night time" defined.**—The words "night time," as used in this chapter, include the period between sunset and sunrise, and every building or structure, which shall have been usually occupied by persons lodging therein at night, is a dwelling-house within the meaning of this chapter.

**§ 493. "Building," defined.**—Any house, vessel, or other structure, capable of affording shelter for human beings, or appurtenant to, or connected with a structure so adapted, is a "building" within the meaning of this chapter.

See section 504, *post*.

It was deemed necessary, in this section, to declare that the word building included a railway car, vessel, etc. *Rouse v. Catskill & N. Y. S. Co.*, 56 Hun, 82; 35 St. Rep., 493; 13 N. Y. Supp., 128.

**§ 494. "Inhabited building," defined.**—A building is deemed an "inhabited building" within the meaning of this chapter, any part of which has usually been occupied by a person lodging therein at night.

**Dwelling-house.**—Any building is a "dwelling-house," which is in whole or in part usually occupied by persons lodging therein at night, though other parts, or the greater part, may be occupied for an entirely different purpose. *People v. Orcutt*, 1 Park, 252, even though it may not be such in the ordinary and popular acceptance of that term. *Id.*

A jail was held to be an inhabited dwelling-house, within the meaning of the act, 2 R. S., 657, 666, 7. *People v. Cotteral*, 18 John., 115.

A building divided into a large number of apartments separately occupied by several tenants, who hold under distinct leases, is a dwelling-house within the meaning of the statute. *Levy v. People*, 19 Hun, 386.

**§ 495. Ownership of building.**—To constitute arson it is not necessary that another person than the defendant should have had ownership in the building set on fire.

Where a part of the house is occupied by a tenant habitually lodging therein at night, and the residue by the owner, the building is well described in the indictment as the dwelling-house of such tenant. *Shepherd v. People*, 19 N. Y., 537.

## CHAPTER II.

### *Burglary.*

**SECTION 496. Burglary in first degree defined.**

497. Id., in second degree.

498. Id., in third degree.

499. "Break," defined.

500. "Night time," defined.

501. "Enter," defined.

502. "Dwelling-house," defined.

503. Dwelling-houses, etc., when deemed separate.

504. "Building," defined.

505. Unlawfully entering building.

506. Burglar punishable separately for crime in building.

507. Burglary, how punished.

508. Misdemeanor to make or mend burglars' tools, etc.

**§ 496. Burglary in first degree defined.**—A person who, with intent to commit some crime therein, breaks and enters, in the night time, the dwelling-house of another, in which there is at the time a human being,

1. Being armed with a dangerous weapon; or
2. Arming himself therein with such a weapon; or
3. Being assisted by a confederate actually present; or
4. Who, while engaged in the night time in effecting such entrance, or in committing any crime in such a building, or in escaping therefrom, assaults any person;

Is guilty of burglary in the first degree.

**Dwelling-house.**—The chamber of a guest at an inn is not his dwelling-house, but that of the landlord. *Rodgers v. People*, 86 N. Y., 330.

Where dwelling-house is occupied by a servant as the house of his master, and in his master's business, it is his master's dwelling-house, and it must be so described in an indictment for burglarious entry. *Rodgers v. People*, 86 N. Y., 364.

Where the owner of a building divided the lower part into a store and bar-room with no communication between them, and carried on business in them, and he lived over the store and leased the part over the bar-room, which could be entered only from the street, it was held in *Quinn v. People*, 11 Hun, 336; *aff'd* 71 N. Y., 561, that the bar-room was part of the dwelling-house, and that the breaking into it for the purpose of committing larceny constituted burglary in the first degree.

See *People ex rel. Reilly v. Bell*, 24 St. Rep., 301; 3 N. Y. Supp., 813.

**§ 497. Burglary in second degree.**—A person, who, with intent to commit some crime therein, breaks and enters the dwelling-house of another in which there is a human being, under circumstances not amounting to burglary in the first degree, is guilty of burglary in the second degree.

See *People v. Bosworth*, 45 St. Rep., 517; 64 Hun, 79; 19 N. Y. Supp., 116.

**§ 498. Burglary in third degree.**—A person who either

1. With intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or
2. Being in any building, commits a crime therein and breaks out of the same;

Is guilty of burglary in the third degree.

The case of *People v. Richards*, 7 St. Rep., 656; 44 Hun, 278; 5 N. Y. Cr., 355, was reversed in 13 St. Rep., 515; 108 N. Y., 137.

**Change from act of 1863.**—The only alteration, made by this section in the statute of 1863, consists in changing the words "with an intent to commit a larceny or felony," into the words "with intent to commit a crime." *People v. Richards*, 13 St. Rep., 515; 108 N. Y., 143.

**Intent.**—The offense is complete by the breaking and entering, with the intent to steal, etc. *People v. Marks*, 4 Park., 154. The intent is a part of the definition of burglary. *Id.*

**Principal.**—A person who induces another to commit the crime of burglary in the third degree, is properly charged as a principal. *People v. Bosworth*, 45 St. Rep., 517; 64 Hun, 74; 19 N. Y. Supp., 116.

**Cemetery.**—A structure above ground, arranged and intended solely as a place for the permanent interment of the dead, is not a "building" within the meaning of the provisions of this section, and section 504, *post*. *People v. Richards*, 13 St. Rep., 515; 108 N. Y., 137.

**Stable.**—Where a party breaks into a stable, takes out a horse, leads it away and cuts its throat, because of ill-feeling between him and its owner, he is guilty of burglary in the third degree, and the finding of a criminal intent to steal is justified. *People v. Bosworth*, 45 St. Rep., 517; 64 Hun, 72; 19 N. Y. Supp., 116.

**Stove-works.**—The word "stove-works" does not necessarily imply a place inclosed by a fence; still less, of necessity, a building. *People v. Haight*, 26 St. Rep., 33; 54 Hun, 2. They are used to mean all the grounds used by a manufacturer for the manufacture of stoves. *Id.* They do not import a building, room or part of a building. *Id.*

See *People v. Hagan*, 37 St. Rep., 661; 14 N. Y. Supp., 233.

**§ 499. "Break," defined.**—The word "break," as used in this chapter, means and includes

1. Breaking or violently detaching any part, internal or external, of a building; or
2. Opening, for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein separately used or occupied, or any window, shutter, scuttle, or other thing, used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another; or
3. Obtaining an entrance into such a building or apartment, by any threat or artifice used for that purpose, or by collusion with any person therein; or

4. Entering such a building or apartment by or through any pipe, chimney, or other opening, or by excavating, digging, or breaking through or under the building, or the walls or foundation thereof.

The case of *People v. Richards*, 7 St. Rep., 656; 44 Hun, 278; 5 N. Y. Cr., 355, was reversed in 18 St. Rep., 515; 108 N. Y., 137.

**Principals.**—Where two persons acted in concert in planning and executing a burglary, and one of them entered the house and brought the property out, while the other waited on the outside, both were held guilty of a breaking and entering. *People v. Boujet*, 2 Park., 11.

Chimney. *Robertson's case*, 4 C. H. Rec., 63.

**Door.**—Where there are to the cellar-way of a dwelling-house two doors, one opening outwardly, the other opening into the cellar, the latter is an outer door of the house. *McCourt v. People*, 64 N. Y., 583. The unlatching of such door and entering constitute a breaking and entry, within the meaning of this section. *Id.*

Breaking inner door. *Smith's case*, 4 C. H. Rec., 62.

Opening a street door, which was only latched, was held to be a sufficient breaking to constitute burglary at the common law. *People v. Bush*, 8 Park., 552.

Simply lifting the latch of an outer door was held to be a sufficient breaking to constitute burglary in an inferior degree, but not to be a breaking within the statutory definition of burglary in the first degree. *Id.*

Where the door of a house is tightly closed, without being either bolted, locked or fastened, to open it and enter the house with the purpose of stealing, is burglary. *Ticknor v. People*, 6 Hun, 657; *Curtis v. Hubbard*, 1 Hill, 338; *People v. Bush*, 8 Park., 552.

Where the scuttle to a store was found broken to pieces and the staple to the lock of the back door forced off, it was held sufficient to warrant a finding of a breaking in. *Foster v. People*, 3 Hun, 6; *aff'd*, 63 N. Y., 619.

Open windows. *People v. Arnold*, 6 Park., 638.

Trap-door. *People v. Fralick*, *Lalor Supp.*, 63.

Window sash. *People v. Edwards*, 1 Wh. Cr. Cas., 171.

See *People ex rel. Reilly v. Bell*, 24 St. Rep., 301; 3 N. Y. Supp., 813.

§ 500, was repealed by chap. 677 of 1892.

The case of *People v. Richards*, 7 St. Rep., 656; 44 Hun, 278; 5 N. Y. Cr., 355, was reversed in 18 St. Rep., 515; 108 N. Y., 137.

§ 501. “**Enter,**” defined.—The word “enter,” as used in this chapter, includes the entrance of the offender into such building or apartment, or the insertion therein of any part of his body or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or intimidate the inmates, or to detach or remove property.

The case of *People v. Richards*, 7 St. Rep., 656; 44 Hun, 278; 5 N. Y. Cr., 355, was reversed in 18 St. Rep., 515; 108 N. Y., 137.

Where it appears that the window may have been open, and the entry may have been effected without any breaking, the offense is not burglary in the first degree. *Sullivan v. People*, 47 Hun, 37; *People v. Burt*, 3 Alb. L. J., 96; *People v. Fillinger*, 24 How., 321; *People v. Bush*, 3 Park., 552.

§ 502. “**Dwelling-house,**” defined.—A building, any part of which is usually occupied by a person lodging therein at night, is, for the purpose of this chapter, deemed a dwelling-house.

**Dwelling-house.**—In *People v. Snyder*, 2 Park., 23, it was held that a shoe-shop, built at the same time, under the same roof, occupied by the same per-



son, and nearly surrounded by rooms occupied by his family, constituted a part of a dwelling-house.

A building or room immediately connected with, and forming a part of, the dwelling-house, must be deemed such, or a part of such, dwelling house. *Quinn v. People*, 11 Hun, 338.

A chamber in a hotel assigned to and occupied by a person as a guest, is not the dwelling-house of the guest, but that of the landlord. *Rodgers v. People*, 80 N. Y., 360. An indictment charging an attempt to burglariously enter the dwelling-house of a certain person, where the attempt was to break into a room assigned to, and occupied by, him as a guest, is fatally defective. *Id.*

**§ 503. Dwelling-houses, etc., when deemed separate.**—If a building is so constructed as to consist of two or more parts, intended to be occupied by different tenants usually lodging therein at night, each part is deemed the separate dwelling-house of a tenant occupying the same. If a building is so constructed as to consist of two or more parts occupied by different tenants separately for any purpose, each part or apartment is considered a separate building within the meaning of this chapter.

See notes under preceding section.

**Separate.**—Where the room entered is severed from the rest of the building by being let to a tenant, who does not sleep in it, and there is no internal communication with the rest of the building, an entry therein is not, *if seems*, an entry within the meaning of the statute. *Quinn v. People*, 71 N. Y., 561; *aff'g* 11 Hun, 836.

In *People v. Bush*, 8 Park., 556, it was held that a room or rooms in a tenement house, rented to separate families, with a door and entry common to all, constituted each the dwelling-house of the particular occupant in the sense of the law.

A structure, which is itself a building separate from, and independent of, the dwelling-house of the owner, *i. e.*, uninhabited outhouses, isolated from the dwelling, is a dwelling-house within the meaning of the provisions of this chapter. *Quinn v. People*, 71 N. Y., 561.

Where a building is severed by lease into distinct habitations, each becomes the mansion or dwelling-house of the lessee thereof, and is entitled to all the privileges of an individual dwelling. *Mason v. People*, 26 N. Y., 203. An exception to this rule might arise, where the owner of the house himself lives in it, and the other inmates are lodgers with him, and not proprietors of distinct tenements separately hired and occupied for a longer or shorter time, with access either separately or jointly to the street. *Id.*

The breaking open of the outer hall door of an apartment house with intent to steal, is sufficient to sustain a charge of burglary in breaking and entering the dwelling-house of the only occupant of an apartment therein. *People v. Calvert*, 51 St. Rep., 187; 22 N. Y. Supp., 221.

Neither this section nor the case of *Rodgers v. People*, is opposed to this view. *Id.*

**§ 504. "Building," defined.**—The term "building" as used in this chapter includes a railway car, vessel, booth, tent, shop, enclosed ginseng garden, or other erection or inclosure.

Words "ginseng garden" added by chap. 332, L. 1903. Take effect Sept. 1, 1903.

The case of *People v. Richards*, 7 St. Rep., 656; 44 Hun, 278; 5 N. Y. Cr., 355, was reversed in 13 St. Rep., 515; 108 N. Y., 137.

**Booth.**—The term "booth" has not been further or more specifically described. *People v. Hagan*, 37 St. Rep., 661; 14 N. Y. Supp., 233. Its meaning must be found in the ordinary understanding or acceptance of the word. *Id.*

**Inclosure.**—A place inclosed by a fence is not an “inclosure” within the meaning of this section. *People v. Haight*, 26 St. Rep., 33; 54 Hun, 9.

A structure above ground, arranged and intended solely as a place for the permanent interment of the dead, is not an “erection or inclosure” within the provision of this section. *People v. Richards*, 13 St. Rep., 515; 108 N. Y., 143.

The phrase “erection or inclosure,” in this section, refers to structures of the character used by man for the purpose of sheltering or transporting property, or of trade or commercial purposes. *Id.*

**Railway car.**—It was deemed necessary, in our statute, to declare that the word “building” includes a railway car, vessel, etc. *Rouse v. Catskill & N. Y. S. Co.*, 35 St. Rep., 493; 59 Hun, 82; 13 N. Y. Supp., 128.

**§ 505. Unlawfully entering building.**—A person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a felony or a larceny, or any malicious mischief, is guilty of a misdemeanor.

This offense involves an intent to commit a felony, or a larceny, or malicious mischief, accompanying the entry. *People v. Meegan*, 5 St. Rep., 743; 104 N. Y., 531; 5 N. Y. Cr., 528. An allegation of intent, in the indictment, “to commit some crime,” is insufficient. *Id.*

The lesser offense of a misdemeanor, under this section, can exist only where the entry into the dwelling-house was “under circumstances, or in a manner not amounting to a burglary.” *Id.*

**§ 506. Burglar punishable separately for crime in building.**—A person who, having entered a building under such circumstances as to constitute burglary in any degree, commits any crime therein, is punishable therefor, as well as for the burglary; and may be prosecuted for each crime, separately, or in the same indictment.

The case of *People v. Richards*, 7 St. Rep., 656; 5 N. Y. Cr., 370; 44 Hun, 289, was reversed in 13 St. Rep., 515; 108 N. Y., 137.

Where, in an indictment for burglary with intent to commit a larceny, and for the commission of such larceny, the latter offense is insufficiently charged, the accused may still be convicted of the burglary alone, if the evidence is sufficient to establish the intent charged. *People v. Marks*, 4 Park., 153.

**§ 507. Burglary, how punished.**—Burglary is punishable by imprisonment in a state prison, as follows:

1. Burglary in the first degree, for not less than ten years.
2. Burglary in the second degree, for a term not exceeding ten years.
3. Burglary in the third degree, for a term not exceeding five years.

Am'd by chap. 662 of 1892.

This amendment omitted, in subds. 2 and 3, the statement of the minimum limit of punishment.

See *People v. Harrington*, 3 N. Y. Cr., 141; 15 Abb. N. C., 163; 1 How. N. S., 37.

**§ 508. Misdemeanor to make or mend burglars' tools, etc.**—A person who makes or mends, or causes to be made or mended, or has in his possession in the day or night time, any

engine, machine, tool, false key, pick-lock, bit, nippers, or implements adapted, designed or commonly used for the commission of burglary, larceny or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of a crime, or knowing that the same are intended to be so used, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime he is guilty of a felony.

Am'd by chap. 869 of 1884.

This amendment extended the scope of the original section.

**Possession.**—If the implements found on the person are adapted to the commission of the offense of burglary, and the circumstances justify a finding of an intent to use them to commit such crime, the case comes within the provisions of this section, even though the tools can be used innocently in legitimate business. *People v. Morgan*, 35 St. Rep., 644; 13 N. Y. Supp., 448. It is not necessary that they should be of such a character as to be adapted to burglary only. *Id.*

**Expert evidence.**—It is a matter of common practice, *it seems*, to show, by one familiar with the facts, what is an instrument adapted or commonly used for the commission of burglary, etc. *People v. Emerson*, 20 St. Rep., 18; 6 N. Y. Cr., 160; 5 N. Y. Supp., 374.

## CHAPTER III.

### *Forgery.*

**SECTION 509.** Forgery in first degree defined.

- 510. *Id.*: false certificate to certain instruments.
- 511. *Id.*: in second degree.
- 512. Qualification of last section.
- 513. Other cases of forgery in second degree.
- 514. 515. *Id.*: of forgery in third degree.
- 516. Forging passage tickets.
- 517. Forging U. S. stamps.
- 518. Officer of corporation selling, etc., shares.
- 519. Falsely indicating person as corporate officer.
- 520. Terms "forge" and "forging" defined.
- 521. Uttering, etc., forged instruments, etc., is forgery.
- 522. Uttering writing signed with wrong-doer's name.
- 523. Forgery in the first degree, how punished.
- 524. *Id.*: in second degree.
- 525. *Id.*: in third degree.
- 526. Having possession of counterfeit coin.
- 527. Advertising counterfeit money.

**§ 509. Forgery in first degree defined.**—A person is guilty of forgery in the first degree who with intent to defraud, forges,

1. A will or codicil of real or personal property, or the attestation thereof, or a deed or other instrument, being or purporting to be the act of another, by which any right or interest in property is or purports to be transferred, conveyed, or in any way charged or affected; or

2. A certificate of the acknowledgment or proof of a will, codicil, deed, or other instrument, which by law may be recorded or given in evidence when duly proved or acknowledged, made or

purporting to have been made by a court or officer duly authorized to make such a certificate; or

3. A certificate, bond, paper, writing, or other public security, issued or purporting to have been issued by or under the authority of this state, or of the United States, or of any other state or territory of the United States, or of any foreign government, country or state, or by any officer thereof in his official capacity, by which the payment of money is promised absolutely, or upon any contingency, or the receipt of any money or property is acknowledged, or being or purporting to be evidence of any debt or liability, either absolute or contingent, issued or purporting to have been issued by lawful authority; or

4. An indorsement or other instrument, transferring or purporting to transfer the right or interest of any holder of such a certificate, obligation, public security, evidence of debt or liability, or of any person entitled to such right or interest; or

5. A certificate of stock, bond or other writing, bank note, bill of exchange, draft, check, certificate of deposit, or other obligation or evidence of debt, issued or purporting to be issued by any bank, banking association or body corporate existing under the laws of this state, or of the United States, or of any other state, government or country, declaring or purporting to declare any right, title or interest of any person in any portion of the capital stock, or property of such a body corporate, or promising or purporting to promise or agree to the payment of money, or the performance of any act, duty, or obligation; or

6. An indorsement or other writing, transferring or purporting to transfer the right or interest of any holder of such a certificate, bond, or writing obligatory, or of any person entitled to such right or interest.

See subd. 5 of section 718, *post*.

**Agent.**—Where one executes and issues an instrument purporting on its face to be executed by him as the agent of a principal therein named, he is not guilty of forgery, either at common law or under the statutes of this state, even though he has in fact no authority from such principal to execute the same. *Mann v. People*, 15 Hun, 155; *aff'd*, 75 N. Y., 484.

The fact that such principal is a corporation incapable of acting except through its officers, by one of whom the instrument is executed, does not alter the rule. *Id.*

**Application for insurance.**—To constitute the crime of forging an application for life insurance, an intent to deceive and to impose the subscription of the applicant as that of the persons whose lives were proposed for insurance, must be apparent. *Fulton v. Metropolitan Life Ins. Co.*, 47 St. Rep., 113.

**Certificate of acknowledgment.**—An indictment will not lie for forging a certificate of an acknowledgment of a deed, when the certificate does not state that the grantor acknowledged the execution of the conveyance, as the statute requires the certificate to state that fact. *People v. Harrison*, 8 Barb., 560.

**Deed.**—Correcting errors in deed is not forgery. *Bough v. People*, 1 W. Dig., 182.

**Fictitious names.** *People v. Jones*, 27 W. Dig., 222; *Brown v. People*, 8 Hun, 562.

**Intent.**—There is no forgery in the case of a total absence of fraudulent intent. *Bendit v. Carr*, 3 St. Rep., 264.

**Invalid instrument.**—An instrument, invalid on its face, cannot be the subject of forgery. *Fadner v. People*, 33 Hun, 240; 2 N. Y. Cr., 558. Forging any instrument or writing which, as appears on its face, would have been void, if genuine, is not an indictable offense. *Id.* *People v. Shall*, 9 Cow., 778; *People v. Fitch*, 1 Wend., 560; *Cunningham v. People*, 4 Hun, 455; *People v. Harrison*, 8 Barb., 560; *People v. Stearns*, 21 Wend., 409.

The charge of forgery cannot be predicated on an instrument which would be void if genuine. *People v. Dewey*, 35 Hun, 310; *People v. Galloway*, 17 Wend., 542; *People v. Harrison*, 8 Barb., 560; *Cunningham v. People*, 4 Hun, 455.

**Legal capacity.**—Name forged need not represent person of legal capacity. *People v. Krummer*, 1 Sheld., 549.

**Own name.**—A man may be guilty of forgery by signing his own proper name. *People v. Peacock*, 6 Cow., 72.

**Proof.**—Upon a trial of an indictment for forgery, it is competent for the prosecution to prove the uttering by defendant of other forged checks upon other occasions, not for the purpose of showing other crimes than that charged in the indictment, but for the purpose of showing his guilty knowledge and intent in uttering the check in question. *People v. Everhardt*, 5 St. Rep., 793; 2 Silv. (Ct. App.), 508; 104 N. Y., 591; 6 N. Y. Cr., 232; *Mayer v. People*, 80 N. Y., 364; *People v. Shulman*, *id.*, 373. *People v. De Kroyft*, 17 St. Rep., 208; 49 Hun, 71.

**State certificate.**—The uttering of a forged certificate of indebtedness, purporting to be issued by a state, was held to be included in subd. 1. section 33 of 3 R. S. (6th ed.), 944. *People v. Brie*, 43 Hun, 317; *aff'd*, 105 N. Y., 618, without written opinion.

**Statutory instrument.**—Where a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making a false statutory one, in a form not provided by statute, even though it is so like the form prescribed as to be likely to deceive most persons. *Cunningham v. People*, 4 Hun, 455.

### § 510. Forgery. False certificate to certain instruments.

—An officer authorized to take the proof or acknowledgment of an instrument which by law may be recorded, who willfully certifies falsely, that the execution of such an instrument was acknowledged by any party thereto, or that the execution of any such instrument was proved, is guilty of forgery in the first degree.

§ 511. Forgery in second degree.—A person is guilty of forgery in the second degree who, with intent to defraud,

1. Forges the great or privy seal of this state, the seal of any court of record, or of any public office or officer authorized by law, or of any body corporate created by or existing under the laws of this state, or of the United States, or of any other state or any territory of the United States, or of any other state, government or country, or any impression of such a seal or any gold or silver coin, whether of the United States, or of any foreign state, government or country; or

2. Forges a record of a will, conveyance, or instrument of any kind, the record of which is by the law of this state made evidence, or of any judgment, order, or decree of any court or officer, or a certified or authenticated copy thereof; or

A judgment roll, judgment, order or decree of any court or officer, or an enrollment thereof, or a certified or authenticated copy thereof, or any document or writing purporting to be such judgment, order, decree, enrollment, or copy ; or

An entry made in any book of record or accounts, kept by or in the office of any officer of this state, or of any village, city, town, or county of this state, by which any demand, claim, obligation or interest, in favor of or against the people of the state, or any city, village, town or county, or any officer thereof, is or purports to be created, increased, diminished, discharged, or in any manner affected ; or an entry made in any book of records or accounts kept by a corporation doing business within the state, or in any account kept by such a corporation, whereby any pecuniary obligation, claim, or credit is or purports to be created, increased, diminished, discharged, or in any manner affected ; or

An instrument, document or writing, being or purporting to be, a process or mandate issued by a competent court, magistrate, or officer of the state, or the return of an officer, court or tribunal, to such a process or mandate ; or a bond, recognizance, undertaking, pleading, or proceeding, filed or entered in any court of the state, or a certificate, order or allowance by a competent court or officer, or a license or authority granted pursuant to any statute of the state, or a certificate, document, instrument, or writing, made evidence by any law or statute ; or

An instrument or writing, being or purporting to be the act of another, by which a pecuniary demand or obligation is or purports to be or to have been created, increased, discharged or diminished, or in any manner affected, or by which any rights or property whatever are or purport to be or to have been created, transferred, conveyed, discharged, increased or diminished, or in any manner affected, the punishment for forging, altering or counterfeiting which is not hereinbefore prescribed, by which the false making, forging, altering, or counterfeiting, any person may be bound, affected or in any way injured in his person or property ; or

3. Makes or engraves a plate in the form or similtude of a promissory note, bill of exchange, bank note, draft, cheque, certificate of deposit, or other evidence of debt, issued by a banker, or by any banking corporation or association, incorporated or carrying on business under the laws of the state, or of the United States, or of any other state or territory of the United States, or of any foreign government, or country, without the authority of such banker, or banking corporation or association ; or

Without like authority, has in his possession or custody such a plate, with intent to use, or permit the same to be used, for the purpose of taking therefrom any impression to be uttered ; or



Without like authority, has in his possession or custody **any** impression taken from such a plate, with intent to have the **same** filled up and completed for the purpose of being uttered; or

Makes or engraves, or causes to be made or engraved, upon any plate, any figures or words, with intent that the same may be used for the purpose of falsely altering any evidence of debt hereinbefore mentioned.

See notes under section 509, *ante*.

The case of *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 35, was reversed in 6 St. Rep., 828; 105 N. Y., 146; 5 N. Y. Cr., 335.

**Before Code.**—Where the offense was committed before the Penal Code went into effect, it was not necessary to allege, in the indictment, an intent to defraud any individual or corporation. *People v. D'Argencour*, 95 N. Y., 624; 2 N. Y. Cr., 267; 19 W. Dig., 139; *aff'g*, 32 Hun, 179.

**Authority.**—Where a person fills up a blank draft or order for the payment of money in his own name and for his own purpose, under an authority to do so at any time he may see fit, a charge of forgery cannot be founded upon the use which he may make of that authority. *People v. Reinitz*, 7 N. Y. Cr., 73. This is so, even though he fills it up with fraudulent intent and absconds from the country. *Id.*

Where the accused had fair grounds for believing that he had authority to affix the name of another person to a written instrument, he is not guilty of forgery, even though he had no such authority. *Parmelee v. People*, 8 Hun, 623.

Where an insurance agent, who is entrusted with policies signed in blank, fills out and issues a policy, after the person named therein is dead, with intent to defraud, he is guilty of forgery. *People v. Graham*, 6 Park., 135.

**Intent.**—An intent to defraud may, under subd. 5 of section 718, *post*, be averred in general terms without alleging an intent to defraud any particular person. *People v. D'Argencour*, 32 Hun, 179; *aff'd*, 95 N. Y., 624; 2 N. Y. Cr., 267.

The acts constitute an offense only when they have been committed with the intent to defraud. *Id.* The averment of such intent seems to be essential. *Id.*

**Invalid instrument.**—An instrument which, if genuine, would not be operative, is not subject of forgery. *People v. Savage*, 5 N. Y. Cr., 541.

A promissory note, which on its face bears interest at seven per cent, is not necessarily usurious, and may, therefore, form the basis of a charge for forgery. *People v. Wheeler*, 14 St. Rep., 422; 47 Hun, 485.

**Knowledge.**—The defendant's knowledge of the forged character of the instrument may be inferred from what transpired at the time of passing it and his subsequent conduct, and also from the fact that near the same time he passed another check under similar circumstances, which was probably forged. *People v. Elmore*, 2 N. Y. Cr., 264.

**Separate offense.**—The forging and the uttering of a forged promissory note, or of an indorsement thereon, are distinct and separate offenses. *People v. Tower*, 48 St. Rep., 438; 135 N. Y., 458; *aff'g* 17 N. Y. Supp., 896. Each under our statute constitutes the crime of forgery in the second degree and subjects the offender to the same imprisonment. *Id.*

**Unaddressed order.**—The making of a counterfeit order for the delivery of property in the name of a third person, though the paper is not addressed to any one, is forgery. *Noakes v. People*, 25 N. Y., 380.

**Variance.**—Variance between the description of the instrument in the indictment for forgery of a mortgage, and the one produced at the trial. *People v. Dewey*, 35 Hun, 308.

**§ 512. Qualification of last section.**—A plate, specified in the last section, is in the form and similitude of the genuine instrument imitated, if the finished parts of the engraving there-

upon resemble and conform to similar parts of the genuine instrument.

**What sufficient.**—The making and engraving of an unfinished plate were held to be sufficient to constitute the offense. *People v. D'Argencour*, 95 N. Y., 639; 9 N. Y. Cr., 267; 19 W. Dig., 189.

In *People v. Osmer*, 4 Park., 242; 1 Sheld., 583, it was held to be no defense that the lettering and vignettes of such plate were different from those of the genuine plate. Exact similitude is not required, even in the operative words of the instrument. It is enough that there is a sufficient resemblance, in connection with the other evidence, to satisfy the jury that the plate was intended to be used in striking off false, to be imposed upon the public as true bills. *Id.*

**§ 513. Other cases of forgery in second degree.**—An instrument partly written and partly printed, or wholly printed with a written signature thereto, and any signature or writing purporting to be a signature of, or intended to bind an individual, a partnership, a corporation or association or an officer thereof, is a written instrument or a writing, within the provisions of this chapter.

Bank notes, wholly printed or engraved, are the subjects of forgery. *People v. Rhoner*, 4 Park., 116. Counterfeits of them, wholly printed or engraved, made with intent to defraud, were held, in the above cited case, to be forgeries within section 33 of 2 R. S., 673.

**§ 514. Other cases of forgery in third degree.**—A person who either,

1. Being an officer or in the employment of a corporation, association, partnership or individuals falsifies, or unlawfully and corruptly alters, erases, obliterates or destroys any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association or partnership or individuals; or,

2. Who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit, or shall cause, aid, abet, assist or otherwise connive at, or be a party to the making, altering, forging or counterfeiting of any letter, telegram or other written communication, paper, or instrument, by which making, altering, forging or counterfeiting, any other person shall be in any manner injured in his good name, standing, position or general reputation; or,

3. Who shall alter,\* or who shall cause, aid, abet, or otherwise connive at, or be a party to the uttering of any letter, telegram, report or other written communication, paper or instrument purporting to have been written or signed by another person, or any paper purporting to be a copy of any such paper or writing where no original existed, which said letter, telegram, report or other written communication, paper or instrument, or paper purporting to be a copy thereof, as aforesaid, the person uttering the same shall know to be false, forged or counterfeited, and by the utter-

\* So in Session Laws.

ing of which the sentiments, opinions, conduct, character, prospects, interests or rights of such other person shall be misrepresented or otherwise injuriously affected; or,

4. With intent to defraud, shall forge, counterfeit or falsify, alter and wrongfully utter any ticket, contract or other paper, writing entitling, or purporting to entitle, the person whose name appears therein, or the holder or bearer thereof, to entrance upon the grounds or premises of any membership corporation, or being thereupon, to remain upon such grounds or premises; or with like intent, shall use any such ticket, contract or other paper or writing, to effect an entrance or as evidence of his right to remain upon such grounds or premises; or, with like intent, shall sell, exchange or deliver, or keep or offer for sale, exchange or delivery, or receive upon any purchase, exchange or delivery, any such ticket, contract or other paper or writing, knowing the same to have been forged, counterfeited or falsely altered;

Is guilty of forgery in the third degree.

Am'd by chap. 878 of 1884.

This amendment added to the original sections subsds. 2 and 3.

Am'd by chap. 692 of 1892.

This amendment purports to substitute, at the beginning of subd. 3, the word "alter" for the word "utter," which is undoubtedly a typographical error, and added subd. 4 of the present section.

See notes under next section.

**§ 515. Other cases of forgery in third degree.** — A person who, with intent to defraud or to conceal any larceny or appropriation by any person of any money or property, either

1. Alters, erases, obliterates, or destroys an account, book, accounts, record, or writing, belonging to, or appertaining to the business of, a corporation, association, public office or officer, partnership, or individual; or

2. Makes a false entry in any such account or book of accounts

3. Willfully omits to make true entry of every material particular in any such account or book of accounts, made, written or kept by him or under his direction;

Is guilty of forgery in the third degree.

**Object.**—Under § 34 of 2 R. S., 673, it was held that the object of the provision of the statute was to protect against any false entries in the books of account of public officers, whether the entries were or were not such as, between individuals, would be evidence against the person charged thereon; also that the statute did not imply that the false entry must purport to be that of some other person. *Phelps v. People*, 6 Hun, 428; *aff'd*, 72 N. Y., 371.

**Intent.**—The statute requires that the false entry be made with intent to defraud, but it is not necessary that the intent be to obtain money or to cause the loss of money, directly by means of the false entry. *Phelps v. People*, 72 N. Y., 371.

The words "with intent to defraud" are used as synonymous with the words, "with fraudulent intent," or "for a fraudulent purpose," to distinguish the case from one of an erroneous entry, made through mistake or under a misapprehension of a right, or such fictitious entries as are sometimes made for book-keeping purposes, or otherwise innocently. *Id.*

**§ 516. Forging passage tickets.**—A person who, with intent to defraud, forges, counterfeits, or falsely alters any ticket, cheque or other paper or writing, entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railway or in any vessel or other public conveyance; and a person who, with like intent, sells, exchanges or delivers, or keeps or offers for sale, exchange or delivery, or receives upon any purchase, exchange or delivery, any such ticket, knowing the same to have been forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

**§ 517. Forging United States or state stamps.**—A person who forges, counterfeits or alters any postage or revenue stamp of the United States, or any tax or revenue stamp of the state of New York, or who sells, or offers, or keeps for sale, as genuine or as forged, any such stamp, knowing it to be forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

Am'd by ch. 242, Laws 1905. Took effect April 19, 1905.

**§ 518. Officer of corporation selling, etc., shares.**—An officer, agent or other person employed by any company or corporation existing under the laws of this state, or of any other state or territory of the United States, or of any foreign government, who willfully and with a design to defraud, sells, pledges or issues, or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued, a false, forged or fraudulent paper, writing or instrument, being or purporting to be a scrip, certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such company or corporation, or a bond or other evidence of debt of such company or corporation, or a certificate or other evidence of the ownership or of the transfer of any such bond or other evidence of debt, is guilty of forgery in the third degree, and upon conviction, in addition to the punishment prescribed in this title for that offense, may also be sentenced to pay a fine not exceeding three thousand dollars.

See section 591, *post*.

**§ 519. Falsely indicating person as corporate officer.**—The false making or forging of an instrument or writing, purporting to have been issued by or in behalf of a corporation or association, state or government, and bearing the pretended signature of any person, therein falsely indicated as an agent or officer of such corporation, is forgery in the same degree, as if that person were in truth such officer or agent of the corporation or association, state or government.

**§ 520. Terms "forge" and "forging" defined.**—The expressions "forge," "forged" and "forging," as used in this chapter, include false making, counterfeiting and the alteration,

erasure, or obliteration of a genuine instrument, in whole or in part, the false making or counterfeiting of the signature, of a party or witness, and the placing or connecting together with intent to defraud different parts of several genuine instruments.

See *Flannagan v. Nat Union Bank of Dover*, 8 St. Rep., 826; 3 N. Y. Supp. 459.

**§ 521. Uttering, etc., forged instruments, etc., is forgery.**—A person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true, or has in his possession, with intent so to utter, offer, dispose of, or put off, either.

1. A forged seal or plate, or any impression of either; or

2. A forged coin; or

3. A forged will, deed, certificate, indorsement, record, instrument or writing, or other thing, the false making, forging or altering of which is punishable as forgery;

Is guilty of forgery in the same degree as if he had forged the same.

**Separate offense.**—The crime, defined in this section, is distinct and separate from the offense prescribed by section 511, *ante*, though both constitute forgery in the second degree. *People v. Tower*, 42 St. Rep., 165; 17 N. Y. Supp., 396.

**Uttering.**—The uttering of a forged promissory note, or of an indorsement thereon, is a distinct and separate offense from the forging of such instrument, though both constitute the crime of forgery in the second degree. *People v. Tower*, 48 St. Rep., 438; 135 N. Y., 458.

Putting a forged deed on record, or averring it in pleading, as a genuine deed, is uttering and publishing it within the meaning of the statute. *Paige v. People*, 3 Abb. Ap., Dec., 439; 6 Park., 683.

**Intent to return.**—The custody of forged coupon and bond, not fully executed, with intent to return them to the person from whom they were received, even with knowledge that they were forged, does not constitute the crime of forgery in the first degree. *People v. Martin*, 36 Hun, 462; 3 N. Y. Cr., 122.

**§ 522. Uttering writing signed with wrong doer's name.**—Whenever the false making or uttering of any instrument or writing is forgery in any degree, a person is guilty of forgery in the same degree, who, with intent to defraud, offers, disposes of, or puts off such an instrument or writing subscribed or indorsed in his own name, or that of any other person, whether such signature be genuine or fictitious, under the pretense that such subscription or indorsement is the act of another person of the same name, or of a person not in existence.

**§ 523. Forgery in first degree, how punished.**—Forgery in the first degree is punishable by imprisonment for a term not exceeding twenty years.

Am'd by chap. 662 of 1892.

This amendment fixed the maximum limit, and omitted the statement of the minimum limit, of punishment.

The punishment of forgery in the first degree was the same under the Revised Statutes as it was under the Code prior to the amendment of 1892 to this section. *People v. Raymond*, 32 Hun, 124; 2 N. Y. Cr., 298; 19 W. Dig., 137; *aff'd*, 96 N. Y., 38. The penalty formerly prescribed was imprisonment for not less than ten years, and, therefore, might be for life. 96 N. Y., 40.

**§ 524. Forgery in second degree, how punished.**—Forgery in the second degree is punishable by imprisonment for a term not exceeding ten years.

*Am'd by chap. 662 of 1892.*

This amendment omitted the statement of the minimum limit of punishment.

**§ 525. Forgery in the third degree, how punished.**—Forgery in the third degree is punishable by imprisonment for not more than five years.

See *People v. Raymond*, 32 Hun, 124; 2 N. Y. Cr., 295; 19 W. Dig., 137; *aff'd*, 96 N. Y., 38.

**§ 526. Having possession of counterfeit coin.**—A person who has in his possession a counterfeit of any gold or silver coin, whether of the United States or of any foreign country or government, knowing the same to be counterfeited, with intent to sell, utter, use, circulate or export the same, as true or as false, or to cause the same to be so uttered or passed, is punishable by imprisonment not more than five years, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Where party is engaged in coining counterfeit money at the time of his arrest. *Weaver's case*, 2 C. H. Rec., 57.

**Possession.**—Possession of a counterfeit, with intent to sell it, is an offense against the statute. *Moses' Case*, 2 C. H. Rec., 84; *Murphy's Case*, 4 *id.*, 42; *Dorsett's Case*, 5 *id.*, 77.

Possession of a die. *Murphy's Case*, 4 C. H. Rec., 42; *Dorsett's Case*, 5 *id.*, 77.

**What sufficient.**—That the counterfeit coin is so far finished as to be calculated to deceive, is sufficient to convict. *Quinn's Case*, 6 C. H. Rec., 93.

**§ 527. Advertising, etc., counterfeit money, government stamps, etc., deemed a felony.**—A person who prints, writes, utters, publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet, hand bill or any other written or printed matter, advertising, offering or purporting to advertise or offer for sale, loan, exchange, gift or distribution, or to furnish, procure or distribute any counterfeit coin, paper money, internal revenue stamp, postage stamp, or any other token of value, or what purports to be counterfeit coin, paper money, internal revenue stamp, postage stamp, or any other token of value, or giving, or purporting to give, either directly or indirectly, information where, how, of whom or by what means any counterfeit coin, paper money, internal revenue stamp, postage stamp or token of value, can be procured or had, or what purports to be counterfeit coin, paper money, internal revenue stamp, post-



age stamp or other token of value, can be procured or had, or whoever shall aid, assist or abet in any manner, in any scheme or device whatsoever, offering or purporting to offer, for sale, loan, gift, exchange or distribution, any counterfeit coin, paper money, internal revenue stamp, postage stamp or other token of value, whether called "green articles," "queer coin," "paper goods," "bills," "spurious treasury notes," "United States goods," "green paper goods," "business that is not legitimate," "cigars," "green cigars," or by any other name or title, or any other device of a similar character, shall be guilty of a felony and on conviction shall be punished by imprisonment for not less than one year nor more than five years, and by a fine of not less than one hundred dollars nor more than one thousand dollars for each offense.

Whoever in and for executing, operating, promoting, carrying on, or in the aiding, assisting or abetting in the promoting, operating, carrying on or executing of any scheme or device whatsoever to defraud, by use or means of any papers, writings, letters, circulars or written or printed matters concerning the offering for sale, loan, gift, distribution, or exchange, of counterfeit coin, paper money, internal revenue stamps, postage stamps or other token of value as provided in section one of this act, shall use any fictitious, false or assumed name or address, or name or address other than his own right, proper and lawful name; or whoever in the executing, operating, promoting, carrying on, aiding, assisting or abetting in the execution, promotion, or carrying on of any scheme or device offering for sale, loan, gift or distribution, or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom, or by what means any counterfeit coin, paper money, internal revenue stamp, postage stamp, or other token of value, can be obtained or had, or who shall knowingly receive or take from the mails of the United States any letter or package addressed to any such fictitious, false or assumed name or address, or name other than his own right, proper or lawful name, shall be guilty of a felony, and on conviction shall be punished by imprisonment for not less than one year, nor more than five years, and by a fine of not less than one hundred dollars nor more than two thousand dollars.

Any letter, circular, writing or paper, offering or purporting to offer for sale, loan, gift, or distribution, or giving or purporting to give, information, directly or indirectly, where, how, of whom, or by what means any counterfeit coin, paper money, internal revenue stamp, postage stamp, or token of value, may be obtained or had, or concerning any similar scheme or device to defraud the public, whether such article, matter or thing is called "green articles," "queer coins," "paper goods," "queer," "articles,"

"bills," "business that is not legitimate," "spurious treasury notes," "United States goods," "green paper goods," "green articles," "cigars," "green cigars," or by any other name, device or title of a similar character, shall be deemed presumptive proof of the fraudulent character of such scheme.

Am'd by chap. 687 of 1887.

This amendment greatly enlarged and extended the provisions of the original section, and added a provision as to the use of fictitious names, etc., in such advertising, etc., and as to proof of fraud.

The amendment of 1887 so extended this section as to include within its ample provisions every device to which resort can be had for the sale or distribution of counterfeit coin or paper money. *People v. Reilly*, 22 St. Rep., 659; 51 Hun, 625; 4 N. Y. Supp., 82.

## CHAPTER IV.

*Larceny, Including Embezzlement, Obtaining Property by False Pretenses, and Felonious Breach of Trust.*

SECTION 528. Larceny defined.

529. Obtaining money or property by fraudulent draft.

530. Grand larceny in first degree.

531. Grand larceny in second degree.

532. Petit larceny.

533. Grand larceny in first degree, how punished.

534. Id., in second degree.

535. Petit larceny a misdemeanor.

536. Completed unissued instruments property.

537. Severance of fixtures, etc., larceny.

538. Keeping wrecked goods, a misdemeanor.

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540. Bringing stolen goods into state, larceny.

541. Conversion by trustee, larceny; how punished

542. Disposition of fine.

543. Remission of fine.

544. Verbal false pretense not larceny.

545. Value of evidence of debt, how ascertained.

546. Id., passenger ticket.

547. Id., of other articles.

548. Claim of title, ground of defense.

549. Intent to restore property.

550. Knowingly receiving.

551. Averment and proof.

§ 528. **Larceny defined.**—A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either

1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or

2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof;

Steals such property, and is guilty of larceny.

See section 544, *post*.

The case of *People v. Cruger*, 38 Hun, 501; 4 N. Y. Cr., 66, was reversed in 2 St. Rep., 468; 102 N. Y., 510.

The case of *People v. Dumar*, 3 St. Rep., 490; 5 N. Y. Cr., 57; 42 Hun, 86, was reversed in 11 St. Rep., 19; 106 N. Y., 502; 8 N. Y. Cr., 268.

The case of *People v. Dimick*, 3 St. Rep., 898; 41 Hun, 621; 5 N. Y. Cr., 187, was reversed in 11 St. Rep., 739; 107 N. Y., 13.

**What offenses included.**—This section changes the law as it formerly existed, in that it makes what was formerly embezzlement and obtaining of money or goods under false pretenses, larceny, but it has not changed the methods of proof of these respective offenses. *People v. Pollock*, 22 St. Rep., 64; 51 Hun, 615; 4 N. Y. Supp., 298. It requires the same proof of criminal intent to make out a case. *Id.*

The Code makes embezzlement and obtaining goods under false pretenses, larceny. *People v. Dunn*, 25 St. Rep., 460; 53 Hun, 381; 7 N. Y. Cr., 184; 6 N. Y. Supp., 805.

By the Code, larceny is so treated as to include not only that offense as defined at common law and by the Revised Statutes, but also embezzlement, obtaining property by false pretences and felonious breach of trust. *People v. Dumar*, 11 St. Rep., 19; 106 N. Y., 508; 8 N. Y. Cr., 268.

The crime is committed when with the intent specified a person either, (1) takes such property from the possession of the true owner or of any other person; or, (2) obtains it from such possession by color or aid of fraudulent or false representations or pretenses, or any false token or writing; or, (3) secretes, withholds or appropriates to his own use, or that of persons other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or articles of value of any kind. *Id.*

The legislature, when it abolished the old distinctions between larceny, false pretenses and embezzlement, did not intend to create a new classification of offenses, and raise the same difficulties as to determining between the various offenses as existed under the former practice. *People v. Dunn*, 25 St. Rep., 461; 7 N. Y. Cr., 185; 53 Hun, 384; 6 N. Y. Supp., 807.

Under the Penal Code, the crime of larceny includes that offense as defined by the common law and by the Revised Statutes. *People v. Sanborn*, 14 St. Rep., 129.

Larceny, under this section, includes that offense as constituted at common law and under the Revised Statutes, but also embezzlement, obtaining property by false pretenses and the felonious breach of a trust. *People v. Laurence*, 51 St. Rep., 289; 137 N. Y., 522.

The distinction between the crime of larceny at common law or under the Revised Statutes, and as defined by this section is pointed out in *People v. Dumar*, 11 St. Rep., 19; 106 N. Y., 502; 8 N. Y. Cr., 268.

**Intent.**—To constitute this offense, there must be an intent to deprive or defraud the owner, and the jury must find such criminal intent as a fact upon the evidence before a conviction can be had. *People v. Pollock*, 51 Hun, 615; 4 N. Y. Supp., 398; *People v. Bosworth*, 45 St. Rep., 517; 64 Hun, 78; 19 N. Y. Supp., 117.

The clause "with intent to deprive," etc., refers to and qualifies the four

classes of larceny, defined in this section. *People v. Moore*, 37 Hun, 93; 3 N. Y. Cr., 469.

This section defines, with considerable detail, what acts shall constitute larceny, and what intent shall characterize the crime, and in the end provides that he who with such intent does any of such acts "steals such property and is guilty of larceny." *People v. Willett*, 1 St. Rep., 384; 102 N. Y., 253; 4 N. Y. Cr., 204. The word "steals" covers all the prescribed details and sufficiently includes the particular intent need to constitute the larceny. *Id.*

The important element of the offense under this section consists in the intent to deprive or defraud the true owner of his property. *People v. Church*, 1 How. N. S., 369.

The purpose of this section was not to make every case of trespass *de bonis*, or trover, larceny. *People v. Grim*, 3 N. Y. Cr., 320. It was, doubtless, intended to change the former general rule that the crime of larceny necessitated a trespass. *Id.* The intent mentioned in this section, means a criminal or felonious intent. *Id.*

In *People v. Woodward*, 31 Hun, 57, it was held that, to constitute the offense of larceny, there must be an intent, on the part of the taker, to reap some advantage or benefit from the taking. See *People v. Bosworth*, 45 St. Rep., 517; 64 Hun, 78; 19 N. Y. Supp., 117.

It is not needful to a conviction that an intent to steal or an intent to "commit a felony" shall be shown, provided the intent to commit any other crime is averred and established. *People v. Bosworth*, *ante*; *People v. Richards*, 7 St. Rep., 656; 44 Hun, 283; 5 N. Y. Cr., 364. Though the latter case was reversed in 108 N. Y., 137, it was upon another ground, to wit: that the "building, erection or inclosure" was not embraced within section 498, *ante*.

Criminal intent is an intent to deprive or defraud the true owner of his property. *People v. Moore*, 3 N. Y. Cr., 469; 37 Hun, 93.

The felonious intent must exist at the time of taking or obtaining possession of the property, where the possession is obtained by means of false representation or pretense. *Id.* In the latter two classes, it is only necessary that such intent exists at the time of the secreting, withholding or appropriating of the property. *Id.* In such cases, the property stolen is properly in the possession of the party secreting, withholding or appropriating it. *Id.*

**Common law larceny.**—This section defines at some length the crime of larceny. *People v. Hollenbeck*, 1 N. Y. Cr., 437, note; 65 How., 401; *People v. McTameny*, 1 N. Y. Cr., 441; 30 Hun, 505; 13 Abb. N. C., 56; 66 How., 70.

Under this section, there are at least four distinct and separate acts or ways by which a person may commit or be guilty of larceny. *People v. Dumar*, 11 St. Rep., 19; 106 N. Y., 508; 8 N. Y. Cr., 268.

The first clause of the first subdivision of this section defines the crime of larceny substantially as it was defined by the Revised Statutes. *People v. Moore*, 37 Hun, 88; 3 N. Y. Cr., 469.

By the Code, it is larceny to steal the personal property of another. *People v. Stevens*, 38 Hun, 65; 3 N. Y. Cr., 385; *aff'd*, 109 N. Y., 634, without written opinion. The same provision existed in a former statute. *Id.*

There cannot be an indictment for larceny for stealing a man's business. *People v. Barondess*, 45 St. Rep., 248; 8 N. Y. Cr., 252.

The removal of property under advice and without *animo furandi* does not constitute larceny. *People v. Burton*, 16 W. Dig., 195.

Concealment with intent to convert, after lawful possession, larceny. *People v. McGarren*, 17 Wend., 460.

Though the charge in *People v. Cruger*, 2 St. Rep., 468; 102 N. Y., 510, was larceny, it in no manner depended upon the provisions of this section. *People v. Civile*, 9 St. Rep., 104; 44 Hun, 500.

Certain acts are herein enumerated, either one of which performed by any person with intent to defraud the true owner of his property, or of its use or benefit, or to appropriate the same to the use of the taker or of any other person, makes him guilty of larceny. *People v. Dumar*, 11 St. Rep., 19; 106 N. Y., 508; *People v. Bosworth*, 45 St. Rep., 517; 64 Hun, 77; 19 N. Y. Supp., 117.

The crime is committed when, with such intent, a person either, first, takes such property from the possession of the true owner, or of any other person, etc. *Id.*

Larceny can be predicated upon the felonious taking of certain papers. *Collyer v. Collyer*, 21 St. Rep., 119; 50 Hun, 422; 3 N. Y. Supp., 811.

Whether a will can be the subject of larceny, was not decided in *Collyer v. Collyer*, *ante*.

Every taking by one person of the personal property of another, without the consent of the latter, without right or claim of right, and with intent to appropriate it, was held in *McCourt v. People*, 64 N. Y., 588, not to be a larceny. There must be a felonious intent. *Id.*

To constitute the offense of larceny, there must be a taking of the goods from the power or control of the owner. *People v. Bosworth*, 45 St. Rep., 517; 64 Hun, 78; 19 N. Y. Supp., 117; *Harrison v. People*, 50 N. Y., 518.

A temporary possession by the thief, though but for a moment, is sufficient. *Id.*

To constitute larceny, it is not necessary that the property stolen should have been taken from the possession of the owner by a trespass. *People v. Laurence*, 51 St. R. p., 289; 137 N. Y., 522.

It is sufficient if possession is obtained by some device, trick, artifice, fraud or false pretense, with intent on the part of the person so obtaining it to appropriate it to his own use, and if he does so appropriate it. *Id.*; *Smith v. People*, 53 N. Y., 111; *Loomis v. People*, 67 *id.*, 322; *People v. Morse*, 99 *id.*, 662.

The people, in such case, must show not only that the person obtained possession of the property in that way, but that he did it *animo furandi*, with the intention at the time of subsequently appropriating it to his own use. *Id.*

In *Harrison v. People*, 50 N. Y., 518, the evidence showed the defendant put his hand into the coat pocket of the complainant, seized his pocket-book, which contained a large amount of money and securities, and lifted it about three inches from the bottom of the pocket, when he was prevented, and it was held that this was a sufficient carrying away to constitute the offense of larceny.

In *Phelps v. People*, 72 N. Y., 334, it was held that a draft, which is a legal operative instrument when it reaches the hands of the defendant, is the subject of larceny.

The definitions in this section have not made the case of *Phelps v. People*, 72 N. Y., 334, inapplicable. *People v. Willett*, 1 St. Rep., 384; 102 N. Y., 253; 4 N. Y. Cr., 204.

The case of *People v. Morse*, 3 N. Y. Cr., 104, was brought for larceny under the Revised Statutes.

**False Pretenses.**—The only substantial change in this part of this section from the provisions of the Revised Statutes, is the 'incorporating of the word "representations" herein, so as to read "false representations or pretense." *People v. Moore*, 3 N. Y. Cr., 466; 37 Hun, 93.

This section makes obtaining goods by false pretenses, larceny. *People v. Lyon*, 99 N. Y., 210; 3 N. Y. Cr., 168.

The second clause of the first subdivision re-enacts, in substance, the provisions of the Revised Statutes constituting the crime of obtaining property by means of false representations or pretense. *People v. Moore*, 37 Hun, 88; 3 N. Y. Cr., 469.

The false pretense cannot be predicated of a mere matter of opinion, but must be of an existing fact. *People v. Ward*, 1 N. Y. Cr., 504. The false statement or representation must be made with intent to defraud, and relied upon by the party to whom it is addressed. *Id.* It must be of such a character as would deceive a man of ordinary prudence and caution. *Id.*

The offense of obtaining money or property by an attorney by false and fraudulent representations is included in this section. *People v. Reavey*, 89 Hun, 365.

When the owner of property, induced by false and fraudulent representations, intends to part with the title to such property, it constitutes the crime of

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larceny by means of false pretenses. *People v. Gottschalk*, 49 St. Rep. If the owner is induced, by trick or artifice, to part with the custody or possession, to one who receives the property *animo furandi*, while the owner still intends to retain the right of property, the taking is common law larceny. *Id. Smith v. People*, 53 N. Y., 111.

Pretenses and representations in the nature of promises and agreements relating wholly to future actions and events, do not constitute false pretenses within the meaning of this section. *People v. Laurence*, 50 St. Rep., 249; 21 N. Y. Supp., 818; *Ranney v. People*, 22 N. Y., 413; *People v. Chard*, 90 id., 314.

When the complainant is induced by the accused and his confederates in pursuance of a conspiracy and with intent thereby to deprive him of his property to deposit it upon the drawing of a pretended art lottery, by means of trick and device they deprive him of his money and convert it to their use, the transaction constitutes larceny. *People v. Tweed*, 1 N. Y. Cr., 1.

The obtaining from another the possession of property by the aid of false and fraudulent pretenses, constitutes larceny within the meaning of this section. *Benedict v. Williams*, 15 St. Rep., 677; 48 Hun. 124.

There is no larceny where no reliance was placed on the false representation made, nor any credit given on account thereof. *People v. Bough*, 18 St. Rep., 18.

A person, who has induced another to purchase a horse from him by falsely representing it to be kind and sound, when he knew it to be unsound and vicious, is guilty of obtaining money by false pretenses, and is not relieved from the effect thereof by the fact that he gave a written warranty on the purchase. *Watson v. People*, 26 Hun, 76; *aff'd*, 87 N. Y., 561.

This section, and section 531, *post*, apply to all persons, attorneys as well as others, who may obtain money on property by the use of false and fraudulent representations or pretenses. *People v. Reavey*, 39 Hun, 865; 4 N. Y. Cr., 6.

By this section, the offense of obtaining property by false pretenses is made a larceny. *People v. Page*, 22 St. Rep., 277; 7 N. Y. Cr., 6; 4 N. Y. Supp., 1.

The certification of a check is a thing in action within the meaning of this section. *People v. Ward*, 3 N. Y. Cr., 483. If the obligation assumed by certification is obtained from the bank under circumstances amounting to a false pretense, the crime of larceny is committed. *Id.*

The false pretenses must be made with intent to cheat and defraud another. *People v. Baker*, 2 N. Y. Cr., 229. Proof of false pretenses and that property was obtained thereby, is not sufficient. *Id.* In all cases of this kind, it must also be shown that the money was paid, or the property parted with, in reliance upon, and under the inducement of the false pretenses. *Id.*

False pretense is not criminal unless it is made and put in writing, and signed by the party to be charged, where it relates to his means or ability to pay. *People v. Moore*, 3 N. Y. Cr., 468; 37 Hun, 93.

The failure to disclose the fact of insolvency, when purchasing property upon credit, does not amount to a false representation or pretense within the meaning of this section. *Id.*

Mere silence and suppression of the truth or withholding knowledge of facts which another may act upon, is not sufficient to constitute the crime of false pretenses. *People v. Baker*, 2 N. Y. Cr., 218.

Neither the false token nor the false writing of the statute is required in order to make a case of false pretenses. *People v. Rice*, 35 St. Rep., 18.

The distinction which existed, prior to the Penal Code, between obtaining property by false pretenses and the crime of larceny, was held, in *Soltau v. Gerdau*, 48 Hun, 537, to be still observed, so far as the rights of parties claiming the property from the wrongful possessor, are concerned.

Prior to the Penal Code, a distinction existed between larceny *eo nomine* and the crime of obtaining property by false pretense. *Soltau v. Gerdau*, 48 St. Rep., 941; 48 Hun, 542; *Collins v. Pratt*, 20 Hun, 246; *aff'd*, 85 N. Y. Cr., 1; *Bassett v. Spofford*, 45 id., 387; *Zink v. People*, 77 id., 114; *Thorne v. Tabor*, 94 id., 90; *People v. Morse*, 99 id., 662. In either case, the property may be obtained by artifice or fraud. *People v. Dumar*, 11 St. Rep., 19; 106 id., 1.



This distinction continued until the adoption of the Code in 1881, which recognized that the moral guilt of the two offenses was the same, and swept away the theory by which the courts had felt constrained to distinguish them in principle. *Soltan v. Gerdau, ante*; *People v. Dumar, ante*; 8 N. Y. Cr. 268.

There is no such crime in the Code as obtaining property under false pretenses. *People v. Jeffery*, 38 St. Rep., 313, 14 N. Y. Supp., 839. This offense is now included under the general term of larceny. *Id.* Larceny includes not only the offense as it was defined at common law, and by the Revised Statutes, but also embezzlement, obtaining property by false pretenses, and felonious breach of trust. *Id.*

Where a person induces another to procure certain goods on forged orders, both are guilty, as principals, of larceny. *People v. Brien*, 25 St. Rep., 238, 53 Hun, 496; 7 N. Y. Cr., 166.

As to what must be proved in order to make out the crime of obtaining property by false pretenses, see *People v. Baker*, 96 N. Y., 340; *People v. Blanchard*, 90 *id.*, 319.

Obtaining money on a fraudulent check, signed by a mythical person, upon the known misrepresentation that it was good, business paper, constitutes an offense under this section. *People v. Pinckney*, 51 St. Rep., 310; 67 Hun, 428.

Where the owner intends to part with the property for a special purpose and the defendant uses it only in the way prescribed, it cannot be said to be stolen. *People v. Cruger*, 2 St. Rep., 468; 102 N. Y., 512. An omission to account for the proceeds cannot, by relation, change the voluntary act of the owner in parting with the property into a larcenous taking, nor sustain an allegation that the defendant "feloniously did steal, take and carry away" such property. *Id.* It may be a breach of trust and even fraudulent conversion of the proceeds, but that does not constitute the offense of larceny. *Id.*

In order to be guilty of larceny under this section, the person must intend to deprive or defraud another of his property, or appropriate the same to his own use or to that of any other person, or must obtain possession by color of aid of false or fraudulent representations made by him. *Poorman v. Moore*, 22 W. Dig., 561.

Where one or more pretenses are proved to be false, and they are sufficient *per se* to constitute the offense, the accused will be convicted notwithstanding that the public prosecutor fails in proving to be false other pretenses alleged in the indictment. *Webster v. People*, 1 N. Y. Cr., 197.

Constructive presence. *McCamey v. People*, 83 N. Y., 408.

False lottery. *People v. Tweed*, 1 N. Y. Cr., 97.

Indorsement, obtained by. *People v. Stone*, 9 Wend., 182; *People v. Chapman*, 4 Park., 56.

Inducement. *Scott v. People*, 62 Barb., 62.

Influence. *People v. Crissie*, 4 Denio, 525; *People v. Haynes*, 11 Wend., 557; *People v. Herrick*, 13 *id.*, 87; *Ranney v. People*, 22 N. Y., 413; See *Zink v. People*, 77 *id.*, 114; *Therassen v. People*, 82 *id.*, 238.

Making change. *Ct. S. S. v. People*, 90 N. Y., 12.

Minor responsible for false pretenses. *People v. Kendall*, 25 Wend., 399.

Misreading deed. *Webster v. People*, 92 N. Y., 422.

Need not be sole inducement, if they materially affect. *People v. Herrick*, 13 Wend., 87.

Payment of just debt, procured by. *People v. Thomas*, 3 Hill, 169; *People v. Smith*, 5 Park., 490.

Pretense must be of fact, not intention. *People v. Blanchard*, 90 N. Y., 314.

Property must be given for an honest purpose. *Cord v. People*, 46 N. Y., 470; *People v. Stetson*, 4 Barb., 151.

Sale of horse. *Watson v. People*, 26 Hun, 413; 87 N. Y., 561.

**Second subdivision.**—The second subdivision of this section re-enacts, in substance, the provisions of the Revised Statutes constituting the crime of embezzlement by bailees, servants, attorneys, agents and officers. *People v. Moore*, 37 Hun, 89; 3 N. Y. Cr., 469.

This section covers a case of an appropriation by the chamberlain of a city to his own use of public moneys in his hands. *People v. Church*, 1 How. N. S., 369.

Subdivision 2 of this section assumes that, beneath the technical legal control of the corporation as such, lies an actual and effective custody and control of corporate officers and servants. *People v. Sherman*, 45 St. Rep., 300; 133 N. Y. 354; aff'g, 40 St. Rep., 833; 16 N. Y. Supp., 784.

Any person who is guilty of the acts by which he appropriates property to the use of himself or any other person, is guilty of larceny. *People v. Jefferey*, 39 St. Rep., 315; 14 N. Y. Supp., 839.

The unexplained failure to pay over collected moneys constituted embezzlement under the Revised Statutes and is made larceny by the Code. *Allen v. D. D., E. B. & B. R. R. Co.*, 19 St. Rep., 118; 2 N. Y. Supp., 738.

Where the owner of personal property parts with the possession to a broker only for the purpose of having it delivered to a certain vendee under a contract fraudulently alleged by the broker to have been secured by him, a fraudulent sale of the property by the latter to another party constitutes larceny. *Soltau v. Gerdau*, 15 St. Rep., 941; 48 Hun, 537; 1 N. Y. Supp., 166; aff'd, 29 St. Rep., 395; 119 N. Y., 880.

A general manager of an elevator was held, in *People v. Sherman*, 40 St. Rep., 833; 16 N. Y. Supp., 784, to have the grain in his possession, custody and control as the agent or officer of the elevator and to come within the provisions of this section.

Where the general manager of several elevators caused grain to be transferred from one to another elevator without the usual and competent order and authority, confused and falsified the accounts so as to cover his action and assented to a concealment of the shortage resulting from the removal by a false and fraudulent weighing of the remaining grain, etc., he is guilty of larceny. *People v. Sherman*, 45 St. Rep., 300; 133 N. Y., 354.

A person, who intentionally appropriates to his own use property held by him as a bailee, is guilty of larceny. *Matter of McFarland*, 36 St. Rep., 574; 59 Hun, 306; 13 N. Y. Supp., 23.

Conversion of money by one to whom it is entrusted to make change is larceny. *Justices, etc. v. People ex rel. Henderson*, 90 N. Y., 12; 1 N. Y. Cr., 83; rev'g, id., 76.

When a failure of an agent to pay over money collected constitutes grand larceny as defined in this section, see *People v. Civile*, 9 St. Rep., 104; 44 Hun, 497.

An agent, authorized by agreement to collect and pay over moneys due from his employer's customers, if he appropriates any portion of the same to his own use, is guilty of larceny, as that offense is now defined by this section. *People v. Carr*, 3 N. Y. Cr., 581. Prior to its enactment, the offense was embezzlement. *Id.*

A person need not intend to appropriate money, collected by him, to his own use or to the use of any other person, at the time when it is received by him, in order to constitute the offense. *People v. Civile*, 9 St. Rep., 104; 44 Hun, 497.

The intent so to use it at any time while it remains in his custody, possession or control as a bailee, servant, attorney, agent, clerk or trustee, followed by such use of it, creates a crime within this section. *Id.*

Bank cashier. *Barton v. People*, 78 N. Y., 377.

Clerk. *People v. Henessy*, 15 Wend., 147.

Public officer. *People v. Genet*, 19 Hun, 91; *Conits v. People*, 22 N. Y., 245; *Bork v. People*, 91 id., 5; *Willis v. People*, 19 Hun, 84.

Stage driver. *People v. Sherman*, 10 Wend., 298.

Tradesman. *People v. Burr*, 41 How., 293.

Instances.—Accepting payment by mistake. *Wolfstein v. Stein*, 6 Hun, 121.

Appropriation of freight by carrier. *Nichols v. People*, 17 N. Y., 114.

Artifice. *Weyman v. People*, 4 Hun, 511; 62 N. Y., 623; *Macino v. People*, 13 Hun, 127.

It was held, in *People v. Wiley*, 3 Hill, 194, that bank bills, complete in form and ready for circulation, though not in fact issued, are the subject of larceny.

Changing money. *Hildebrand v. People*, 56 N. Y., 134; 1 Hun, 19.

Check. *Smith v. People*, 47 N. Y., 303.

Fraudulent conspiracy. *Loomis v. People*, 67 N. Y., 322.

Hiring with felonious intent to convert is larceny. *Brannan's Case*, 1 C. H. Rec., 50.

Owner's permission when no defense. *Sanders v. State*, 21 Alb. L. J., 196.

Post-dated check. *Lesser v. People*, 12 Hun, 668; 78 N. Y., 78; *Foots v. People*, 17 Hun, 218.

Stealing from thief. *Ward v. People*, 3 Hill, 395; 6 id., 144.

Straying cattle. *People v. Kaatz*, 3 Park., 129.

Taking goods by owner. *Palmer v. People*, 10 Wend., 166.

Trick. *Smith v. People*, 53 N. Y., 111; *Weyman v. People*, 6 Lans., 696.

**Subjects of larceny.**—Certificates of stock. *People v. Griffin*, 38 How., 475.

Dogs. *People v. Campbell*, 4 Park., 386; *Mullaly v. People*, 86 N. Y., 365; *People v. Malony*, 1 id., 593.

Foreign bank notes. *People v. Jackson*, 8 Barb., 637.

Ice. *Ward v. People*, 3 Hill, 395; 6 id., 144.

Note. *People v. Call*, 1 Denio, 120.

Note payable in specific articles. *People v. Bradley*, 4 Park., 245.

Property of husband with consent of wife. *People v. Cole*, 43 N. Y., 508.

Unissued bank bills. *People v. Wiley*, 3 Hill, 194.

Wife's clothes in elopement. *People v. Schuyler*, 6 Cow., 572.

**Not subjects of larceny.**—Appropriation by finder of lost article, no larceny. *People v. Anderson*, 14 Johns., 294; except owner is known. *People v. Swan*, 1 Park., 9; *People v. Cogdell*, 1 H. L., 94.

Chose in action. *Linnenden's Case*, 1 C. H. Rec., 30.

Letters. *Payne v. People*, 6 Johns., 103.

Receipts. *People v. Bradley*, 4 Park., 245; *People v. Griffin*, 38 How., 475; *People v. Loomis*, 4 Denio, 380.

Undrawn lottery tickets. *Healy's case*, 4 C. H. Rec., 36.

**Second degree.**—What constitutes the crime of larceny in the second degree under this section and section 531, *post*. *People v. Reavey*, 38 Hun, 419.

**Owner.**—The name of the owner of the stolen property is no material attribute whatever of the crime of larceny. *People v. Herman*, 10 St. Rep., 66; 45 Hun, 176. It is not essential to the crime that the property should be owned by any particular corporation or person. *Id.* An amendment of the indictment in this respect may be allowed. *Id.*

**Re-enactment.**—The third clause of the first subdivision of this section re-enacts, in substance, the provisions of the Revised Statutes constituting the crime of the secreting, withholding and converting of property. *People v. Moore*, 37 Hun, 89; 3 N. Y. Cr., 469.

**Possession of stolen property.**—It is not necessary to show exclusive possession of stolen property, to authorize conviction. *People v. McCallam*, 103 N. Y., 596; 5 N. Y. Cr., 151; 4 St. Rep., 291. Such rule applies only in a case where the evidence of guilt is the possession of the property stolen, and it is to be presumed from that fact. *Id.*

**Value.**—Value of property stolen. *People v. Kehoe*, 46 St. Rep., 224; 19 N. Y. Supp., 764.

**Indictment.**—An indictment may charge in separate counts the same larceny to have been committed by different means. *People v. Dimick*, 11 St. Rep., 739; 107 N. Y., 31.

It is not necessary that an indictment, under this section, should be drawn under one or the other of the special classes of larceny as defined herein. *People v. Dunn*, 25 St. Rep., 461; 7 N. Y. Cr., 185; 53 Hun, 384; 6 N. Y. Supp., 807.

Though the cases of *Vilmar v. Schall*, 61 N. Y., 564; *Segelken v. Meyer*, 94 id., 473, and *Donovan v. Cornell*, 24 W. Dig., 351, presented this section, they

were disposed of chiefly as matters of pleading. *People v. Civile*, 9 St. Rep., 109; 44 Hun, 499.

**Proof.**—It is not necessary that the person, whose property was in the indictment charged to have been taken, should be produced and sworn on the trial for the purpose of showing either the intent of the accused to steal the property, or that it was taken without the owner's consent. *People v. Wiggins*, 1 N. Y. Cr., 290; *aff'd*, *id.*, 296. Each of these facts may be established by the circumstances attendant upon the commission of the act. *Id.*

**Conviction.**—Under a count in an indictment for taking three one gallon crocks of preserves, a defendant cannot be convicted of stealing a three gallon crock of preserves. *People v. Kehoe*, 46 St. Rep., 224; 19 N. Y. Supp., 764.

**Repeal.**—Sections 1 to 5, inclusive, of chapter 1, part 4 of the Revised Statutes, were repealed by chapter 593 of 1886. *People v. Page*, 22 St. Rep., 278; 7 N. Y. Cr., 7; 4 N. Y. Supp., 780.

This Code has not repealed section 3, chapter 374 of 1862. *People v. Bernardo*, 1 N. Y. Cr., 245.

See *People v. Pscherhofer*, 46 St. Rep., 735; 64 Hun, 484; *People v. Bradner*, 107 N. Y., 4; *People v. Poucher*, 30 Hun, 577; 1 N. Y. Cr., 546; *People v. Ouley*, 7 St. Rep., 798; *People v. McHale*, 39 St. Rep., 759; 15 N. Y. Supp., 496; *People v. Rice*, 39 St. Rep., 189; 13 N. Y. Supp., 164.

**§ 529. Obtaining money or property by fraudulent draft.**—A person who willfully, with intent to defraud, by color or aid of a cheque or draft, or order for the payment of money or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified therein, or to order the payment of the amount, or delivery of the property, although no express representation is made in reference thereto, obtains from another any money or property, is guilty of stealing the same and punishable accordingly.

See section 569, *post*.

The case of *People v. Dimick*, 3 St. Rep., 898; 41 Hun, 621; 5 N. Y. Cr., 187, was reversed in 11 St. Rep., 739; 107 N. Y., 13.

**Object.**—This section is a new one in our criminal law, and was undoubtedly intended to make the giving of a check, etc., criminal, when the person giving it knows that he is not entitled to draw on the drawee for the sum specified therein, though no express representation is made in reference thereto. *People v. Cuykendall*, 3 N. Y. Cr., 315.

**Intent.**—To constitute a crime under this section, the giving of the check must be done "willfully, with intent to defraud." *Id.* The mere giving of a check by a person upon a bank, at which he has no deposit or credit to pay does not constitute such crime. *Id.* But it must be done with a willful intent to defraud. *Id.*

In *People v. Cuykendall*, *ante*, the defendant paid a debt by a post-dated check, stating that he did not want it presented till the day of its date, as he had bought certain property, was a little short and had paper out on which he expected to get some money; *held*, not larceny.

**Check without funds.**—A check drawn on a bank where the accused had no funds, under a representation that there were funds to meet it; is indictable. *People v. Smith*, 47 N. Y., 303; *Lesser v. People*, 12 Hun, 670; 73 N. Y., 78; *Foote v. People*, 17 Hun, 218.

See *People v. Dimick*, 11 St. Rep., 739; 107 N. Y., 31; 3 N. Y. Cr., 484.

**§ 530. Grand larceny in first degree.**—A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this chapter,

1. Property of any value, by taking the same from the person of another in the night time; or

2. Property of the value of more than twenty-five dollars, by taking the same in the night time from any dwelling-house, vessel, or railway car; or

3. Property of the value of more than five hundred dollars in any manner whatever.

This and the following section define the first and second degrees of grand larceny. *People v. Hollenbeck*, 1 N. Y. Cr., 437, note; 65 How., 401; *People v. McTameny*, 1 N. Y. Cr., 441; 30 Hun, 505; 13 Abb. N. C. 56; 66 How., 70.

See *People v. Pscherhofer*, 46 St. Rep., 735; 64 Hun, 484.

**§ 531. Grand larceny in second degree.**—A person is guilty of grand larceny in the second degree who, under circumstances not amounting to grand larceny in the first degree in any manner specified in this chapter, steals or unlawfully obtains or appropriates,

1. Property of the value of more than twenty-five dollars, but not exceeding five hundred dollars, in any manner whatever or

2. Property of any value, by taking the same from the person of another; or

3. A record of a court or officer, or a writing, instrument or record kept filed or deposited according to law, with, or in keeping of any public office or officer.

See notes under preceding section.

See notes under section 528, *ante*.

**Definition.**—The crime of grand larceny in the second degree is defined by this section, among others, as that of a person who, under circumstances not amounting to grand larceny, steals and unlawfully appropriates property of any value, by taking the same from the person of another. *People v. Morar*, 33 St. Rep., 398; 123 N. Y., 256; 8 N. Y. Cr., 106; rev'g 27 St. Rep., 20; 5 Hun, 279; 7 N. Y. Cr., 386.

Grand larceny in the second degree is defined to be stealing property of the value of more than \$25, and not exceeding \$500. *People v. Carr*, 3 N. Y. Cr. 581.

When money or property may be obtained by the color or aid of fraudulent representations or pretenses, and the amount or value exceeds the sum of twenty-five dollars and does not exceed five hundred dollars, under this section and section 528, *ante*, the offense of grand larceny will be committed. *People v. Reavey*, 39 Hun, 365; 4 N. Y. Cr., 24.

**Application.**—This section and section 528, *ante*, apply alike to all persons, attorneys as well as others, who may obtain money or property by the use of false and fraudulent representations or pretenses. *People v. Reavey*, 39 Hun, 365.

See *People v. Cuykendall*, 3 N. Y. Cr., 314.

**§ 532. Petit larceny.**—Every other larceny is petit larceny.

This section declares that every other larceny than those defined in the preceding sections is petit larceny. *People v. Hollenbeck*, 1 N. Y. Cr., 437, note; 65 How., 401; *People v. McTameny*, 1 N. Y. Cr., 441; 30 Hun, 505; 13 Abb. N. C., 56; 66 How., 70.

A party, who goes out with a \$20 gold coin under the pretense of obtaining

change for it, and immediately gambles it away, and fails to return, is guilty of petit larceny. *Justices, etc., v. People ex rel. Henderson*, 90 N. Y., 12.

That the stolen property has some intrinsic value justifies a conviction of petit larceny. *People v. White*, 1 N. Y. Cr., 466.

**§ 533. Grand larceny, how punished.**—Grand larceny in the first degree is punishable by imprisonment for a term not exceeding ten years.

Am'd by chap. 662 of 1892.

This amendment omitted the statement of the minimum limit of punishment.

**§ 534. Grand larceny in second degree, how punished.**—Grand larceny in the second degree is punishable by imprisonment for a term not exceeding five years.

Am'd by chap. 662 of 1892.

This amendment omitted the statement of the minimum limit of punishment.

See *People v. Poucher*, 30 Hun, 577; 1 N. Y. Cr., 546.

**§ 535. Petit larceny a misdemeanor.**—Petit larceny is a misdemeanor.

See section 15, *ante*; subd. 1, section 56 of Code of Criminal Procedure.

At common law, petit larceny was a felony. *Crumeill v. Hill*, 2 City Ct., 238.

No statute, prior to the Penal Code, had, in express terms, declared petit larceny to be a misdemeanor. *People ex rel. Laughlin v. Finn*, 26 Hun, 59; *aff'd*, 87 N. Y., 533.

This section must mean that petit larceny, as previously defined in the Code, is a misdemeanor. *People v. Hollenbeck*, 1 N. Y. Cr., 437, note; 65 How., 401; *People v. McTameny*, 1 N. Y. Cr., 442; 30 Hun, 505; 13 Abb, N. C., 56; 66 How., 70.

See *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr., 439.

**§ 536. Completed unissued instruments property.**—All the provisions of this chapter apply to cases where the property taken is an instrument for the payment of money, an evidence of debt, a public security, or a passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the maker thereof to any person as a purchaser or owner.

See section 201, *ante*; section 645, *post*.

**Application.**—This provision does not embrace instruments intended to be used as a release of a debt or a discharge of a mortgage lien. *People v. Stevens*, 38 Hun, 65; 3 N. Y. Cr., 586; *aff'd*, 109 N. Y., 634, without written opinion.

After delivery, it is the subject of larceny if feloniously taken from the possession of the rightful owner. *Id.*

**Instances.** Certification of check. *People v. Ward*, 3 N. Y. Cr., 483.

Notes on foreign bank. *People v. Jackson*, 8 Barb., 637.

Unindorsed draft. *People v. Phelps*, 6 Hun, 401; 49 How., 457; 72 N. Y., 324.

Unissued bank bills. *People v. Wiley*, 3 Hill, 194.

**§ 537. Severance of fixture, etc., larceny.**—All the provisions of this chapter apply to cases where the thing taken is



a fixture or part of the realty, or any growing tree, plant, or produce, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at a previous time.

See subd. 3 of section 640, *post*; subd. 4, section 56 of Code of Criminal Procedure.

**§ 538. Keeping wrecked goods, a misdemeanor.**—A person, who takes away goods or other property not his own from a stranded vessel, or any goods or other property cast by the sea upon the land, or found in any bay or creek, or who knowing he becomes possessed of any such goods or other property, and does not deliver the same, within forty-eight hours thereafter, to the sheriff or one of the coroners or wreck masters of the county where the same was found, is guilty of a misdemeanor.

The felonious appropriation of property, swept from the deck of a vessel by a gale, is larceny. *Dayton's case*, 2 C. H. Rec., 154, 167.

**§ 539. Lost property.**—A person, who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person who is not entitled thereto, without having first made every reasonable effort to find the owner and restore the property to him, is guilty of larceny.

**Lost property.**—A *bona fide* finder of a lost article is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found. *People v. Anderson*, 14 Johns., 294. In this case, it is assumed that the owner had lost the goods, and that the defendant was an honest finder. *People v. Swan*, 1 Park., 10.

The decision in *People v. Anderson*, 14 John., 294, proceeded on the ground that the property was lost by the owner, so that it no longer remained, either actually or constructively in his possession, and that it afterward came lawfully to the hands of the defendant by finding. *People v. McGarren*, 17 Wend. 461.

In *People v. Cogdell*, 1 Hill, 94, it was held that, to render the finder of lost property liable as for a larceny, he must know who the owner is at the time he acquires possession or have the means of identifying him instantaneously, make marks then about the property which he understands, and that it was enough that he has general means of discovering the owner by honest diligence, etc. Has not this section of the Code somewhat modified this rule?

Where property, with no mark about it indicating the owner, was lost and found in the highway, and there was no evidence to show that the finder, at the time, knew who the owner was, it was held, in the case last cited, that he could not be convicted of larceny, though he fraudulently, and with intent to convert the property to his own use, concealed the same immediately afterwards.

Where the personal property of one is, through inadvertence, left in the possession of another person, and the latter, *animo furandi*, conceals it, he is guilty of larceny. *People v. McGarren*, 17 Wend., 460. As he knows it to be the property of another, his possession will not protect him from the charge of committing such offense. *Id.* The general remark, in this case, that the finder, having the means of discovery, is an exception to the rule laid down in *People v. Anderson*, 14 John., 294, was held, in *People v. Cogdell*, to be so.

ject to the limitation indicated by the authorities referred to in the case of *People v. McGarren, ante*.

The finder of property, who knows, or has reason to believe he knows, the owner, is guilty of larceny, if he fraudulently converts it to his own use. *People v. Swan*, 1 Park., 9.

There must be evidence showing that the property was found by the accused under such circumstances as would give knowledge or means of inquiry as to the true owner, or that the accused, if he has found the property, has not made reasonable effort to find the owner. *Tracy v. Seamans*, 7 St. Rep., 146.

In *People v. Seaton*, 39 St. Rep., 483; 15 N. Y. Supp., 272, the evidence was held insufficient to establish, upon the trial of an indictment for receiving stolen goods, misappropriation of goods as lost and found property under this section.

The rule that larceny could not be committed of goods accidentally lost and of which the finder really supposed that the owner could not be ascertained, was held, in *People v. Kaatz*, 3 Park., 129, to be inapplicable to cattle which had strayed from the inclosure of the owner upon the public highway. Where cattle were found upon the public highway, under such circumstances, and driven by the finder to market with the intention of converting them to his own use, he was adjudged guilty of larceny. *Id.*

**§ 540. Bringing stolen goods into state, larceny.**—A person, who having, at any place without the state, stolen the property of another, or received such property, knowing it to have been stolen, brings the same into this state, may be convicted and punished in the same manner as if such larceny or receiving had been committed within this state. Complaint may be made and the indictment found and tried, and the offense may be charged to have been committed, in any county into or through which the stolen property is brought.

See subd. 2 of section 16, *ante*.

**Into state.**—A foreigner committing a larceny abroad, coming into this state and bringing the stolen property with him, may be indicted, convicted and punished in the same manner as though the larceny had been committed in this state. *People v. Burke*, 11 Wend., 129.

**Into county.**—An indictment for the offense of receiving, with guilty knowledge, goods stolen from a railroad train, may be found and tried in any county through which the train passed. *People v. Dowling*, 84 N. Y., 478.

A person may be tried and convicted of the offense of feloniously receiving and having stolen goods either in the county where the prisoner originally received the stolen property or in any county in which he afterwards had it. *Wills v. People*, 3 Park., 473.

A person may be convicted of burglary or larceny in any county into which he carries the stolen goods. *Haskins v. People*, 16 N. Y., 344.

**§ 541. Conversion by trustee, larceny; how punished.**—A person acting as executor, administrator, committee, guardian, receiver, collector or trustee of any description, appointed by a deed, will or other instrument, or by an order or judgment of a court or officer, who secretes, withholds, or otherwise appropriates to his own use, or that of any person other than the true owner, or person entitled thereto, any money, goods, thing in action, security, evidence of debt or of property, or other valuable thing, or any proceeds thereof, in his possession or custody by virtue of his office, employment, or appointment, is guilty of grand or petit

larceny in such degree as is herein prescribed, with reference to the amount of such property; and, upon conviction, in addition to the punishment in this chapter prescribed for such larceny, to be adjudged to pay a fine, not exceeding the value of the property so misappropriated or stolen, with interest thereon from the time of the misappropriation, withholding, or concealment, and twenty per centum thereupon, in addition, and to be imprisoned for not more than five years in addition to the term of his sentence for larceny, according to this chapter, unless the fine is sooner paid.

The case of *Bartow v. People*, 18 Hun, 22, was reversed in 78 N. Y., 37

**Trustee.**—A breach of trust by a trustee in wrongfully misappropriating property of a corporation, is larceny. *Gildersleeve v. Lester*, 52 St. Rep.,

The money must come into his possession or under his care by virtue of office. *Bartow v. People*, 78 N. Y., 382.

**Guardian.**—The appropriation to their own use by guardians of the money of their wards, renders them liable to indictment under this section. *Matter of Bushnell*, 17 St. Rep., 827; 4 N. Y. Supp., 480.

**Cemetery association.**—Where a cemetery association borrowed money from various persons, issuing to them certificates by which, after certifying that persons named, each had, at the date thereof, loaned to it the sums stated, agreed that one-half of the proceeds of sales of lots in its cemetery should be applied to the payment of the sum loaned and interest, a failure to make such application would not, *it seems*, render such association, even if an individual is guilty of larceny, under this section, for receiving money as a trustee, or withholding or misappropriating the same. *Thacher v. H. C. Ass'n*, 38 St. Rep., 521; 126 N. Y., 511.

**§ 542. Disposition of fine.**—So much of the fine authorized in the preceding section to be imposed, as does not exceed the amount or value of the property taken, appropriated, or stolen, with interest thereupon from the time of the commission of the offense, and a reasonable sum to defray the expenses of collecting the same, to be fixed by the supreme court, must, when received or collected, be paid to the county treasurer of the county where the conviction was had, for the benefit of the person injured or defrauded or whose property the offender took, misappropriated, or concealed, or his representative or assignee: and must be paid over to him by the county treasurer, upon the order of the supreme court, made after notice to the district attorney of the county.

**§ 543. Remission of fine.**—In case of the payment of the value of the property stolen or taken, with interest, by the person convicted, or of the collection of the same by civil action, the court may, in its discretion, upon application by such person, and such notice to other persons interested, remit the fine imposed, pursuant to the last section, except the additional allowance for expenses.

**§ 544.** A purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged. Whenever property shall be purchased by aid of a statement relating to the purchaser's means or ability to pay, made in writing and signed by the party to be charged, and in said statement the party to be charged shall state that he conducts a specified kind of business and keeps books of account of said business, then, if at the expiration of any term of credit obtained by him in so purchasing said property he shall fail to pay for the same, he shall at all times during the period of ninety days subsequent to such failure to pay, upon the request of the persons from whom said property was purchased, or their agents duly accredited in writing, produce within ten days after such request is made his said books of account.

and each and every one of them mentioned or described in said statement and permit the persons from whom said property was purchased, or their agents duly accredited in writing, to fully examine such books of account and each and every one of them mentioned or described in said statement, and to make copies of any part thereof. Upon such request being made, failure to so produce within ten days said books of account and each and every one of them mentioned or described in said statement shall be presumptive evidence that each and every pretense relating to the purchaser's means or ability to pay in said statement contained were false at the time of making said statement and were known to the purchaser to be false.

Am'd by chap. 556, Laws 1905. Takes effect May 18, 1905.

The case of *People v. Dumar*, 3 St. Rep., 490; 42 Hun, 83; 5 N. Y. Cr., 60, was reversed in 11 St. Rep., 19; 106 N. Y., 502; 8 N. Y. Cr., 268.

The purchase of property is not criminal, unless the false pretense is made, put in writing and signed by the party to be charged where it relates to his means or ability to pay. *People v. Moore*, 37 Hun, 93.

See *People v. Page*, 22 St. Rep., 278; 7 N. Y. Cr., 6; 4 N. Y. Supp., 780.

**§ 545. Value of evidence of debt, how ascertained.**—If the thing stolen consists of a written instrument, being an evidence of debt, other than a public or corporate certificate, scrip. bond, or security having a market value, or being the transfer of or evidence of title to any property, or of the creating, releasing, or discharging, of any demand, right or obligation, the amount of money due thereupon or secured to be paid thereby, and remaining unsatisfied, or which, in any contingency, might be collected thereupon or thereby, or the value of the property transferred or affected, or the title to which is shown thereby, or the sum which might be recovered for the want thereof, as the case may be, is deemed the value of the thing stolen.

**Proof.**—On the trial of an indictment for stealing foreign bank bills, the public prosecutor must produce at least *prima facie* evidence of the existence of the banks, and of the genuineness of the bills. *People v. Caryl*, 12 Wend., 547; *Johnson v. People*, 4 Denio, 364. Evidence that the prisoner had passed the stolen bills as genuine is, *it seems*, sufficient. *Johnson v. People, ante*. So is evidence that bills of the same kind have been received and passed in the ordinary course of business, as a part of the currency of the country. *Id*

**Burden.**—The presumption is in favor of the genuineness of a bank bill, and the onus of proving the contrary rests upon the defendant. *People v. Fallon*, 6 Park, 256. The fact that a bill has been paid for, and received in payment of, services, is some evidence that it is genuine and of some value. *Id*.

**§ 546. Id.; passenger ticket.**—If the thing stolen is a ticket, paper or other writing, entitling or purporting to entitle, the holder or proprietor thereof to a passage upon a railway car, vessel, or other public conveyance, the price at which a ticket, entitling a person to a like passage, is usually sold, is deemed the value thereof.

**§ 547. Id.; of other articles.**—In every case not otherwise regulated by statute, the market value of the thing stolen is deemed its value.

**§ 548. Claim of title, ground of defense.**—Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable. But this section shall not excuse the retention of the property of another, to offset or pay demands held against him.

The reference to section 448 in *People v. Grim*, 3 N. Y. Cr., 319, should be to this section.

**Claim of title.**—A person, who removes property under claim of title, is not guilty of larceny. *People v. Burton*, 1 N. Y. Cr., 297.

**Application to indebtedness.**—In *People v. Smith*, 5 Park., 490, it was held that it was no defense to a charge of obtaining money by false pretenses, that the owner was at the time indebted to the defendant in an amount equal to the sum so obtained, and the latter intended to apply the money on such debt. But in *People v. Thomas*, 3 Hill, 169, a false representation tending merely to induce a person to pay a debt previously due from him was held not to be within the statute against obtaining property by false pretenses, though payment is thereby secured. In the case last cited, the party, on paying his money, knew that it was to be appropriated to the payment of the debt. *People v. Smith*, 5 Park., 515.

**Retention in good faith.**—Proof that the property was obtained and held in good faith by the party charged with stealing it, will take from the case all criminal intent. *People v. Grim*, 3 N. Y. Cr., 317.

See *People v. Ouley*, 7 St. Rep., 798.

**§ 549. Intent to restore property.**—The fact that the defendant intended to restore the property stolen or embezzled, is no ground of defense, or of mitigation of punishment, if it has not been restored before complaint to a magistrate, charging the commission of the crime.

See *Chatterton v. People*, 15 Abb., 147.

**§ 550. Criminally receiving property.**—A person, who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this chapter, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this chapter, if such misappropriation has been committed within the state, whether such property were so stolen or misappropriated within or without the state, or who being a dealer in or collector of junk, metals or second hand materials, or the agent, employe or representative of such dealer or collector, buys or receives any wire, cable, copper, lead, solder, iron or brass used by or belonging to a railroad, telephone, telegraph, gas or electric light company without ascertaining by diligent inquiry, that the person selling or delivering the same has a legal right to do so, is guilty of criminally receiving such property, and is punishable, by imprisonment in a state prison for not more than five years, or in a county jail for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

As amended by L. 1903, chap. 326. In effect July 1, 1903.

**Distinct offenses.**—Larceny and the offense of receiving stolen goods are separate, distinct and independent, requiring different kinds of proof. *People v. Brien*, 25 St. Rep., 239; 53 Hun, 497; 7 N. Y. Cr., 166.

**Extent of provision.**—This section is quite broad and includes within its terms all persons who receive stolen property knowing it to be stolen. *People v. Weldon*, 20 St. Rep., 114; 111 N. Y., 574.

**What constitutes.**—Under the new classification and definition of offenses, as contained in the Penal Code, receiving stolen goods, knowing them to have

been stolen, remains a criminal offense. *People v. Sanborn*, 14 St. Rep., 126.

A person who buys or receives any stolen property, knowing the same to have been stolen, is guilty of criminally receiving such property. *People v. Weldon*, 20 St. Rep., 114; 111 N. Y., 514.

Stolen goods must have been feloniously received, to authorize a conviction. *Miller v. People*, 25 Hun, 473; 13 W. Dig., 260; *People v. Johnson*, 1 Park., 564.

A man cannot be convicted of feloniously receiving from himself property which he has stolen. *People v. Brien*, 25 St. Rep., 239; 53 Hun, 497; 7 N. Y. Cr., 166.

All who have confederated in feloniously receiving embezzled goods, knowing them to have been embezzled, may be convicted, though the receiving was at different times and places, and though all were not present. *People v. Stein*, 1 Park., 202.

If the goods have been stolen from a bailee by another, the owner may render himself criminally responsible by fraudulently receiving them from the thief. *People v. Wiley*, 3 Hill, 194.

**Possession of stolen goods.**—The possession of stolen goods, immediately after the larceny, if under peculiar and suspicious circumstances, where there is evidence tending to show that some other person or persons stole the property, not being satisfactorily explained, will warrant a conviction. *Goldstein v. People*, 82 N. Y., 231.

**Instigator.**—Where a person is the instigator and employs another to assist him in procuring the goods, and it is through the agency of the latter and by his use of the forged orders furnished to him by the former that the possession of the goods is obtained, both are principals in the transaction, and it is a taking by both and not a receiving by one from the other. *People v. Brien*, 25 St. Rep., 239; 53 Hun, 496; 7 N. Y. Cr., 166.

**Negotiator.**—A person, who negotiates for the restoration of stolen property in consideration of himself receiving a percentage therefor, and receives the property though under color of an agency from the owner, is guilty of the offense of receiving stolen property. *People v. Wiley*, 3 Hill, 194.

**Identification.**—In *People v. Connor*, 52 St. Rep., 83; 68 Hun, 78, the question of proof of identification of property arose upon the trial of an indictment for receiving stolen goods and was discussed at some length. In this case it was held that the evidence was sufficient to support a conviction.

**Defense.**—The prisoner has the right to meet the evidence against him by testimony tending to show that he came by the property honestly. *People v. Dowling*, 84 N. Y., 478.

A proviso to the effect that a person, who receives such property with a laudable intent, is not guilty of the commission of the crime, has been incorporated in the act. *People v. Weldon*, 20 St. Rep., 114; 111 N. Y., 574.

**Evidence.**—Evidence competent upon the trial of an indictment for receiving stolen property, knowing it to have been stolen. *Copperman v. People*, 56 N. Y., 591; *People v. Shulman*, 80 id., 374, note; *Coleman v. People*, 55 id., 81.

**§ 551. Averment and proof.**—It is not necessary to aver, in an indictment for an offense specified in the last section, nor to prove upon the trial thereof, that the principal who stole the property has been convicted, or is amenable to justice.

In the more ancient order of procedure, the conviction of the thief necessarily preceded the trial of the receiver, and the offense of the latter necessarily involved two persons, the person who purloined the property, and the person who received it, knowing it to have been stolen. If the latter was accessory before or after the fact, he was not a receiver, but a principal. Under the new procedure, the thief need not be convicted before entering upon and completing the trial of the receiver, but his existence is clearly contemplated. It is not now necessary to aver or prove that the principal who stole the property has been convicted or is amenable to justice. *People v. Brien*, 25 St. Rep., 239; 53 Hun, 497; 7 N. Y. Cr., 171; 6 N. Y. Supp., 198.



## CHAPTER V.

*Extortion and Oppression.*

**SECTION 552.** "Extortion" defined.

553. What threats may constitute extortion.

554. Punishment of extortion in certain cases.

555. Compelling execution, etc., of papers.

556. 557. Oppression and extortion committed under color of official right.

558. Blackmail.

559. Sending, etc., of threatening or annoying letters, etc., penalty for.

560. Attempts to extort money, or property, by verbal threats.

561. Unlawful threat referring to act of third person.

**§ 552. "Extortion" defined.**—Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

The case of *People v. Barondess*, 41 St. Rep., 662; 8 N. Y. Cr., 248; 61 Hun, 572; 16 N. Y. Supp., 438, was reversed in 45 St. Rep., 248; 8 N. Y. Cr., 376; 133 N. Y., 649.

**What constitutes.**—The statute is not, either by its language or reasonable import, confined to the case of an actual injury to some specific article of property, but is made to include the threat to do any unlawful injury to property. *People v. Barondess*, 45 St. Rep., 248; 133 N. Y., 549; 8 N. Y. Cr., 376. See dissenting opinion of Justice Daniels, in 8 N. Y. Cr., 257; 41 St. Rep., 669; upon which the general term judgment was reversed by the court of appeals, without written opinion.

Obtaining money from another with his consent, induced by a threat to injure the business of the individual threatened, by persuading his employes to absent themselves from work, is extortion under this, and subd. 1 of the next, section. *Id.*

The procuring of money from another with his consent, obtained by fear induced by a threat to do or continue an unlawful injury to property, *e. g.*, to continue a "boycott," constitutes the crime of extortion under this and the following section. *People v. Wilzig*, 4 N. Y. Cr., 408. It is of no consequence as affecting the crime, whether the money extorted was personally shared by the conspirators, or used to pay the expenses of the "boycott." *Id.*

One may refuse to deal with a firm because of a conviction that it does not give honest compensation for labor, and may ask his friends or the public to do the same thing, and his conduct may produce injury to such business without thereby becoming illegal. *People v. Hughes*, 50 St. Rep., 67; 19 N. Y. Supp., 550. But, where a person influences his friends and the public to inflict the same injury of withdrawal of custom without just or excusable reason, and by fraudulently concealing the fact that it does not, and pretending that it does, exist, and using official power and influence to make effective the deception, and to force and compel unwilling dealers to desist from their purchases, and that for the sole purpose of extorting money such resultant injury becomes unlawful. *Id.*

**§ 553. What threats may constitute extortion.**—Fear, such as will constitute extortion, may be induced by a threat:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family; or

2. To accuse him, or any relative of his or any member of his family, of any crime; or

8. To expose, or impute to him, or any of them, any deformity or disgrace; or

4. To expose any secret affecting him or any of them.

See notes under preceding section.

See sections 254 and 254 A, *ante*.

The case of *People v. Barondess*, 41 St. Rep., 659; 8 N. Y. Cr., 234; 61 Hun, 512; 16 N. Y. Supp., 438, was reversed in 45 St. Rep., 248; 133 N. Y., 649; 8 N. Y. Cr., 376.

The reference to chap. 5, title 16, in *People v. Barondess*, 8 N. Y. Cr., 252, should be to chap. 5, title 15.

Where the head of a labor organization conveys the idea strongly and clearly that, unless his demand for money is complied with, he can and will, by threatening the hostility of his order, compel the retail dealers to withdraw their custom, and can and will utilize the power he has though the original occasion for its exercise is gone, it amounts to a threat to do an unlawful injury to property. *People v. Hughes*, 50 St. Rep., 67; 19 N. Y. Supp., 550; *People v. Barondess*, 45 St. Rep., 248; 133 N. Y., 649; 8 N. Y. Cr., 276; rev'g 41 St. Rep., 659; 61 Hun, 581; 8 N. Y. Cr., 252; 16 N. Y. Supp., 440.

**§ 554. Punishment of extortion in certain cases.**—A person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or a threat mentioned in the last two sections, is punishable by imprisonment not exceeding five years.

The case of *People v. Barondess*, 41 St. Rep., 659; 8 N. Y. Cr., 234; 6 Hun, 572; 16 N. Y. Supp., 438; was reversed in 45 St. Rep., 248; 133 N. Y., 649; 8 N. Y. Cr., 376.

**Felony.**—Extortion is a felony under the definition of the Code. *People v. Hughes*, 50 St. Rep., 64; 19 N. Y. Supp., 550.

**Punishment.**—The offense may be punished by an imprisonment of one year or more, which may be, or must be, in the state prison. *Id.*

**§ 555. Compelling execution, etc., of papers.**—The compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter, or destroy any valuable security, or instrument or writing, affecting or intended to affect any cause of action or defense or any property, is an extortion of property, within the last two sections.

Amended by chapter 884 of 1892.

This amendment was made before the Code went into effect.

**§ 556. Oppression and extortion committed under color of official right.**—A public officer, or a person pretending to be such, who, unlawfully and maliciously, under pretense or color of official authority,

1. Arrests another, or detains him against his will; or
2. Seizes or levies upon another's property; or
3. Dispossesses another of any lands or tenements; or
4. Does any other act, whereby another person is injured in his person, property, or rights;

Commits oppression and is guilty of a misdemeanor.

See sections 118, 119 and 120, *ante*.

**§ 557. Oppression and extortion committed under color of official right.**—A public officer who asks, or receives, or agrees to receive, a fee or other compensation for his official service, either

1. In excess of the fee or compensation allowed to him by statute therefor; or

2. Where no fee or compensation is allowed to him by statute therefor;

Commits extortion and is guilty of a misdemeanor.

See sections 48, 49 and 50, *ante*.

**§ 558. Blackmail.**—A person who, knowing the contents thereof, and with intent, by means thereof, to extort or gain any money or other property, or to do, abet, or procure any illegal or wrongful act, sends, delivers, or in any manner causes to be forwarded or received, or makes and parts with for the purpose that there may be sent or delivered, any letter or writing, threatening

1. To accuse any person of a crime; or

2. To do any injury to any person or to any property; or

3. To publish or connive at publishing any libel; or

4. To expose or impute to any person any deformity or disgrace;

Is punishable by imprisonment for not more than five years.

See section 254, *ante*.

**Former statute.**—The former statute was intended to embrace only cases where the intent to obtain that which, in justice and equity, the writer of the letter was not entitled to receive. *People v. Griffin*, 2 Barb., 427. It did not extend to cases where the person threatened actually owed the writer the sum claimed by him. *Id.*

**Construction.**—No precise words are needed to convey a threat. *People v. Thompson*, 97 N. Y., 313; 2 N. Y. Cr., 527. It may be done by innuendo or suggestion. *Id.* To ascertain whether a letter conveys a threat, all its language together with the circumstances under which it was written, and the relations between the parties, may be considered. *Id.* If it can be found that the proper and natural effect of the letter is to convey a threat, then the mere form of words is unimportant. *Id.*

**Where made.**—A threat of the character mentioned in the statute must be made in the letter delivered to the complainant. *People v. Gillian*, 18 St. Rep., 681; 50 Hun, 38; 2 N. Y. Supp., 477. But parol evidence is admissible to show that, by the language, etc., used, the writer intended to make the threat, and the receiver so understood its meaning. *Id.*

**By whom.**—To make out the crime specified in this section, it is not necessary to show that the threat was against the person to whom the letter was sent or addressed, or that its writer or sender was the one threatening to do the unlawful act. *People v. Thompson*, 97 N. Y., 317; 2 N. Y. Cr., 526. It may be committed by one who sends a letter conveying a threat of some other person to do the forbidden acts, provided he sends the letter for the unlawful purposes mentioned in the section. *Id.* Nor is it needful that the threat should inspire fear, or that it should be calculated to produce terror. *Id.* But if the threat is of the kind mentioned in the section, and is made and conveyed with the view and intent specified therein, the crime has been committed, however far the threat may have fallen short of its purpose. *Id.*

**Friendship.**—This section cannot be evaded under the guise of friendship. *Id.*

**Honest demand.**—An honest demand for indemnity for a wrong, made in good faith, accompanied by a suggestion that legal proceedings will be resorted

to unless satisfaction is voluntarily made, is not a threat within the section, though the wrong is one, the disclosure of which will bring disgrace upon the guilty party. *People v. Wightman*, 5 St. Rep., 787; 104 N. Y., 601; 5 N. Y. Cr., 549, aff'g 6 St. Rep., 521; 43 Hun, 358.

**Illegal act.**—It is not essential that the threat on its face be to do an illegal act. *Id.* An accusation in writing of an act involving moral turpitude, known by the writer to be false, accompanied with a suggestion that legal proceedings will be taken, unless the person, against whom it is made, purchases silence, may be a threat within the section, though, in form, the accused is only called upon to render satisfaction for that which, if the charge is true, will entitle the accuser to pecuniary compensation. *Id.*

**Crime.**—The gist of the offense is the attempt to extort money by a malicious threat to accuse of some crime. *People v. Gillian*, 18 St. Rep., 681; 50 Hun, 38; 2 N. Y. Supp., 477. The words used do not constitute the offense without the accompanying intent to extort. *Id.*

**What constitutes.**—What facts constitute the crime of forwarding threatening letters, under this section. *People v. Wightman*, 6 St. Rep., 521; 43 Hun, 358; aff'd, 5 St. Rep., 787; 104 N. Y., 601; 5 N. Y. Cr., 549.

**§ 559. Sending, etc., of threatening or annoying letters, etc., penalty for.**—A person who knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received any letter or other writing threatening to do any unlawful injury to the person or property of another, or any person who shall knowingly send or deliver or shall make and for the purpose of being delivered or sent, shall part with the possession of any letter, postal card or writing with or without a name subscribed thereto or signed with a fictitious name or with any letter, mark or other designation, with intent thereby to cause annoyance to any person, is guilty of misdemeanor.

Am'd by chap. 120 of 1891.

This amendment added the latter provision of the present section.

**§ 560. Attempt to extort money, or property, by verbal threats.**—A person who under circumstances not amounting to robbery, or an attempt at robbery, with intent to extort or gain any money or other property, verbally makes such a threat as would be criminal under either of the foregoing sections of this chapter, if made or communicated in writing, is guilty of a misdemeanor.

**§ 561. Unlawful threat referring to act of third person.**—It is immaterial whether a threat, made as specified in this chapter, is of things to be done or omitted by the offender, or by any other person.

See notes under section 558, *ante*.

## CHAPTER VI.

### *False Personation, and Cheats.*

**SECTION 562. Falsely personating another.**

**563. Limitations as to indictment.**

**564. Receiving property in false character.**

**565. Personating officers, policemen, and other persons.**

**SECTION 566.** Obtaining signature by false pretenses.

**566a.** Obtaining or giving false pedigree of animals, how punished.

**567.** Obtaining property for charitable purposes.

**568.** Obtaining negotiable evidence of debt by false pretenses.

**569.** Using false check or order for payment of money.

**570.** Obtaining employment by false statements or fraudulent representations as a deaf and dumb person, a misdemeanor.

**571.** Selling or secreting property with intent to defraud.

**572.** Pawning, etc., borrowed property.

**573.** Personating beneficiary of entrance ticket.

**574.** Mock auctions.

**§ 562. Falsely personating another.**—A person who falsely personates another, and, in such assumed character,

1. Marries or pretends to marry, or to sustain the marriage relation towards another, with or without the connivance of the latter or

2. Becomes bail or surety for a party in an action or special proceeding, civil or criminal, before a court or officer authorized to take such bail or surety; or

3. Confesses a judgment; or

4. Subscribes, verifies, publishes, acknowledges, or proves a written instrument, which by law may be recorded, with intent that the same may be delivered or used as true; or

5. Does any other act, in the course of any action or proceeding, whereby, if it were done by the person falsely impersonated such person might in any event become liable to an action or special proceeding, civil or criminal, or to pay a sum of money, or to incur a charge, forfeiture, or penalty, or whereby any benefit might accrue to the offender, or to another person;

Is punishable by imprisonment in a state prison for not more than ten years.

The Code makes no attempt to define, in terms, what constitutes a cheat. *People v. Olsen*, 39 St. Rep., 297.

**§ 563. Limitations as to indictments.**—An indictment cannot be found, for the crime specified in subdivision first of the last section, except upon the complaint of the person injured if there be any such person living, and within two years after the perpetration of the crime.

**§ 564. Receiving property in false character.**—A person who falsely personates another, or the officer or agent of any legally organized or incorporated society or institution, or falsely represents himself to be such an officer or agent, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual or society, or institution or its officers or agents, so personated, or whose officer or agent he falsely claims to be, with the intent to convert the same to his own use or to that of another person who is not entitled thereto, is punishable in the same manner and to the same extent as for larceny, of the money or property so received.

Am'd by chap. 327 of 1899. In force Sept. 1, 1899.

**§ 565. Personating officers, policemen and other persons**—A person who falsely personates a public officer, civil or

military, or a policeman, or a private individual having special authority by law to perform an act affecting the rights or interests of another, or who assumes, without authority, any uniform or badge by which such an officer or person is lawfully distinguished, and in such assumed character does an act, purporting to be official, whereby another is injured or defrauded, is guilty of a misdemeanor.

A port warden of another state, who had assumed the office of port warden in this state, was held, in *Curtin v. People*, 26 Hun. 564; aff'd, without opinion, in 89 N. Y., 621, punishable under chap. 87 of 1881.

**§ 566. Obtaining signature by false pretenses.** — A person who, with intent to cheat or defraud another, designedly, by color or aid of a false token or writing, or other false pretense, obtains the signature of any person to a written instrument, is punishable by imprisonment in a state prison for not more than three years, or in a county jail for not more than one year, or by a fine of not more than three times the value of the money or property affected or obtained thereby, or by both such fine and imprisonment.

See sections 528, 529 and 544, *ante*.

**What constitutes.**—The obtaining of the signature of a person as an indorser upon a promissory note by false pretenses, with the intent to cheat and defraud him, is an offense within this section. *People v. Cole*, 48 St. Rep., 351; 20 N. Y. Supp., 505.

The fact that the person so defrauded was credulous and unwary is immaterial. *Id.*

Where the signature of a municipal officer was procured to a false claim of indebtedness against the municipal corporation by its presentation under such circumstances and in such a manner as was calculated to deceive him, a conviction will be sustained. *People ex rel. Phelps v. Court, etc.*, 83 N. Y., 436.

**Sole inducement.**—The false pretense need not be the sole inducement to the act of the party defrauded. *Id.*

The signing of the instrument must be occasioned, or materially influenced, by the false pretenses. *Therasson v. People*, 82 N. Y., 238; rev'g 20 Hun, 55. The defrauded party, in giving his signature, must rely upon them. *Id.* This fact need not be established by direct proof, but may be inferred from the facts tending legitimately to show it. *Id.*

**Silence.**—To create the false representation, spoken or written words are not necessary. *People ex rel. Phelps v. Court, etc.*, 83 N. Y., 436. A mute or silent act may convey the falsehood, and if it does, it constitutes the offense. *Id.*

**Indictment.**—It is not essential to set forth all the details of the fraud. *Id.* It is sufficient to specify particularly the pretenses, to aver their falsity and the fraudulent intent, and to show how they were effectual in accomplishing the fraud. *Id.* If the false pretense is capable of defrauding, it is sufficient; this must be determined by the circumstances of each particular case. *Id.*

**Evidence.**—On the trial of an indictment under this section, evidence that defendant procured the defrauded person to indorse other notes from time to time to a large amount, which finally resulted in his financial ruin, is competent as bearing on the former's motive. *People v. Cole*, 48 St. Rep., 351; 20 N. Y. Supp., 505.

**Question for jury**—Whether the representations were made for the purpose of inducing the defrauded person to indorse the note, and with intent to cheat and defraud him, and whether they were false and were calculated to deceive him, are questions for the jury. *Id.*



The question whether the false pretense was calculated to deceive and was capable of defrauding, is one for the jury. *People ex rel. Phelps v. Court*, etc., 83 N. Y. 436.

In order to convict under this section, the jury must find as a fact that the false pretense was uttered with the intent to cheat or defraud another. *Brown v. People*, 16 Hun. 535. The intent "to cheat and defraud" is an essential element of the offense. *Id.*

**§ 566a. Obtaining or giving false pedigree of animals, how punished.**—Every person who by any false pretense shall obtain from any club, association, society or company for improving the breed of cattle, horses, sheep, swine or other domestic animals the registration of any animal in the herd register or other register of any such club, association, society or company or a transfer of any such registration, and every person who shall knowingly give a false pedigree of any animal, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in a county jail for a term not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

Added by chap. 153 of 1887.

**§ 567. Obtaining property for charitable purposes.**—A person, who wilfully, by color or aid of any false token or writing, or other false pretense, obtains the signature of any person to any written instrument, or any money or property, for any alleged or pretended charitable or benevolent purpose, is punishable by imprisonment for not less than one nor more than three years, or by a fine to an amount not exceeding the value of the money or property obtained, or by both.

In *People v. Clough*, 17 Wend. 351, it was held that an indictment would not lie for obtaining money by false pretenses, where the money was parted with as a charitable donation, though the pretenses moving to the gift were false and fraudulent. This case was decided under section 53, art. 4, title 3, chap. 1, part 4 of the Revised Statutes, prior to the enactment of chap. 144 of 1853.

**§ 567a. Obtaining by fraud or without authority signature to applications or property for degrees, secrets or membership in secret fraternities.**—A person who wilfully by color or aid of any false token or writing, or other false pretense or false statement verbal or written, or without authority of the grand lodge hereinafter mentioned, obtains the signature of any person to any written application or any money or property for any alleged or pretended degree, or for any alleged or pretended secret work or for any alleged or pretended secrets of, or membership in any secret fraternal association, society, order or organization having a grand lodge in this state, or in any subordinate lodge or body thereof is punishable by imprisonment for not more than three years or by a fine to an amount not exceeding the value of the money or property obtained or by both.

Added by chap. 366, Laws 1905. Takes effect Sept. 1, 1905.

**§ 568. Obtaining negotiable evidence of debt by false pretenses.**—If the false token, by which money or property is obtained in violation of sections five hundred and sixty-six and five hundred and sixty-seven, is a promissory note or other negotiable evidence of debt purporting to be issued by or under the authority of any banking company or corporation not in existence, the person guilty of such cheat is punishable by imprisonment in a state prison not exceeding seven years, instead of by the punishments prescribed by those sections.

**§ 569. Using false check or order for payment of money.**—The use of a matured check, or other order for the payment of money, as a means of obtaining a signature, or money or property, such as is specified in sections five hundred and sixty-six and

five hundred and sixty-seven, by a person who knows that the drawer thereof is not entitled to draw for the sum specified therein, upon the drawee, is the use of a false token within the meaning of those sections, although no representation is made in respect thereto.

See section 529, *ante*.

**Fraudulent check.**—If one who has no money or credit at a bank draws a check thereon and obtains money therefor from some third person, he may, *it seems*, be guilty of a crime under this section. *People v. Clements*, 3 St. Rep., 700; 42 Hun, 289; 5 N. Y. Cr., 280.

The mere possession of the check by such third person would be no evidence of the crime. *Id.*

Proof would have to be given of the obtaining of the money from him by such check. *Id.*

Obtaining goods on a worthless, post-dated check of a third party who had kept no account at the bank on which it was drawn, is within the statute. *Lesser v. People*, 12 Hun, 668; *aff'd*, 73 N. Y., 78.

Where a person purchases property and gives therefor his check dated the day of the sale, but payable subsequently, when he has no account in the bank on which the check is drawn, but the whole transaction is a device to cheat, he is properly convicted of obtaining goods by false pretenses. *Footte v. People*, 17 Hun, 218.

**§ 570. Obtaining employment by false statement or fraudulent representation as a deaf and dumb person, a misdemeanor.**—A person who obtains employment, or appointment to any office or place of trust by color or aid of any false or forged letter or certificate of recommendation, or of any false statement in writing as to his name, residence, previous employment or qualification, or any person who shall willfully and intentionally fraudulently represent himself or herself to be a deaf and dumb person in order to collect, receive or otherwise obtain moneys, food, clothing or anything of value whatsoever, is guilty of a misdemeanor.

Am'd by chapter 654 of 1886.

This amendment added the latter provision of the present section.

**§ 571. Selling or secreting property with intent to defraud.**—A person who, having theretofore executed a mortgage of personal property, or any instrument intended to operate as such, sells, assigns, exchanges, secretes, or otherwise disposes of any part of the property, upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee, or a purchaser thereof, is guilty of a misdemeanor.

This section was inserted by chap. 384 of 1882.

The sale of mortgaged chattels by the mortgagor, with the full permission of the mortgagee to sell, is not within the statute. *Millichamp v. People*, 14 W. Dig., 252. But where such permission is only to enable him to pay the mortgage, and he, with fraudulent intent, planned to sell and convert the proceeds to his own use, the case is within the statute. *Id.*

The *People ex rel. Stokes v. Risely*, 38 Hun, 281; 4 N. Y. Cr., 109; *Vaus v. Middlebrook*, 3 St. Rep., 277.

**§ 572. Pawning, etc., borrowed property.**—A person who, without the consent of the owner thereof, sells, pledges, pawns, or otherwise disposes of any property which he has borrowed or hired from the owner, is guilty of a misdemeanor; but this section does not apply to a person leasing or lending property, for a time not exceeding that for which the same was leased or lent to himself.

This section was inserted by chapter 384 of 1882.

By chapter 692 of 1892, the then section 573 was made part of this section.

See section 355, *ante*.

**§ 573. Personating beneficiary of entrance ticket.**—A person who, with intent to wrongfully convert to his own use the benefits secured by any ticket, contract, or other paper or writing, appearing upon its face not negotiable, and which entitles, or purports to entitle the person whose name appears therein, to entrance upon the grounds or premises of a membership corporation, or being thereupon, to remain upon such grounds or premises, falsely personates or attempts to so personate any individual named in such ticket, contract or other paper or writing, as the grantee or beneficiary thereof, is guilty of a misdemeanor.

New. Added by chap. 692 of 1892.

**§ 574. Mock auctions.**—A person who obtains money or property from another, or obtains the signature of another to any writing, the false making of which would be forgery, by means of any false or fraudulent sale of property or pretended property by auction, or by any of the practices known as mock auctions, is punishable by imprisonment in a state prison not exceeding three years, or in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment; and in addition thereto he forfeits any license he may hold to act as an auctioneer, and is forever disqualified from receiving a license to act as auctioneer within this state.

See section 443, *ante*.

See chap. 289 of 1893, amending section 991 of chap. 410 of 1882, relative to auctions and auctioneers.

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## CHAPTER VII.

### *Fraudulently Fitting Out and Destroying Vessels.*

**SECTION 575.** Person willfully destroying vessel, etc.

576. Fitting out or lading any vessel, with intent to wreck the same.

577. Making false manifest, etc.

**§ 575. Person willfully destroying vessel, etc.**—A person, who wrecks burns, sinks, scuttles, or otherwise injures or destroys a vessel, or the cargo of a vessel, or willfully permits the

same to be wrecked, burned, sunk, scuttled, or otherwise injured or destroyed, with intent to prejudice or defraud an insurer or any other person, is punishable by imprisonment for not more than five years.

**§ 576. Fitting out or lading vessel, with intent to wreck the same.**—A person who fits out any vessel, or who lades any cargo on board of a vessel, who\* with intent to permit or cause the same to be wrecked, sunk, or otherwise injured or destroyed, and thereby to defraud or prejudice an insurer or another person, is punishable by imprisonment in the state prison not exceeding ten years.

\* So in original.

Am'd by chap. 662 of 1892.

This amendment omitted the statement of the minimum limit of punishment.

**§ 577. Making false manifest, etc.**—A person, guilty of preparing, making or subscribing, a false or fraudulent manifest, invoice, bill of lading, ship's register or protest, with intent to defraud another, is punishable by imprisonment in a state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or both.

## CHAPTER VIII.

### *Misconduct and Frauds in Relation to Insurance Corporations, Associations and Societies.*

**SECTION 577a. False statements in application for membership.**

577b. Discriminations and rebates by life insurance corporations prohibited.

577c. Acting as agent of life insurance corporation without certificate of authority.

577d. Fire insurance corporations to use standard policy only.

577e. Overcharges by marine insurance agents.

577f. Misconduct of officers and agents of corporations for the insurance of domestic animals.

577g. Transfers to and reinsurance of risks in unauthorized foreign corporations prohibited to co-operative associations.

577h. Misconduct of officers and agents of co-operative insurance companies.

577i. Acts of agents of fire or marine insurance corporations organized in other countries, after revocation of certificate.

577j. Acting for foreign insurance corporation which has not designated superintendent of insurance as attorney.

578. Destroying property insured.

579. Presenting false proof of loss in support of claim upon policy of insurance.

**§ 577a. False statements in applications for membership.**—Any applicant, officer, agent, solicitor, examining physician, surgeon or other person, who knowingly or willfully makes any false or fraudulent statements or representations in or with reference to any application for membership or reinstatement or

any other documentary or other proof for the purpose of obtaining or reinstating membership in or benefit from any fraternal beneficiary society, order or association, any corporation, association or society transacting the business of life or casualty insurance or both, upon the co-operative or assessment plan, or a corporation for the insurance of domestic animals, is guilty of misdemeanor.

Added by chapter 692 of 1892.

Am'd by chapter 692 of 1893.

This amendment inserted the words "any application for membership reinstatement or any," and "or reinstating," into the former section, and ~~w~~ go into effect October 1, 1893.

**§ 577b. Discriminations and rebates by life insurance corporations prohibited.**—Any life insurance corporation doing business in this state, or any officer or agent thereof, who,

1. Makes any discrimination in favor of individuals of the same class or of the same expectation of life either in the amount of the premium charged or in any return of premiums, dividends or other advantages, or

2. Makes any contract for insurance or agreement as to such contract other than that which is plainly expressed in the policy issued, or

3. Pays or allows, or offers to pay or allow as an inducement to any person to insure, any rebate or premium, or any special favor or advantage whatever, in the dividends to accrue thereon or as an inducement whatever not specified in the policy; or

4. Makes any distinction or discrimination between white persons and colored persons, wholly or partially of African descent as to the premiums or rates charged for policies upon the lives of such persons, or in any other manner whatever; or demands or requires a greater premium from such colored persons than is at that time required by such company from white persons of the same age, sex, general condition of health and prospect of longevity; or makes or requires any rebate, diminution or discount upon the amount to be paid on such policy in case of the death of such colored person insured, or inserts in the policy any condition, or makes any stipulation whereby such person insured shall bind himself, or his heirs, executors, administrators and assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of such person insured, other than such as are imposed upon white persons in similar cases, is guilty of a misdemeanor.

Added by chapter 692 of 1892.

**§ 577c. Acting as agent of life insurance corporation without certificate of authority.**—Any person acting as agent, sub-agent, or broker of a life insurance corporation doing business in this state, except as agent operating solely on the weekly pa

ment plan of insurance, who solicits or procures applications for insurance without first procuring a certificate of authority from the superintendent of insurance, is guilty of a misdemeanor.

Added by chap. 692 of 1892.

**§ 577d. Fire insurance corporations to use standard policy only.**—Any fire insurance corporation, or any officer or agent thereof, who makes, issues, delivers, or offers to deliver any policy of insurance on property in this state, which does not conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with the printed form or contract of policy filed in the office of the secretary of state, known and designated as the "Standard fire insurance policy of the state of New York," except as to such exceptions as are specially provided and allowed by law, is guilty of a misdemeanor, punishable by a fine of not less than twenty-five nor more than one hundred dollars for the first offense, and of not less than one hundred or more than two hundred and fifty dollars for each subsequent offense.

Added by chap. 692 of 1892.

**§ 577e. Overcharges by marine insurance agents.**—Any agent, shipper or other person, representing or acting for a marine insurance corporation doing business in this state; who,  
1. Charges or receives, directly or indirectly, from any person for insurance of any property in transit upon the canals of the state, any greater sum than the original rates of premium fixed by the corporation for the insurance of such property; or  
2. Demands or receives upon any policy of insurance issued upon any such property, for the business of obtaining such insurance, a sum of money, as compensation or remuneration by way of salary, commission or in any other capacity, which includes in any case, over fifteen per centum of the premium, is guilty of a misdemeanor.

Added by chap. 692 of 1892.

**§ 577f. Misconduct of officers and agents of corporations for the insurance of domestic animals.**—Any officer or agent of a corporation organized for the insurance of domestic animals who,

1. Refuses to make any report or perform any duty required by law; or
2. Intentionally makes any false or fraudulent statement or report, is guilty of a misdemeanor punishable by a fine of not less than one hundred or more than five hundred dollars.

Added by chap. 692 of 1892.

**§ 577g. Transfers to and reinsurance of risks in unauthorized foreign corporations prohibited to co-operative associations.**—Any officer, manager, director or agent of a cas-



ualty insurance corporation upon the co-operative or assessment plan, organized under the laws of this state, who transfers its risks or assets or any part thereof to or reinsures its risks or any part thereof, in any insurance corporation or association of another state or country which is not, at the time of such transfer or reinsurance, authorized by law to do insurance business in this state, is guilty of a misdemeanor.

Added by chap. 692 of 1892.

**§ 577h. Misconduct of officers and agents of co-operative insurance companies.**— Any officer, agent or representative of a corporation, association or society doing a life or casualty insurance business or both, upon the co-operative or assessment plan, who,

1. Neglects or refuses to perform any duty required of him by law; or,

2. Intentionally makes any false or fraudulent statement or report; or,

3. Refuses to permit the superintendent of insurance, or any examiner duly authorized by him for the purpose, to make an examination of the condition and business, books, papers and vouchers of any such corporation, association or society; or,

4. Thirty days after any such corporation has been notified by the superintendent of insurance to designate some person residing in the same city, village or town where the principal business office within the state of such corporation is located, as a person upon whom service of legal process and papers may be made, as provided by law, collects any money or issues any certificate in carrying on such business, during the failure of such corporation to designate such person; or,

5. Being within this state the agent or representative of any such corporation, association or society, which has neglected or refused to comply with any duty imposed upon it by law, or which has failed or neglected to procure from the superintendent of insurance the certificate of authority to transact business within this state as provided by law, acts as such agent, during such period of default;

Is guilty of a misdemeanor.

Added by chap. 692 of 1892.

**§ 577i. Acts of agents of fire or marine insurance corporation, organized in other countries, after revocation of certificate.**— Any agent of a fire or marine insurance corporation, incorporated by or existing under the government or laws of another country than the United States, and doing business in this state, who issued any new policy of insurance after having been notified by the superintendent of insurance that the certifi-

ate to such corporation to do business within this state has been revoked, is guilty of a misdemeanor.

Added by chap. 692 of 1892.

**§ 577j. Acting for foreign insurance corporation which has not designated superintendent of insurance as attorney**

—Any person acting for himself or for others, not having been specially licensed, as provided by law, by the superintendent of insurance, who solicits or procures, or aids in the solicitation or procurement of policies or certificates of insurance from, or adjusts losses or in any manner aids the transaction of any business for, any foreign insurance corporation, which has not executed and filed in the office of the superintendent of insurance, a written appointment of the superintendent to be the true and lawful attorney of such corporation in and for this state, upon whom all lawful process in any action or proceeding against the corporation may be served, is guilty of a misdemeanor.

Added by chap. 692 of 1892.

**§ 578. Destroying property insured.**—A person who, with intent to defraud or prejudice the insurer thereof, willfully burn or in any manner injures or destroys property not included or described in section five hundred and seventy-five, which is insured at the time against loss or damage by fire or by any other casualty, under such circumstances that the offense is not arson in any of its degrees, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

**§ 579. Presenting false proofs of loss in support of claim upon policy of insurance.**—A person who knowing to be such, either presents or causes to be presented a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract of insurance; or

Prepares, makes, or subscribes a false or fraudulent account, certificate, affidavit of proof of loss, or other document or writing with intent that the same may be presented or used in support of such a claim;

Is punishable by imprisonment for not more than five years or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

Amended by chap. 884 of 1882.

This amendment was made before the Code went into effect.

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## CHAPTER IX.

### *False Weights and Measures.*

**SECTION 580. Using false weights, measures, etc.**

**581. Keeping false weights.**

**SECTION 582. False weights and measures authorized to be seized.**

583. May be tested by committing magistrate, and destroyed or delivered to district attorney.

584. Shall be destroyed after conviction of offender.

585. Stamping false weight or tare, on casks or packages.

585a. Violations of regulations for sale of baled hay and straw.

**§ 580. Using false weights, measures, etc.**—A person who injures or defrauds another by using, with knowledge that the same is false, a false weight, measure, or other apparatus, for determining the quantity of any commodity, or article of merchandise, or by knowingly delivering less than the quantity he represents, is guilty of a misdemeanor.

See section 406, *ante*.

See chap. 391 of 1893, for the protection of purchasers of coal in cities of over eight hundred thousand inhabitants, and under twelve hundred thousand inhabitants, and providing for the enforcement thereof.

Buying, or receiving and storing for hire, by false weights or measures, in a recognized and most important department of commercial business, was held, in *People v. Fish*, 2 Park., 206, to be an offense under the Revised Statutes.

**§ 581. Keeping false weights.**—A person who retains in his possession any weight or measure, knowing it to be false, unless it appears beyond a reasonable doubt that it was so retained without intent to use it, or permit it to be used in violation of the last section, is guilty of a misdemeanor.

**§ 582. False weights and measures authorized to be seized.**—A person who is authorized or enjoined by law to arrest another person for a violation of the last two sections, is equally authorized and enjoined to seize any false weights or measures found in the possession of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

**§ 583. May be tested by committing magistrate and destroyed or delivered to district attorney.**—The magistrate to whom any weight or measure is delivered pursuant to the last section, must, upon the examination of the defendant, or if the examination is delayed or prevented, without awaiting such examination, cause the same to be tested by comparison with standards conformable to law; and if he finds it to be false, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice in his judgment require.

**§ 584. Shall be destroyed after conviction of offender.**—Upon the conviction of the defendant, the district attorney must cause any weight or measure in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney, to be destroyed

**§ 585. Stamping false weight or tare on casks or packages.**—A person who knowingly marks or stamps false or short weights, or false tare on any cask or package, or knowingly sells or offers for sale any cask or package so marked, is guilty of a misdemeanor.

See section 406, *ante*.

**§ 585a. Violations of regulations for sale of baled hay and straw.**—A person who :

1. Sells or offers for sale baled hay or straw containing more than twenty pounds of wood to the bale, the weight of which is two hundred pounds or upward, or more than ten pounds of wood to the bale the weight of which is less than two hundred pounds ; or

2. Sells or offers for sale any bale of hay or straw upon which the correct gross weight is not plainly marked or which weighs more than five pounds less than the gross weight so marked thereupon, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect, October 1, 1893.

## CHAPTER X.

### *Fraudulent Insolvencies by Individuals.*

**SECTION 586.** Fraudulent conveyances.

587. Fraudulent removal of property.

588. Knowingly receiving property.

589. Concealment of effects of insolvent debtor.

**§ 586. Fraudulent conveyances.**—A person who either

1. Becomes a party to a conveyance or assignment of real or personal property, or of an interest therein, with intent to defraud prior or subsequent purchasers, or to hinder, delay, or defraud creditors or other persons ; or

2. Being a party or privy to, or knowing of, such a conveyance or assignment so made, willfully puts the same in use as having been made in good faith ;

Is guilty of a misdemeanor.

The case of *Loos v. Wilkinson*, 14 St. Rep., 144; 51 Hun, 85; 5 N. Y. Supp., 414, was reversed in 23 St. Rep., 282; 113 N. Y., 485.

**Transferree.**—The person who receives, as well as the one who transfers, the title, for the promotion of the design of withholding a debtor's property from the satisfaction of the demands of his lawful creditors, are both rendered so far criminal as to be guilty of a misdemeanor. *Goodenough v. Spencer*, 2 T. & C., 511. The vendee cannot shield himself from its consequences on the ground that its commission arose out of the advice sought, for his protection, by an embarrassed or insolvent client. *Id.*

The conveyance of his property by a judgment debtor to his wife, made and accepted for the purpose of cheating and defrauding creditors, renders her guilty of an offense under this section. *Lapham v. Marshall*, 20 St. Rep., 797; 51 Hun, 40; 3 N. Y. Supp., 603.

See *Matter of Peterson*, 39 St. Rep., 924; 15 N. Y. Supp., 489.

**§ 587. Fraudulent removal of property to prevent levy**—A person who with intent to defraud a creditor, or to prevent any of his property from being made liable for the payment of any of his debts, or levied upon by an execution or warrant of attachment, removes any of his property or secretes, assigns, conveys or otherwise disposes of the same; or with intent to defraud a creditor, removes, secretes, assigns, conveys or otherwise disposes of any of his books of account, accounts, vouchers or writings in any way relating to his business affairs, or destroys, obliterates, alters or erases any of such books of account, accounts, vouchers or writings, or any entry, memorandum or minute therein contained, is guilty of a misdemeanor.

Am'd by chap. 681 of 1893.

This amendment added the latter provision of the present section.

See subd. 25 of section 56 of Code of Criminal Procedure.

**Crime.**—It is a crime to dispose of property to defraud creditors. *Stringfield v. Fields*, 7 Civ. Pro., 360.

**Carrying watch.**—The carrying of a watch about the person of the defendant was held, in *People v. Morrison*, 13 Wend., 399, not to be a secretin of property within the meaning of section 26 of the Session Laws 1831, page 396.

**Defense.**—The defendant is entitled to show that the removal of his property consisted in taking it with him on a change of residence of himself and family. *Thomas v. People*, 19 Wend., 480. Such intended removal need not come to the knowledge of the complainant. *Id.*

See *Matter of Peterson*, 39 St. Rep., 924; 15 N. Y. Supp., 489.

**§ 588. Knowingly receiving property.**—A person who receives any property from another knowing that the same is transferred or delivered to him in violation of, or with intent to violate, the last section, is guilty of a misdemeanor.

**§ 589. Concealment of effects of insolvent debtor.**—A person who being an applicant, as an insolvent debtor, for a discharge from his debts, or for exoneration or discharge from imprisonment, or having made a general assignment of his property for the payment of his debts, willfully either

1. Conceals any part of his estate or effects, or any book, account, or other writing relative thereto; or

2. Omits to disclose, to the court before which his application is pending, any debt or demand which he has collected, or an transfer of property which he has made, since the presentation of his application; or

3. Fraudulently presents, or authorizes to be presented in his behalf, such an application, in a case where it is not authorized by law; or

4. Makes or presents to the court or officer in support of such an application, a petition, schedule, book, account, voucher, or other paper or document, knowing the same to contain a false statement; or

5. Fraudulently makes and exhibits, or alters, obliterates, or

destroys an account or voucher, relating to the condition of his affairs, or an entry or statement in such an account or voucher; or

6. Commits any fraud upon a creditor, to induce him to petition for, or consent to such a discharge; or

7. Conspires with, or induces another fraudulently to consent as creditor to a petition for such discharge, or to practice any fraud in aid thereof;

Is guilty of a misdemeanor.

See notes under section 587, *ante*.

What amounts to a concealing of property. *McButt v. Hirsch*, 4 Abb., 441.

## CHAPTER XI.

### *Fraudulent Insolvencies by Corporations and Other Frauds in their Management.*

SECTION 590. Frauds in the organization of corporations.

591. Fraudulent issue of stock, scrip, etc.

592. Frauds in procuring organization of corporation or increase of capital.

593. Acting for foreign corporations not authorized to do business in this state.

594. Misconduct of directors of stock corporations.

595. Misconduct of directors of banking corporations.

596. Loans made in violation of last section, not invalid.

597. Sale or hypothecation of bank notes by officer, etc.

598. Officer of bank putting excessive number of its notes in circulation.

599. Officer or agent of banking corporation, making guaranty or indorsement, in its behalf, in certain cases.

600. Bank officer overdrawing his account.

601. Receiving deposits in insolvent bank.

602. Unlawful investments by officers of savings banks.

603. Misconduct by directors of monied corporations.

604. Misconduct by banks and bankers.

605. Unlawful discount of bills of foreign banks.

606. Misconduct by officers of banking department.

607. Using dies and plates of extinct state bank.

609. Private banker using sign.

610. Misconduct of officers and directors of stock corporations.

611. Misconduct of officers and employes of corporations.

612. Misconduct of officers and agents of pipe line corporations.

613. Misconduct at corporate elections.

614. Presumption of knowledge of corporate condition and business, and of assent thereto by directors; definitions.

See section 162 of chap. 566 of 1890-1892.

§ 590. Frauds in the organization of corporations.—A person who:

1. Without authority subscribes the name of another to or inserts the name of another in any prospectus, circular or other advertisement or announcement of any corporation or joint-stock association existing or intended to be formed, with intent to permit the same to be published, and thereby lead persons



to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association; or,

2. Signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation, existing or proposed; or,

3. Signs to any such subscription or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or under any understanding or agreement, that the terms of such subscription or agreement are not to be complied with or enforced;

Is guilty of a misdemeanor.

Am'd by chap. 692 of 1892.

Virtually includes this and section 593, *ante*, as they stood prior to the amendment of 1892.

**§ 591. Fraudulent issue of stock, scrip, etc.**—An officer, agent or other person in the service of any joint-stock company or corporation formed or existing under the laws of this state, or of the United States, or of any state or territory thereof, or of any foreign government or country, who willfully or knowingly, with intent to defraud, either:

1. Sells, pledges or issues, or causes to be sold, pledged or issued, or signs or executes, or causes to be signed or executed, with intent to sell, pledges or issues, or causes to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being first thereto duly authorized by such company or corporation, or contrary to the charter or laws under which such corporation or company exists, or in excess of the power of such company or corporation or of the limit imposed by law or otherwise upon its power to create or issue stock or evidence of debt; or

2. Reissues, sells, pledges or disposes of, or causes to be reissued, sold, pledged or disposed of, any surrendered or canceled certificates, or other evidence of the transfer or ownership of any such share or shares, is punishable by imprisonment for a term not exceeding seven years, or by a fine not exceeding three thousand dollars, or by both.

Am'd by chap. 662 of 1892.

This amendment omitted the statement of the minimum limit of imprisonment.

**§ 592. Frauds in procuring organization of corporation, or increase of capital.**—An officer, agent or clerk of a corporation, or of persons proposing to organize a corporation, or to increase the capital stock of a corporation, who knowingly exhibits

a false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a state prison not exceeding ten years.

**§ 593. Acting for foreign corporations not authorized to do business in this state.**—Any person, or corporation, who

1. Acts as agent or representative of any mortgage company or co-operative loan and building association organized outside of the state while such mortgage company or co-operative loan and building association shall not be authorized under a license of the superintendent of banks to do business in this state; or

2. Acts as agent or representative in this state of a foreign corporation other than a moneyed corporation, with the words "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan," "benefit," or any other words or terms indicating, representing or holding out such company to be a moneyed corporation as a part of its name or corporate title, or who in connection with such corporation or otherwise shall put forth any signs containing said name, or who shall advertise or publish the said company as doing business in this state, directly or indirectly through agents or otherwise, while such company shall not be authorized under a certificate procured from the secretary of state pursuant to section fifteen of the general corporation law to do business in this state is guilty of a misdemeanor.

Amended by chap. 489, Laws 1904. Took effect April 29, 1904.

**§ 594. Misconduct of directors of stock corporations.**—A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended:

1. To make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce such capital stock without the consent of the legislature; or,

3. To discount or receive any note or other evidence of debt in payment of an installment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him or his stock; or,

5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock; or,  
Is guilty of a misdemeanor.

Subs. 6 and 7, as amended by chap. 692, Laws 1892, repealed by chap. 588, L. 1901; took effect April 27, 1901.

Am'd by chap. 692 of 1892.

This amendment added to subd. 7 of the original section the words "engaged in another line of business, unless authorized by law to make such exchange."

It is an offense to withdraw or pay a stockholder any part of the capital stock. *Lorillard v. Clyde*, 48 St. Rep., 577; 15 N. Y. Supp., 811.

**§ 595. Misconduct of directors of banking corporations.**

—A director of a corporation, organized under the laws of this state, having banking powers, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended, either

1. To make a loan, or discount, by which the whole amount of the loans and discounts of the corporation shall be greater than the amount allowed by law, or, where there is no express statutory limitation of the amount, greater than three times its capital stock then paid in and actually possessed; or

2. To make a loan or discount to any director of such corporation, or upon paper upon which any such director is responsible to an amount exceeding the amount allowed by statute, or where there is no express statutory limitation of the amount, exceeding in the aggregate one-third of the capital stock of such corporation, then paid in and actually possessed,

Is guilty of a misdemeanor.

**§ 596. Loans made in violation of last section, not invalid.**—Nothing in the last section shall render any loan made by the directors of any such corporation, in violation thereof, invalid.

**§ 597. Sale or hypothecation of bank notes by officer, etc.**—An officer or agent of any corporation having banking powers, who sells, or causes or permits to be sold, any bank notes of such corporation, or pledges or hypothecates, or causes or permits to be pledged or hypothecated, with any other corporation, association or individual, any such notes, as a security for a loan or for any liability of such corporation, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or both.

**598. Officer of bank putting excessive number of its notes in circulation.**—An officer or agent of any corporation having banking powers, who issues or puts in circulation, or causes or permits to be issued or put in circulation, the bank notes of such corporation to an amount, which, together with previous issues, leaves in circulation or outstanding a greater amount of notes than such corporation is allowed by law to issue and circulate, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or both.

**§ 599. Officer or agent of banking corporation making guaranty or indorsement, in its behalf, in certain cases.**—An officer or agent of any banking corporation, who makes or delivers any guaranty or indorsement on behalf of such corporation, whereby it may become liable upon any of its discounted notes, bills or obligations, in a sum beyond the amount of loans and discounts which such corporation may legally make, is guilty of a misdemeanor.

**§ 600. Bank officer overdrawing his account or asking for or receiving commissions or gratuities from persons procuring loans or making overdrafts of their accounts.**—An officer, director, agent, teller, clerk or employee of any bank, banking association, savings bank or trust company, who, either,

1. Knowingly overdraws his account with such bank, banking association, savings bank or trust company, and thereby obtains the money, notes or funds of any such bank, banking association, savings bank or trust company; or

2. Asks or receives, or consents or agrees to receive, any commission, emolument, gratuity or reward, or any promise of any commission, emolument, gratuity or reward, or any money, property or thing of value or of personal advantage, for procuring or endeavoring to procure for any person, firm or corporation, any loan from, or the purchase or discount of any paper, note, draft, check or bill of exchange, by any such bank, banking association, savings bank or trust company, or for permitting any person, firm or corporation to overdraw any account with such bank, banking association, savings bank or trust company, is guilty of a misdemeanor.

Am'd by ch. 248, Laws 1905. Took effect April 20, 1905.

In some respects, this section creates a new offense though it may embrace what heretofore constituted embezzlement by the common law and under our statute. *People v. Upton*, 38 Hun, 107, 4 N. Y. Cr., 463.

**Object.**—The chief purpose of this section is to secure a ready and easy conviction of bank officers and clerks, who having access to the funds and securities of the bank, may misappropriate them to their own use under the pretense of charging the amount or value thereof in their account with the bank. *Id.*

**What essential.**—Proof of the possession by the bank of the officer's check at a time when his account is overdrawn will not justify his conviction under this section. *People v. Clement*, 3 St. Rep., 700; 42 Hun, 289; 5 N. Y. Cr., 280. The transaction, by which the defendant delivered the check to the bank and obtained the money therefor, must be shown. *Id.*

The mere fact that an officer of the bank has knowingly overdrawn his account will not justify his conviction. *Id.* It must be shown that the money thereby obtained was "wrongfully obtained." *Id.* The word "wrongful" in this section implies more than the mere want of funds in the bank. *Id.*

**Proof.**—What evidence admissible on trial of an indictment under this section. *People v. Upton*, 38 Hun, 107; 4 N. Y. Cr., 460.

See *People v. O'Donnell*, 15 St. Rep., 141; 46 Hun, 360; 7 N. Y. Cr., 347; 10 N. Y. Supp., 251.

**§ 601. Any officer, teller or clerk of any bank, banking association or savings bank, and every individual banker or agent, and every private banker or agent, and any teller or clerk of an individual banker, or of a private banker who receives any deposit, knowing that such bank or association or banker is insolvent, is guilty of a misdemeanor, if the amount or value of such deposit be less than twenty-five dollars; if the amount or value of such deposit be twenty-five dollars or over, such person shall be guilty of a felony punishable by imprisonment for not less than one nor more than five years, or by a fine of not less than five hundred nor more than three thousand dollars, or by both.**

Am'd by ch. 148, Laws 1902. To take effect September 1, 1902.

*Atkinson v. Roch. Pub. Co.*, 23 St. Rep., 155; 114 N. Y., 175; *Cragie v. Hadley*, 99 N. Y., 131.

**§ 602. Unlawful investments by officers of savings banks.**—Any officer or trustee of a savings bank authorizing or making any investment of the funds of the bank in securities, not authorized by law, is guilty of a misdemeanor.

Am'd by chap. 693 of 1892.

New, and substituted for section as it stood prior to 1892.

The former provision transferred to subds. 1 and 2 of section 611, *post*, by amendment of 1892.

**Falsely entry in books of a banking corporation.** *People v. Severence*, 51 St. Rep., 209; 67 Hun, 182.

**§ 603. Misconduct by directors of monied corporations.** — Every director of a monied corporation who :

1. In case of the fraudulent insolvency of such corporation, shall have participated in such fraud ; or

2. Willfully does any act as such director which is expressly forbidden by law, or willfully omits to perform any duty imposed upon him as such director by law ;

Is guilty of a misdemeanor, if no other punishment is prescribed therefor by law.

The insolvency of a monied corporation is deemed fraudulent unless its affairs appear upon investigation to have been administered fairly, legally, and with the same care and diligence that agents receiving a compensation for their services are bound, by law, to observe.

The former provision was transferred to subd. 3 of section 611, *post*, by amendment of 1892.

The former provisions of sections 604–606, inclusive, *post*, were consolidated into the present section by the amendment of 1892.

**§ 604. Misconduct by banks and bankers.** — Any monied corporation or individual banker authorized to carry on the business of banking under the laws of this state who :

1. Receives, pays out, gives or offers in payment as money to circulate, or who attempts to circulate as money, any bill, note or other evidence of debt issued or purporting to have been issued by any corporation or individual, situated or residing without this state, and which bill, note or other evidence of debt shall, upon any part thereof, purport to be payable or redeemable at any place or by any corporation or individual within this state ; or,

2. Issues, utters or circulates, any money, or in any way, directly or indirectly, aids or assists in the issuing, uttering or circulating, as money within this state, of any bank bill, note or other evidence of debt in the similitude of a bank note issued or purporting to have been issued by any corporation or individual situated or residing without this state ; or procures or receives, in any manner whatever, any such bank bill, note or other evidence of debt with intent to issue, utter or circulate, or with intent to aid in issuing, uttering or circulating the same as money within this state ; or,

3. Directly or indirectly lends or pays out for paper discounted or purchased any bank bill, note or other evidence of debt, which is not received at par by such corporation or banker for debts due such corporation or banker ; or,

4. Issues or puts in circulation any bank bill or note of any such corporation or banker, unless the same shall be made payable on demand and without interest, except bills of exchange on foreign countries or places beyond the limits or jurisdiction of the United States ;

Is guilty of a misdemeanor. Nothing in this section contained shall be construed to prohibit any such corporation or banker from receiving and paying out such foreign bank bills as they shall receive at par in the ordinary course of their business, or to prohibit such corporation or banker from receiving foreign notes from their dealers and customers in the regular and usual course of their business, at a rate of discount not exceeding that which is or shall be at the time fixed by law, for the redemption of the bills of the banks of this state at their agencies, or from obtaining from the corporations, associations or individuals by which such foreign notes are made, the payment or redemption thereof.

Former provision transferred to section 603, *ante*.

Added by chap. 692 of 1892.

**§ 605. Unlawful discount of bills of foreign banks.**—Any person, association or corporation within the state who, directly or indirectly, on any pretense whatever, procures or receives or offers to receive, from any corporation or person, any bank bill or note or other evidence of debt in the similitude of a bank note issued or purporting to have been issued by any corporation or individual, situated or residing without this state, at a greater rate of discount than is or shall be at the time fixed by law for the redemption of the bills of the banks of this state at their agencies, is guilty of a misdemeanor.

Former provision transferred to section 603, *ante*. Present section added by chap. 692 of 1892.

**§ 606. Misconduct by officers of banking department.**—The superintendent of banks, or any officer in the banking department who countersigns bills or notes for any person or corporation exceeding the value of the interest-bearing stocks of the state of New York or of the United States, or other securities deposited with such superintendent by such person or corporation on account thereof, is guilty of a felony, punishable by a fine of not less than five thousand dollars or by imprisonment for not less than five years, or by both.

Former provision transferred to section 603, *ante*. Present section added by chap. 692 of 1892.

**§ 607. Using dies and plates of extinct state bank.**—Any person who uses the dies and plates of a state bank in the manufacture of notes and bills, after such bank has become a national bank in pursuance of law, is guilty of a misdemeanor.

The former provision was repealed by chap. 377 of 1884. The present section was added by chap. 692 of 1892.

**§ 608.** Any person, association or corporation other than a moneyed corporation, who shall, within the state, directly or indirectly, or through agents or representatives, transact business under, or in anywise use a corporate name or a corporate title with the words, "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan," "benefit," as a part of such name or title, is guilty of a misdemeanor; provided, however, that any domestic corporation, other than a moneyed corporation, heretofore duly organized and heretofore duly authorized by law to use and at the time of the passage of this act lawfully using either or any of such words as part of its lawful corporate title, may lawfully continue to use such corporate title, provided and if it, being a corporation other than a moneyed corporation, shall, wherever the same shall be printed, written, engraved or displayed, add in legible English characters of substantially the same size and style as the name, directly under the said name or immediately in connection therewith, wherever so used, the words, "not a moneyed corporation."

Amended by chap. 489, Laws 1904. Took effect April 29, 1904.



**§ 609. Private banker using sign.**—Any person engaged in banking in this state, not subject to the supervision of the superintendent of banks, and not required by law to report to such superintendent, who was not engaged in such banking before May 23, 1885, who

1. Uses an office sign at the place where such business is transacted, having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank; or,

2. Uses or circulates any letter-heads, bill-heads, blank notes, blank receipts, certificates, circulars or any written or printed paper whatever, having thereon any artificial or corporate name, or other word or words indicating that such business is the business of a bank;

Is guilty of a misdemeanor.

The former provision was transferred to section 614, *post*, and the present section added, by chap. 692 of 1892.

**§ 610. Misconduct of officers and directors of stock corporations.**—An officer or director of a stock corporation who:

1. Issues, participates in issuing, or concurs in a vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of law; or,

2. Sells, or agrees to sell, or is directly or indirectly interested in the sale of any share of stock of such corporation, or in any agreement to sell the same, unless at the time of such sale or agreement he is an actual owner of such share;

Is guilty of a misdemeanor, punishable by imprisonment for not less than six months, or by a fine not exceeding five thousand dollars, or by both.

The former provision was transferred to section 614, *post*, and the present section added, by chap. 692 of 1892.

**§ 611. Misconduct of officers and employes of corporations.**—A director, officer, agent or employe of any corporation or joint-stock association, who:

1. Knowingly receives or possesses himself of any of its property otherwise than in payment for a just demand, and with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in its books and accounts; or,

2. Concurs in omitting to make any material entry thereof; or,

3. Knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary conditions, containing any material statement which is false; or,

4. Having the custody or control of its books, willfully refuses or neglects to make any proper entry in the stock book of such corporation as required by law, or to exhibit or allow the same to be inspected and extracts to be taken therefrom by any person entitled by law to inspect the same or take extracts therefrom; or,

5. If a notice of an application for an injunction affecting the property or business of such joint-stock association or corporation is served upon him, omits to disclose the fact of such service and the time and place of such application to the other directors, officers and managers thereof; or,

6. Refuses or neglects to make any report or statement lawfully required by a public officer;

Is guilty of a misdemeanor.

The former provision was transferred to section 614, *post*, by chap. 692 of 1892.

Subdivisions 1 and 2 of present section embody former section 602; subd. 3 embodies former section 603; subd. 5 embodies former section 612; and subds. 4 and 6 are new. The section, as it now stands, was added by chap. 692 of 1892.

Am'd by chap. 692 of 1893.

This amendment inserted, in subd. 4, the words "make any proper entry in the stock book of such corporation as required by law, or to exhibit or," and will go into effect, October, 1, 1893.

**§ 612. Misconduct of officers and agents of pipe-line corporations.**—Any officer, agent or manager of a pipe-line corporation, who:

1. Neglects or refuses to transport any product delivered for transportation, or to accept and allow a delivery thereof in the order of application, according to the general rules of the corporation, as provided by law; or

2. Charges, accepts or agrees to accept for such receipt, transportation and delivery, a sum different from the amount fixed by such regulations; or

3. Allows or pays, or agrees to allow or pay, or suffers to be allowed or paid or repaid, any draw-back, rebate or allowance, so that any person shall, by any device, have or procure any transportation of products over such pipe-line at a less rate or charge than is fixed in such regulations;

Is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both.

The former provision was transferred to section 611, *ante*, and the present section added, by chap. 692 of 1892.

**§ 613. Misconduct at corporate elections.**—Any person

Sec. 613, sub. 1, as amended by chap. 692, Laws 1892, repealed April 27, 1901, by chap. 588, Laws 1901.

2. Being entitled to vote at any meeting of the stock-holders or bondholders or both of a stock corporation, sells his vote or who issues a proxy to vote to any person for any sum of money or thing of value, except as expressly authorized by law; or,

Amended by chap. 588, Laws 1901; took effect April 27, 1901.

3. Acts as an inspector of election at any such meeting, and violates an oath taken by him, in pursuance of law as such inspector or violates the provisions of an oath required by law to be taken by him as such inspector, or is guilty of any dishonest or corrupt conduct as such inspector;

Is guilty of a misdemeanor.

The former provision was transferred to section 614, *ante*, and the present section added, by chap. 692 of 1892.

**§ 614. Presumption of knowledge of corporate condition, and business and of assent thereto by directors; definitions.**—It is no defense to a prosecution for a violation of the provisions of this chapter, that the corporation is a foreign corporation, if it carries on business or keeps an office therefor in this state.

The term "director" as used in this chapter includes any of the persons having, by law, the direction or management of the affairs of a corporation, by whatever name described.

A director of a corporation or joint-stock association is deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this chapter. If present at a meeting of the directors at which an act, proceeding or omission of such directors in violation of this chapter occurs, he must be deemed to have concurred therein, unless he at the time causes or in writing requires his dissent therefrom to be entered on the minutes of the directors. If absent from such meeting, he must be deemed to have concurred in any such violation, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the corporation for six months thereafter without causing or in writing requiring his dissent from such violation to be entered on such record or minutes.

The former provision was retained, and sections 609, 610, 611 and 618, *ante*, were transferred to, and embodied in, the present section, by chap. 692 of 1892.

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## CHAPTER XII

### *Frauds in the Sale of Passage Tickets.*

**SECTION 615.** Sale of passage tickets on vessels and railroads forbidden except by agents specially authorized.

616. Sales by authorized agents, restricted.

617. Unauthorized persons forbidden to sell certificates, receipts, etc. for the purpose of procuring tickets.

618. Fraud in sale of passage tickets.

619. Conspiring to sell passage tickets in violation of law.

SECTION 620. Conspirators may be indicted, notwithstanding object of conspiracy has not been accomplished.

621. Offices kept for unlawful sale of passage tickets, declared disorderly houses.

622. Owners, purser:s, etc., allowed to sell tickets.

623. Station masters, conductors, etc., allowed to sell tickets.

624. What must be stated in passage tickets.

625. Sale of tickets not filled out as required in last section, a misdemeanor.

626. Certain sales and exchanges of passage tickets.

627. "Company" defined.

**§ 615. Sale of passage tickets on vessels and railroads forbidden except by agents specially authorized.**—No person shall issue or sell, or offer to sell, any passage ticket, or an instrument giving or purporting to give any right, either absolutely or upon any condition or contingency to a passage or conveyance upon any vessel or railway train, or a berth or state-room in any vessel, unless he is an authorized agent of the owners or consignees of such vessel, or of the company running such train, except as allowed by sections six hundred and sixteen and six hundred and twenty-two; and no person is deemed an authorized agent of such owners, consignees or company, within the meaning of the chapter, unless he has received authority in writing therefor, specifying the name of the company, line, vessel or railway for which he is authorized to act as agent, and the city, town or village together with the street and street number, in which his office is kept, for the sale of tickets.

Added by ch. 506, 1897. To take effect Sept. 1, 1897.

**§ 616. Sales by authorized agents restricted.**—No person, except as allowed in section six hundred and twenty-two, shall ask, take or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train, or for the procurement of any ticket or instrument giving or purporting to give a right, either absolutely or upon a condition or contingency, to a passage or conveyance upon a vessel or railway train, or a berth or state-room on a vessel, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell or offer to sell, any such ticket, instrument, berth or state-room, or ask, take or receive any consideration for any such passage, conveyance, berth or state-room, excepting at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the last section, nor for a sum exceeding the price charged at the time of such sale by the company, owners or consignees of the vessel or railway mentioned in the ticket. Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the



in which his ticket shall read. Every person who has purchased a ticket from an authorized agent of a railroad company, which shall not have been used, or shall have been used only in part, may, within thirty days after the date of issue of said ticket, present the same, unused or partly used, for redemption, at the general office of the railroad company which issued the ticket, or at the ticket office where said ticket was sold, or at the ticket office at the point to which the ticket has been issued. If said ticket, wholly unused, shall be presented for redemption at the ticket office where sold, the same shall be then redeemed by the agent in charge of said ticket office at the price paid for said ticket. If said ticket, partly used, shall be presented for redemption at the ticket office where sold, or at the ticket office at the point to which used, the ticket agent at either office, upon the delivery of said ticket, shall issue to the holder thereof a receipt, properly describing said ticket and setting forth the date of the receipt of said ticket, and the name of the person from whom received, and shall thereupon forthwith deliver said ticket for redemption to the general office. It shall be the duty of every railroad company to redeem tickets presented for redemption, as in this section provided for, promptly and not to exceed thirty days from the date of presentation at the general office or from the date of the aforesaid receipt. A wholly unused ticket shall be redeemed at the price paid therefor. A partly used ticket shall be redeemed at a rate which shall be the same as the difference between the price paid for the whole ticket and the price of a ticket of the same class between the points for which the ticket was actually used. Mileage books shall be redeemed in the same manner. Every railroad company which shall wrongfully refuse redemption, as in this section provided for, shall be liable to the aggrieved party fifty dollars, which sum may be recovered together with the amount of redemption money to which the party is entitled, in an action in any court of competent jurisdiction, together with costs; but no such action can be maintained unless commenced within one year after the cause of action accrued.

506, 1897. To take effect Sept. 1, 1897.

**Unauthorized persons forbidden to sell certificates, etc., for the purpose of procuring tickets.** No person other than an agent appointed, as provided in section 615, shall sell, or offer to sell, or in any way attempt to dispose of, any certificate, receipt or other instrument for the purpose, under the pretense, of procuring any ticket, or instrument provided for in section 615, upon any company or line, vessel or other means therein mentioned. And every such order sold or offered for sale by any agent, must be directed to the company, or to the consignees at their office.

Section 615 was repealed by chap. 384 of 1882, the reference to that section has been allowed to remain in this section.

**Fraud in sale of passage tickets.**—A person guilty of a violation of any of the provisions of the preceding sections



of this chapter is punishable with imprisonment in a state prison not exceeding two years, or imprisonment in a county jail not exceeding two months.

Am'd by chapter 662 of 1892.

This amendment substituted the words "not exceeding" before "months" in place of the words "not less than."

**§ 619. Conspiracy to sell passage tickets in violation of law.**—All persons who conspire together to sell or attempt to sell, to any person, any passage ticket, or other instrument mentioned in sections six hundred and fifteen and six hundred and seventeen, in violation of those sections, and all persons, who by means of any such conspiracy, obtain, or attempt to obtain any money or other property, under the pretense of procuring or securing any passage or right of passage in violation of this chapter, are punishable by imprisonment in a state prison not exceeding five years.

Though section 615 was repealed by chap. 384 of 1892, the reference to that section has been allowed to remain in this section.

**§ 619a.** No transfer ticket, or written or printed instrument giving, or purporting to give, the right of transfer to any person or persons from a public conveyance operated upon one line or route of a street surface railroad to a public conveyance upon another line or route of a street surface railroad, from one car to another car upon the same line of street surface railroad, shall be issued, sold or given except to a passenger lawfully entitled thereto. Any person who shall issue, sell or give away such a transfer ticket or instrument as aforesaid to a person or persons not lawfully entitled thereto, and any person or persons not lawfully entitled thereto who shall receive and use or offer for passage any such transfer ticket or instrument or shall sell or give away such a transfer ticket or instrument to another with intent to have such transfer ticket used or offered for passage after the time limited for its use shall have expired shall be guilty of a misdemeanor.

Added by chap. 663 of 1898. In effect September 1, 1898.

**§ 620. Conspirators may be indicted, notwithstanding object of conspiracy has not been accomplished.**—Persons guilty of violating the last section may be indicted and convicted for conspiracy, though the object of such conspiracy has not been executed.

See section 171, *ante*.

**§ 621. Offices kept for unlawful sales of passage tickets.**—All offices kept for the purpose of selling passage tickets in violation of any of the provisions of this chapter, and all offices where any such sale is made, are deemed disorderly houses; and all persons keeping any such office, and all persons associating together for the purpose of violating any of the provisions of this chapter are punishable by imprisonment in a county jail for a period not exceeding six months.

Am'd by chap. 662 of 1892.

This amendment omitted the statement of the minimum limit of punishment.

**§ 622. Owners, pursers, etc., allowed to sell tickets.**—The provisions of this chapter do not prevent the actual owner or consignees of any vessel, from selling passage tickets thereon; nor do they prevent the purser or clerk of any vessel from selling in his office on board of such vessel, any passage tickets upon such vessel.

**§ 623. Station masters, conductors, etc., allowed to sell tickets.**—The provisions of this chapter do not prevent the station master or other ticket agent upon any railway from selling in his office at any station on such railway, any passage tickets upon

such railway ; nor do they prevent any conductor upon a railway from selling such tickets upon the trains of such railway.

**§ 624. What must be stated in passage tickets.**—A ticket or instrument issued as evidence of a right of passage upon the high seas, from any port in this state, to any port of any other state or nation, and every certificate or order issued for the purpose, or under pretense of procuring any such ticket or instrument, and every receipt for money paid for such ticket or instrument must state the name of the vessel on board of which the passage is to be made, the name of the owners or consignees of such vessel, the name of the company, or line, if any, to which such vessel belongs, the place from which such passage is to commence, the place where such passage is to terminate, the day of the month and year upon which the voyage is to commence, the name of the person or persons purchasing such ticket or instrument, or receiving such order, certificate or receipt, and the amount paid therefor; and such ticket or instrument, order, certificate or receipt, unless sold or issued by the owners or consignees of such vessel, must be signed by their authorized agent.

It was held, in *Enright v. People*, 21 How., 383, that an indictment under the act of 1860 must state the port or place from which the ticket purports to entitle the person to a passage.

**§ 625. Sale of tickets not filled out as required in last section, a misdemeanor.**—A person who issues, sells or delivers to another, any ticket, instrument, certificate, order or receipt, which is not made or filled out as prescribed in the last section, is guilty of a misdemeanor.

**§ 626. Certain sales and exchanges of passenger tickets.**—A person who,

1. Sells, or causes to be sold, a passage ticket, or order for such ticket on any railway, vehicle or vessel, to any emigrant passenger at a higher rate than one and a quarter cents per mile; or,

2. Takes payment for any such ticket or order for a ticket under a false representation as to the class of the ticket, whether emigrant or first class; or,

3. Directly or indirectly, by means of false representations, purchases or receives from an emigrant passenger any such ticket; or,

4. Procures or solicits any such passenger having such a ticket, to exchange the same for another passenger ticket, or to sell the same and purchase some other passenger ticket; or,

5. Solicits or books any passenger arriving at the port of New York from a foreign country, before such passenger has left the vessel on which he has arrived, or enters or goes on board any vessel arriving at the port of New York from a foreign country,

having emigrant passengers on board, for the purpose of soliciting or booking such passengers, and a person or agent of a corporation employing any person for the purpose of booking such passengers before leaving the ship;

Is guilty of a misdemeanor.

§ 627. “**Company**” defined.—The term “company,” as used in this chapter, includes all corporations, whether created under the laws of this state, or of the United States, or of those of any other state or nation.

## CHAPTER XIII.

### *Fraudulent issue of Documents of title to Merchandise.*

SECTION 628. By pipe-line corporations.

629. Issuing fictitious bills of lading, receipts and vouchers.

630. Erroneous bills of lading or receipts, issued in good faith, excepted.

631. Duplicate receipts must be marked “duplicate.”

632. Selling, hypothecating or pledging property received for transportation or storage.

633. Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property.

634. Property demanded by process of law.

§ 628. **By pipe-line corporations.**—A pipe-line corporation, or a person being the officer, agent, manager or representative thereof, who:

1. Accepts, makes or issues any receipt, certificate or order of any kind for any commodity, unless the commodity represented is actually at the time in the possession of the corporation; or,

2. Delivers to any person any petroleum or other commodity received for transportation by such corporation without the presentation and surrender of all vouchers, receipts, orders or certificates that have been issued or accepted for the same; or,

3. Having parted with the possession of any commodity and having received therefor an order, voucher, receipt or certificate, shall reissue the same, or shall not cause it to be canceled by the word “canceled” stamped or printed legibly across the face thereof, and to be filed and recorded by such corporation, as provided by law,

Is guilty of a misdemeanor.

The former provision was transferred to subd. 1 of section 630, *post*, and this section was added by chap. 692 of 1892.

§ 629. **Issuing fictitious bill of lading, receipts and vouchers.**—A person who:

1. Being the master, owner or agent of any vessel, or officer or agent of any railway, express or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt or other voucher, by which it appears that mer-

merchandise of any kind has been shipped on board a vessel, or delivered to a railway, express or transportation company, or other carrier, unless the same has been so shipped or delivered and is at the time actually under the control of such carrier, or the master, owner or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt or voucher; or,

2. Carrying on the business of a warehouseman, wharfinger or other depositary of property, who issues any receipt, bill of lading or other voucher for merchandise of any kind which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness;

Is guilty of a misdemeanor, punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

This section combined the provisions of the former sections 628 and 629. The first subdivision was transferred from section 628, and the second subdivision was retained, by chap. 693 of 1892.

To further protect the public, warehousemen were forbidden to issue receipts or vouchers for goods not actually in store, and it is a penal offense to issue fictitious certificates. *First Nat. B'k v. Dean*, 44 St. Rep., 209; 27 Abb. N. C., 284; 17 N. Y. Supp., 376; 16 id., 108.

**§ 630. Erroneous bills of lading or receipts, issued in good faith, excepted.**—No person can be convicted of an offense under the last two sections, for the reason that the contents of any barrel, box, case, cask or other vessel or package mentioned in the bill of lading, receipt or other voucher did not correspond with the description given in such instrument of the merchandise received, if such description corresponds substantially with the marks, labels or brands upon the outside of such vessel or package, unless it appears that the defendant knew that such marks, labels or brands were untrue.

**§ 631. Duplicate receipts must be marked "duplicate."**—A person mentioned in sections six hundred and twenty-eight and six hundred and twenty-nine, who issues any second or duplicate receipt or voucher, of a kind specified in those sections, at a time while a former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "duplicate," in a plain and legible manner, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

**§ 632. Selling, hypothecating or pledging property received for transportation or storage.**—A person mentioned in sections six hundred and twenty-eight and six hundred and

twenty-nine, who sells or pledges any merchandise for which a bill of lading receipt or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 633. Bill of lading or receipt issued by warehouseman must be canceled on delivery of the property.—A person mentioned in section six hundred and twenty-nine, who delivers to another any merchandise for which a bill of lading, receipt or voucher has been issued, unless such receipt or voucher bears upon its face the words “not negotiable,” plainly written or stamped, or unless such receipt is surrendered to be canceled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars or by both.

§ 634. Property demanded by process of law.—The last two sections do not apply to any case where property is demanded by virtue of legal process.

§ 634a. Failure to issue bill of lading.—Any person who, being the owner, master or agent of any vessel transporting merchandise or property between ports of this state, departs with such vessel or causes such vessel to depart from the port where such merchandise or property is taken on board without giving or tendering to the shipper of such merchandise or property, if a bill of lading be demanded by such shipper, a bill of lading or shipping document as provided by section forty-one of the domestic commerce law, is guilty of a misdemeanor.

Added by L. 1898, ch. 156. In effect September 1, 1898.

## CHAPTER XIV.

### *Malicious Mischief and Other Injuries to Property.*

- SECTION** 635. Injuries to railroad tracks, etc.  
 636. Damaging building, etc., by explosion.  
 637. Burning certain property, how punished.  
 638. Altering, etc., signal or light for vessel, etc.  
 639. Injury and unlawful use, etc., of telegraph and telephone property.  
 640. Malicious injury and destruction of property.  
 640a. Trespasses on Indian lands.  
 640b. Trespasses on Onondaga reservation.  
 640c. Cutting ice in front of premises of another.  
 641. Divulging, etc., telegram, a misdemeanor.  
 642. Opening or publishing a sealed letter, etc.  
 643. Affixing advertisement to another's land, etc., how punished.  
 644. Presumptive evidence against certain persons.  
 645. Endangering life by maliciously placing explosives near building.  
 646. Malicious injury to standing crops, when a misdemeanor.  
 647. Removal of books and works of art from library; willful injury to works of art, ornamental trees, etc.  
 648. Malicious injury to certain articles in museum, etc., how punished.  
 649. Destroying or delay of election returns.  
 650. Property in house of worship, etc.  
 651. Unlawful interference with gas meter or steam valves.  
 652. Driving vehicle, etc., on sidewalks.  
 653. Compelling another to do or not to do a lawful act.  
 654. Injury to property, interference with railroad cars, etc., how punished.

**§ 635. Injuries to railroad tracks, etc.—A person who:**

1. Displaces, removes, injures or destroys any rail, sleeper, switch, bridge, viaduct, culvert, embankment, or structure, or any part thereof, attached, appertaining to or connected with any railway, or by any other means attempts to wreck, destroy, or so damage any car, tender, locomotive or railway train or part thereof, while moving or standing upon any railway track in this state, as to render such car, tender, locomotive or railway train wholly or partially unfitted for its ordinary use, whether operated by steam, electricity or other motive power; or,

2. Places any obstruction upon the track of any such railway; or,

3. Willfully destroys or breaks any guard erected or maintained by a railroad corporation as a warning signal for the protection of its employes; or,

4. Willfully discharges a loaded firearm, or projects or throws a stone or other missile at a railway train, or at a locomotive, car or vehicle standing or moving upon a railway; or,

5. Willfully displaces, removes, cuts, injures or destroys any wire, insulator, pole, dynamo, motor, locomotive, or any part thereof, attached, appertaining to or connected with any railway operated by electricity, or willfully interferes with or interrupts any motive power used in running such road, or willfully places any obstruction upon the track of such railroad, or willfully discharges a loaded firearm, or projects or throws a stone or any other missile at such railway train or locomotive, car or vehicle, standing or moving upon such railway; or,

6. Removes a journal-brass from a car while standing upon any railroad track in this state, without authority from some person who has a right to give such authority;

Is punishable as follows:

1. If thereby the safety of any person is endangered, by imprisonment for not more than twenty years.

2. In every other case, by imprisonment for not more than five years.

Am'd by chap. 280 of 1890.

This amendment added a fourth subdivision to the original section.

Am'd by chap. 692 of 1893.

This amendment added to the first subdivision the words "or other motive power," inserted a new subdivision numbered the third, and changed the numbering of the former third and fourth subdivisions to the fourth and fifth respectively.

The amendment of 1895 inserted the first part of subdivision 6 down to words "is punishable."

**§ 636. Damaging building, etc., by explosion.—A person who unlawfully and maliciously, by the explosion of gunpowder, or any other explosive substance, destroys or damages any building or vessel, is punishable as follows:**

1. If thereby the life or safety of a human being is endangered, by imprisonment for not more than ten years;

2. In every other case by imprisonment for not more than five years.

**§ 637. Burning certain property, how punished.—A person who willfully burns or sets fire to any grain, grass, or growing crop, or standing timber, or to any building, fixtures or**



appurtenances to real property of another, under circumstances not amounting to arson in any of its degrees, is punishable by imprisonment for not more than four years.

See section 685, *ante*.

Wilfully setting fire to a building under circumstances not amounting to arson in any of its degrees, amounts to nothing more than a mere misdemeanor under this section. *People v. Fanshawe*, 50 St. Rep., 3, aff'g 47 id., 331.

**§ 638. Altering, etc., signal or light for vessel, etc.**—A person who, with intent to bring a vessel, railway engine, or railway train into danger, either

1. Unlawfully or wrongfully shows, masks, extinguishes, alters, or removes a light or other signal; or

2. Exhibits any false light or signal;

Is punishable by imprisonment for not more than ten years.

**§ 639. Injury and unlawful use, etc., of telegraph and telephone property.**—A person who wilfully or maliciously displaces, removes, injures or destroys,

1. A public highway or bridge, or a private way laid out by authority of law, or a bridge upon such public or private way; or

2. A pier, boom or dam, lawfully erected, or maintained upon any water within the state, or hoists any gate in or about such dam; or

3. A pile, or other material, fixed in the ground and used for securing any sea-bank, or sea-walls, or the bank or dam of any river or other water, or any dock, quay, jetty or lock; or

4. A buoy or beacon, lawfully placed in any waters within the state; or

5. A tree, rock, post or other monument, which has been either erected or marked for the purpose of designating a point in the boundary of the state, or of a county, city, town, or village, or of a farm, tract, or lot of land, or any mark or inscription thereon; or

6. A mile-board, mile-stone, or guide post, erected upon a highway, or any inscription upon the same; or

7. A line of telegram or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or who shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy, in any unauthorized manner, any message, communication or report passing over it, in this state, or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state, of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment, or apparatus, or unlawfully do or cause to be done any of the acts hereinbefore mentioned; or

8. A pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenance or appendage connected therewith; or

9. A sewer or drain, or a pipe or main connected therewith, or forming part thereof; or who

10. Destroys or damages with intent to destroy or render useless any engine, machine, tool or implement intended for use in trade or husbandry;

Is punishable by imprisonment for not more than two years.

11. Any person who shall without authority of the corporation owning the same open any fire-hydrant, except for the purpose of extinguishing fire, or who shall wantonly injure or impair the same, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of ten dollars or by imprisonment in a county jail for the term of ten days; and

it shall be the duty of all policemen, deputy sheriffs or constables to arrest any person found violating this act.

Added by chap. 338 of 1899. In force Sept. 1, 1899.

See subdivisions 6, 7, 15 and 16 of section 56 of Code of Criminal Procedure.

The word "wilfully," in this section, means something more than a voluntary act, and more also than an intentional act which, in fact, is wrongful. *Wass v. Stephens*, 38 St. Rep. 883; 128 N. Y. 128. It includes an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness. *Id.*

A person who, under the direction, and on premises under the jurisdiction of the park commissioners, disconnects certain water pipes from the city mains under the control of said commissioners, does not commit a criminal offense under this section. *Id.*

**§ 639a. False alarms of fire; unlawful interference with fire alarm telegraph systems.**—Any person who shall wilfully give any false alarm of fire, or who shall wilfully tamper, meddle or interfere with any station or signal box of any fire alarm telegraph system, or who shall wilfully break, injure, deface or remove any such box or station, or who shall wilfully break, injure, destroy or disturb any of the wires, poles or other supports and appliances connected with or forming a part of any fire alarm telegraph system shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars or by imprisonment for not less than ten days or by both such fine and imprisonment.

Added by ch. 279, Laws 1905. Takes effect Sept. 1, 1905.

**§ 640. Malicious injury and destruction of property.**—A person who wilfully:

1. Cuts down, destroys or injures any wood or timber standing or growing, or which had been cut down and is lying on lands of another, or of the people of the state; or,

2. Cuts down, girdles or otherwise injures a fruit, shade or ornamental tree standing on the lands of another, or of the people of the state; or,

3. Severs from the freehold of another, or of the people of the state, any produce thereof, or anything attached thereto; or,

4. Digs, takes or carries away without lawful authority or consent from any lot of land in any city or incorporated village, or from any lands included within the limits of a street or avenue laid down on the map of such city or village, or otherwise recognized or established, any earth, soil or stone; or,

5. Enters without the consent of the owner or occupant any orchard, fruit garden, vineyard or ground whereon is cultivated any fruit, with intent to take, injure or destroy anything there growing or grown; or,

6. Cuts down, destroys or in any way injures any shrub, tree or vine being or growing within any such orchard, garden, vineyard or upon any such ground, or any building, framework or erection thereon; or,

7. Maliciously injures any ice upon any waters from which ice is taken as an article of merchandise with intent to injure the owner thereof, or enters or skates upon any pond or body of water not navigable, kept and used for the purpose of taking ice therefrom as an article of merchandise, and upon or adjoining which a notice has been placed in a conspicuous position forbidding such entry, and stating the purpose for which said body of water is kept or used, or puts or throws upon or into any such pond or body of water any stick, stone or other substance to the injury of the ice or water; or,

8. Unlawfully takes or carries away or interferes with or disturbs by any means the oysters or other shell-fish of another, legally planted upon the bed of any river, bay, sound or water of this state, or removes, pulls up or destroys any stake or buoy designated or marking out any legally planted oyster bed of another, is guilty of a misdemeanor; and any oysters planted upon the bed of any waters of this state leased by the commissioners of fisheries shall be deemed legally planted, and evidence that any

boat or vessel has been used for the purpose of taking, carrying away or interfering with such oysters shall be presumptive evidence of guilt as against the owner, master or crew of such vessel; or.

9. Intrudes or places any hovel, shanty or building upon, or within the limits of any lot or pieces of land within any incorporated city or village, without the consent of the owner, or within the boundaries of any street or avenue within such city or village; or,

10. Kills, wounds or traps any bird, deer, squirrel, rabbit or other animal within the limits of any cemetery or public burying ground, or of any public park or pleasure ground, or removes the young of any such animal, or the eggs of any such bird, from any cemetery, park or pleasure ground, or exposes for sale, or knowingly buys or sells any bird or animal so killed or taken; or,

11. Drives or leads along a public highway a wild and dangerous animal, or a vehicle or engine propelled by steam, except upon a railroad, along a public highway, or causes or directs such animal, vehicle or engine to be so driven, led, or to be made to pass, unless a person of mature age shall precede such animal, vehicle or engine by at least one-eighth of a mile, carrying a red light, if in the night time, and gives warning to all persons whom he meets traveling such highway, of the approach of such animal, vehicle or engine; or,

12. Takes or attempts to take, without the consent of the owner of any lake or pond, any fish from the waters thereof, provided such lake or pond is so situated that fish cannot pass thereinto from the waters of any other lake, pond or stream, either public or owned by other persons; or without the consent of the owner of any such lake or pond, places therein any piscivorous fish or any poison or other substance injurious to the health of fish, or lets the waters out of any such lake or pond with intent to take fish therefrom or to harm fish therein; or,

13. Injures any arsenal or armory, or its fixtures, or any uniforms, arms or equipments, or other property therein deposited; or,

14. Trespasses upon any rifle-range lawfully used by or in connection with the national guard of the state, or any organization, division or district thereof or who injures any target or other property situate thereon, or who wilfully violates thereon any regulation established to maintain order, preserve property, prevent accident upon such range, or removes, mutilates or destroys a battle flag, book, placard, relic or record deposited or kept in the state military bureau; or,

15. Cuts, spoils or destroys any cordage, cable, buoys, buoy-rope, head-fast or other fast fixed to the anchor or moorings belonging to any vessel, or who shall, with intent to injure, tamper in any way with the lines or cables by which any vessel is moored or made fast, or who shall, with intent to injure, tamper in any manner with the steering-gear, bell-gear, engines, machinery, lights or any other equipments of any vessel, shall be deemed guilty of a misdemeanor.

16. Any person who in any manner, for exhibition or display, shall after the first day of September, nineteen hundred and five, place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color or ensign of the United States of America or state flag of this state or ensign, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, printed or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall, after the first day of September, nineteen hundred and five, expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish, the article or substance, on which so placed, or who shall publicly mutilate, deface, defile or defy, trample upon, or cut

contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars or by imprisonment for not more than thirty days or both, in the discretion of the court; and shall also forfeit a penalty of fifty dollars for each such offense, to be recovered with costs in a civil action, or suit, in any court having jurisdiction, and such action or suit may be brought by or in the name of any citizen of this state, and such penalty when collected less the reasonable cost and expense of action or suit and recovery to be certified by the district attorney of the county in which the offense is committed shall be paid into the treasury of this state; and two or more penalties may be sued for and recovered in the same action or suit. The words, flag, standard, color or ensign, as used in this subdivision or section, shall include any flag, standard, color, ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color or ensign, of the United States of America, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, or ensign of the United States of America. The possession after September one, nineteen hundred and five, by any person, other than a public officer, as such, of any such flag, standard, color or ensign, on which shall be anything made unlawful at any time by this section, or of any article or substance or thing on which shall be anything made unlawful at any time by this section shall be presumptive evidence that the same is in violation of this section, and was made, done or created after the first day of September, nineteen hundred and five, and that such flag, standard, color, ensign, or article, substance, or thing, did not exist on the first day of September, nineteen hundred and five.

Am'd by chap. 440, Laws 1905. Takes effect Sept. 1, 1905.

Supersedes chap. 80, Laws 1905.

Am'd by L. 1903, chap. 272. In effect Sept. 1, 1903.

Subd. 14 am'd, and subd. 15 added by chap. 662 of 1896. In effect Sept. 1, 1896.

Am'd by chap. 491 of 1888.

The amendment introduced, after the words "carries away," in subd. 8 of the original section, the words "or interferes with or disturbs."

Am'd by chap. 497 of 1899.

The amendment added the present twelfth subdivision to the section.

Am'd by chap. 602 of 1892.

This amendment substituted the present subdivision 11 for the former subdivision.

Am'd by chap. 602 of 1893.

This amendment added subds. 13 and 14, of the present section, and will go into effect, October 1, 1903.

See sections 196, 198, 467 and 537, *ante*; section 646, *post*.

See subdivisions 4, 18 and 24 of section 56 of Code of Criminal Procedure.

Subd. 3. — Subd. 3 of this section is a re-enactment or substitute for the provision of subd. 1, section 15 of 2 R. S. 603. *Anderson v. How*, 28 St. Rep. 790; 116 N. Y. 342.

The offense defined in this subdivision consists in the willful severance, from the freehold of another, of anything attached thereto. *Id.*

It does not apply to a person who severs with the consent of the owner, or who has a legal right to sever. *Id.*

Maliciousness is not an element in the offense defined in this subdivision. *Id.*

It requires, to constitute this offense, only, that the act should be done willfully, that is, intentionally and with design. *Id.*

Subd. 4. — Subd. 8 of this section was enacted to prevent the sailing over ground planted with oysters, with rakes dragging upon the bottom. *People v. Decker*, 32 St. Rep. 87; 10 N. Y. Supp. 676.

Under this section, proof that defendant dragged his rakes for a long distance over ground which had been planted with oysters, and that such acts must necessarily disturb them, is sufficient to warrant a conviction. *Id.*

Subd. 9. — Under subd. 9 it is competent to give the incidents, details and circumstances of the acts with a view to establishing the intent in the perpetration of the principal acts constituting the offense. *People v. Upton*, 29 St. Rep. 778; 9 N. Y. Supp. 64.

See *O'Donnell v. McIntyre*, 16 Abb. N. C. 87; *Von Hoffman v. Kendall*, 44 St. Rep. 485.

**§ 640a. Trespasses on Indian land.**—A person who cuts, removes, causes to be removed or aids or assists in removing from the Allegany, Cattaraugus, Tonawanda or Onondaga reservations any wood, trees, timber, bark or poles, except as authorized by law, is guilty of a misdemeanor.

This section was added by chap. 602 of 1893, and will go into effect, October, 1893.

**§ 640b. Trespasses on Onondaga reservation.**—A person, other than an Onondaga Indian, who cuts or removes from the

Onondaga reservation any tree, timber, wood, bark or poles; or an Indian who cuts for the purpose of sale or removal from such reservation, or who removes, causes to be removed or aids in the removal from such reservation of any tree, timber, wood, bark or poles, except on the written permission of a majority of the chiefs of the Onondaga tribe, particularly specifying the quantity and kind of trees, timber, wood, bark or poles to be cut or removed, is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect, October 1, 1893.

**§ 640c. Cutting ice in front of premises of another.**—A person who takes possession of or cuts ice in front of the lands of another on any water except lakes, ponds, the Hudson and Mohawk rivers and the tide waters of Rondout and Catskill creeks, between the center of such body of water and such lands after the owner or occupant has posted in a conspicuous manner upon such lands near the banks of such waters a written or printed notice of his desire to cut ice in front of such lands; or

2. Trespasses upon or takes such ice or any part thereof for commercial purposes; or

3. Willfully removes any such notice; is guilty of a misdemeanor.

This section was added by chap. 692 of 1893, and will go into effect, October 1, 1893.

**§ 640d. Unauthorized sale of real property.**—In cities of the first and second class, any person who shall offer for sale any real property without the written authority of the owner of such property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor.

Inserted by L. 1901, chap. 128, taking effect September 1, 1901.

**§ 640e. Unauthorized loans on real property.**—In cities of the first and second class, any person who shall make application to any other person, or to any corporation, for a loan upon any real property without the written authority of the owner of such real property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor.

Inserted by L. 1901, chap. 128, taking effect September 1, 1901.

**§ 641. A person who, either**

1. Wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic or telephonic message by connivance with a clerk, operator, messenger, or other employe of a telegraph or telephone company; or

2. Being such clerk, operator, messenger or other employe, willfully divulges to anyone but the persons for whom it was intended, the contents or the nature thereof of a telegraphic or telephonic message or dispatch intrusted to him for the transmission or delivery, or of which contents he may in any manner become possessed, or occupying such position in a telegraph office shall willfully refuse or neglect duly to transmit or deliver messages received at such office, except when such telegraphic or telephonic message or dispatch is in aid of or used to abet or carry on any unlawful business or traffic, or to perpetrate any criminal offense, and when it shall appear that any offense at law or unlawful business or traffic is being carried on or conducted in whole or in part by means of a telegraphic or telephonic message or dispatch, it shall be the duty of any corporation or employe having knowledge of the same to withhold such dispatch from delivery, and to further furnish to any public officer whose duty it is to prosecute any offense at law so aided and abetted, all information in their possession, relating to said unlawful business or traffic; and to further assist in the identification of any person aiding or abetting in or conducting any such unlawful business or traffic; and any violation of this act or refusal or neglect to furnish information as provided hereinbefore, is punishable by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment.

Am'd by Chap. 661 of 1901. To take effect May 3, 1901.

**§ 642. Opening or publishing a letter, et cetera.**—A person who wilfully, and without authority, either

1. Opens or reads, or causes to be opened or read, a sealed letter, telegram, or private paper; or

2. Publishes the whole or any portion of such a letter, or telegram, or private paper, knowing it to have been opened or read without authority; or

3. Takes a letter, telegram or private paper, belonging to another, or a copy thereof, and publishes the whole or any portion thereof; or

4. Publishes the whole or any portion of such letter, telegram, or private paper, knowing it to have been taken or copied without authority; or

5. Publishes or causes to be published, or connives at the publication of any letter, telegram, or private paper or of any portion of any letter, telegram, or private paper found on, or among the effects of, any person who has been dangerously wounded, or who has committed suicide, or who has died suddenly, or who has been found dead, unless such letter, telegram, or private paper shall have been produced pursuant to law before a coroner at an inquest, and the publication of such letter, telegram, or private paper, or of such portion of such letter, telegram, or private paper shall have been declared by that coroner in writing to be necessary to aid in the discovery of a crime, or of the identity of the wounded or deceased person; or

6. Any person having or obtaining access, either with or without the consent of the lawful owner, to any original list, compilation or other collection of the names of customers or subscribers not less than five hundred in number, or to any other original list, compilation or other collection of names not less than five hundred in number, used in connection with any lawful business or occupation whatsoever, and who, without the consent of such lawful owner, shall take possession of any such original list, compilation, or other collection, or any part thereof, or shall make or cause to be made, or take possession of, a copy or duplication thereof, or of any part thereof, or who shall aid, abet or incite any other person to take or to copy or to cause to be copied or taken, any such list, compilation or collection, or any part thereof; or

7. Any person who may have heretofore obtained or may hereafter obtain any such list, compilation or other collection specified in subdivision six hereof, or any part thereof, or any copy or duplication of such list, compilation or collection or any part thereof, or the information contained in any such list, compilation, collection or any part thereof, and who, without the consent of the lawful owner of the original of any such list, compilation or collection, and with notice or knowledge of his rights, may at any time hereafter, make use of or attempt to make use of any such list, compilation or collection, or any part thereof, or of any copy or duplication of the whole or any part thereof, or of the information contained in any such list, compilation, collection or copy or duplication or any part thereof, for his own benefit or advantage, or that of any person other than said lawful owner,

Is guilty of a misdemeanor.

Am'd by chap. 441, Laws 1905. Takes effect Sept. 1, 1905.

**§ 643. Affixing advertisement to another's land, etc., how punished.**—A person who places upon or affixes to, or causes or procures to be placed upon or affixed to, real property not his own, or a rock, tree, wall, fence, or other structure thereupon without the consent of the owner, any words, characters, or device, as a notice of, or reference to, any article, business, exhibition, profession, matter or event, is punishable by imprisonment for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both.

**§ 644. Presumptive evidence against certain persons.**—The placing or affixing of any words, characters, device, or notice, of any article, business, or other thing, to or upon any property or place specified in the last section, is presumptive evidence that the proprietor, vendor, or exhibitor thereof caused or procured the same to be so placed or affixed.

**§ 645. Endangering life by maliciously placing explosive near building.**—A person, who places in, upon, under, against or near to, any building, car vessel or structure, gunpowder, or any other explosive substance, with intent to destroy, throw down or injure the whole or any part



thereof, under such circumstances, that, if the intent were accomplished human life or safety would be endangered thereby, although no damage done, is guilty of a felony.

See sections 201 and 636, *ante*.

**§ 646. Malicious injury to standing crops, when a misdemeanor.**—A person who maliciously injures or destroys any standing crops, grain, cultivated fruits, or vegetables, the property of another, in any case for which punishment is not otherwise prescribed by this Code or by some other statute, is guilty of a misdemeanor.

See section 640, *ante*.

See *People v. Upton*, 29 St. Rep., 778; 9 N. Y. Supp., 684.

**§ 647. Removal of books and works of art from library; wilful injury of works of art, ornamental trees, etc.**—Any person who,

1. Removes or assists in removing any book, manuscript, map, print, coin, medal, painting or other literary article or work of art from the library building of any reference library company, except for its preservation or repair, or for the purpose of its deposit in some other building of the company, or, being a trustee or officer of such company, consents to the removal thereof; or, upon such removal refuses to permit the same to be restored; or,

2. Not being the owner thereof, and without lawful authority, wilfully injures, disfigures, removes or destroys a gravestone, monument, work of art, or useful or ornamental improvement, or any shade tree or ornamental plant, whether situated upon private grounds or upon the street, road or sidewalk, cemetery or public park or place, or removes from any grave in a cemetery any flowers, memorials or other tokens of affection or other thing connected with them,

Is guilty of a misdemeanor.

Am'd by chap. 692 of 1892.

Subdivision 1 of this section was added by chap. 692 of 1892.

The previous provision was made subd. 2, by such amendment.

The case of *People v. Richards*, 7 St. Rep., 656; 44 Hun, 278; 5 N. Y. Cr., 355, was reversed in 13 St. Rep., 515; 108 N. Y., 137.

**§ 648. Malicious injury to certain articles in museum, etc., how punished.**—A person, who maliciously cuts, tears, defaces, disfigures, soils, obliterates, breaks or destroys, a book, map, chart, picture, engraving, statue, coin, model, apparatus, specimen, or other work of literature or object of art, or curiosity, deposited in a public library, gallery, museum, collection, fair, or exhibition, is punishable by imprisonment in a state prison for not more than three years, or in a county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

**§ 649. Destroying or delay of election returns.**—A messenger appointed by authority of law to receive and carry a report, certificate or certified copy of any statement relating to the result of any election, who willfully mutilates, tears, defaces, obliterates or destroys the same, or does any other act which prevents the delivery of it as required by law; and a person who takes away from such messenger any such report, certificate or certified copy, with intent to prevent its delivery, or who willfully does any injury or other act in this section specified, is punishable by imprisonment in a state prison not exceeding five years.

Am'd by chap. 662 of 1892.

This amendment omitted the statement of the minimum limit of punishment.

See section 94, *ante*.

**Application.**—This section is evidently leveled against two classes of persons: (1) A messenger appointed by authority of law; (2) Any person who interferes with such messenger. *People v. Wise*, 3 N. Y. Cr., 309; 2 How. N. S., 96.

It is directed against misconduct of messengers in charge of election returns, appointed by authority of law, or who interferes with such messengers, and the words "or who willfully does any injury or other act in this section specified," do not enlarge the scope of the section, or affect any person except those specified. *Id.*

This section should be so construed with section 94, *ante*, as not to make a double crime of one act. *Id.*

**§ 650. Property in house of worship, etc.** — A person, who willfully and without authority, breaks, defaces or otherwise injures any house of religious worship, or any part thereof, or any appurtenance thereto, or any book, furniture, ornament, musical instrument, article of silver or plated ware, or other chattel kept therein for use in connection with religious worship is guilty of felony.

See section 14, *ante*.

**§ 651. Unlawful interference with gas or electric meters or steam valves.**—A person who willfully with intent to injure or defraud :

1. Connects a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for the conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or instrument provided for registering the quantity consumed ; or

2. Obstructs, alters, injures or prevents the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person or a person other than a state inspector or deputy inspector of gas meters or an employe of the company owning any gas or electric meter, who willfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any such meter so detached or disconnected ; or

3. In any manner whatever, changes, extends or alters any service or other pipe, wire or attachment of any kind, connecting or through which natural or artificial gas or electricity is furnished from the gas mains or pipes or wires of any person, company or corporation without first procuring from said person, company or corporation written permission to make such change, extension or alterations ; or

4. Makes any connection or reconnection with the gas mains, service pipes or wires of any person, company or corporation furnishing to consumers natural or artificial gas or electricity, or turns on or off or in any manner interferes with any valve or stop-cock or other appliances belonging to such person, company or corporation and connected with its service or other pipes or wires, or enlarges the orifice of mixers, or uses natural gas for heating purposes except through mixers, or electricity for any purpose, without first procuring from such person, company or corporation a written permit to turn on or off such stop-cock or valve, or to make such connections or reconnections, or to enlarge the orifice of mixers or to use for heating purposes without mixers, or to interfere with the valves, stop-cocks, wires, or other appliances of such person, company or corporation as the case may be ; or

5. Retains possession of or refuses to deliver any mixer or mixers, meter or meters, lamp or lamps, or other appliances which may be or may have been loaned or rented to them by any person company or corporation for the purpose of furnishing gas, electricity or power through the same, or who sells, loans or in any manner disposes of the same to any person or persons other than the said person, company or corporation entitled to the possession of the same; or

6. Sets on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person, company or corporation, in conveying gas to consumers, or interfere in any manner with the wells, pipes, mains, gate-boxes, valves stop-cocks, wires, cables, conduits, or any other appliances, machinery or property of any person, company or corporation engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person, company or corporation; or

7. Opens or causes to be opened or reconnects or causes to be reconnected any valve lawfully closed or disconnected by a district steam corporation; or

8. Turns on steam or causes it to be turned on, or to re-enter any premises when the same has been lawfully stopped from entering such premises, is guilty of a misdemeanor.

Am'd by ch. of 1900.

Am'd by chap. 219 of 1888.

This amendment inserted, after the words "illuminating gas" in the original section, the words "full or natural gas," and, before the word "obstructs," the word: "willfully with intent to injure or defraud."

Am'd by chap. 692 of 1892.

This amendment divided the former section into two subdivisions, added two additional ones, substituted the word "intention" for the word "intent," and omitted from the part forming the second subdivision the words "willfully with intent to injure or defraud."

Am'd by chap. 690 of 1892.

This amendment retained the first two subdivisions literally in the matter prior to the present subdivisions and substituted for subdivisions 3 and 4 of the former section, the present four subdivisions and the last clause of the matter prior thereto.

Am'd by chap. 692 of 1892.

This amendment added subds. 1, 2, 7 and 8 of the present section, and will go into effect, October 1, 1893.

See section 15, *ante*.

This section, prior to the amendment of 1892, prescribed no penalty; but this amendment provided a penalty.

See *People v. Hollenbeck*, 1 N. Y. Cr., 437, note; 65 How., 401; *People v. McTameny*, 1 N. Y. Cr., 443; 30 Hun, 505; 13 Abb. N. C., 56; 66 How., 70

**§ 652. Driving vehicles, etc., on sidewalks.**—A person who willfully and without authority or necessity drives any team, vehicle, cattle, sheep, horse, swine or other animal along, upon a sidewalk is punishable by a fine of fifty dollars, or imprisonment in the county jail not exceeding thirty days, or both.

Subdivision 1. A person who willfully and without authority or necessity drives any team or vehicle, except a bicycle, upon a sidepath, or wheelway constructed by or exclusively for the use of bicyclists, and not constructed by a street of a city, is punishable by a fine of not more than fifty dollars, or imprisonment not exceeding thirty days, or both.

The case of *Fisher v. Village of Cambridge*, 32 St. Rep., 492; 57 Hun, 30; 10 N. Y. Supp., 628, was reversed in 4 Silv. (Ct. App.), 187; 44 St. Rep., 31; 133 N. Y., 527.

§ 651a. **Unlawful interference with water meters, water service pipes and their connections.**—A person who, wilfully, with intent to injure or defraud:

1. Breaks or defaces, or causes to be broken or defaced, the seal of a water meter; or

2. Obstructs, alters, injures or prevents, or causes to be obstructed, altered, injured or prevented, the action of any such meter or other instrument used to measure or register the quantity of water supplied to or consumed by any person, corporation or company; or

3. Makes or causes to be made any connection by means of pipe, conduit or otherwise with the water main or service pipe of any person, corporation or company furnishing water to consumers, in such manner as to take water from said main or service pipe without its passing through the meter or other instrument provided for registering or measuring the amount or quantity of water taken from said main or service pipe; or

4. Makes any connection or reconnection with the water main or service pipe of any person, corporation or company furnishing water to consumers, or turns on or off, or in any manner interferes with any valve, stop-cock or other appliance belonging to said person, corporation or company without obtaining from such person, corporation or company a written permit to make such connection or reconnection or to turn or otherwise interfere with said valve, stop-cock or other appliance; or

5. Prevents, by the erection of any device or construction, or by any other means, free access to any such meter by the person, company or corporation furnishing such water; or interferes, obstructs or prevents, by any means, the reading or inspection of such meter, is guilty of a misdemeanor.

Added by ch. 333, Laws 1902. April 2, 1902.



This section makes it a misdemeanor willfully and without authority to drive along a sidewalk. *Fisher v. Village of Cambridge*, 44 St. Rep. 317; 13 N. Y. 527; 4 Silv. (Ct. App.), 187.

A person cannot make use of the sidewalk to drive upon to his store without subjecting himself to fine or imprisonment, or both, by the statute law of this state. *Rauenstein v. N. Y., L. & W. R. R. Co.*, 47 St. Rep. 140.

**§ 652a. Riding bicycle on sidewalk or footpath.**—A person who willfully and without authority rides a bicycle upon a sidewalk or footpath, constructed, maintained, or allowed to remain for the exclusive use of pedestrians in any street where a sidepath for bicycles is maintained, outside of an incorporated city or village, is guilty of a misdemeanor, punishable by a fine of not more than twenty-five dollars, or by imprisonment for not more than twenty days, or both.

Added by chap. 560, Laws 1901. Took effect April 26, 1901.

**§ 653. Compelling another to do or not to do a lawful act.**—A person, who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property, or threatens such violence or injury; or
  2. Deprives any such person of any tool, implement, or clothing, or hinders him in the use thereof; or
  3. Uses or attempts the intimidation of such person by threats or force;
- Is guilty of a misdemeanor.

Am'd by chap. 384 of 1882.

This amendment was made before the Code went into effect.

See subd. 5 of section 168, *ante*; section 673, *post*.

See *People v. Crotty*, 30 St. Rep., 46; 9 N. Y. Supp., 939; *People v. Lendert*, 4 N. Y. Cr., 326.

**§ 654. Injury to property, interference with railroad cars, etc., how punished.**—A person who unlawfully and willfully destroys or injures any real or personal property of another, or who without authority or permission of a person who has the right to give such authority or permission, loosens or breaks or blocking of any car standing on any railroad track in this state, without like authority or permission, puts upon or runs any hand car, or other car, on any railroad track in this state, or without like authority or permission, interferes or meddles with any brake or coupling of any car while standing or moving on any railroad track in this state, or takes any part therein in a case where the punishment is not specially prescribed by statute, is punishable as follows:

. If the value of the property destroyed, or the diminution in the value of property by the injury is more than twenty-five dollars, by imprisonment for not more than four years.

. In any other case, by imprisonment for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

And in addition to the punishment prescribed therefor, he is liable in damages for the injury done, to be recovered in a civil action by the owner of such property, or the public officer having charge thereof.

Am'd by chap. 186 of 1892.

This amendment introduced into the original section the provision as to interference with railroad cars, etc.

See section 640, *ante*.

In the case of *People v. Kane*, 39 St. Rep. 752; 15 N. Y. Supp., 612; was reversed in 42 St. Rep. 724; 131 N. Y. 113.

**Application.**—This section was limited to cases where the punishment is fixed by statute. *Von Hoffman v. Kendall*, 44 St. Rep. 485; 17 N. Y. Cr., 713.

**Intent.**—The act alone does not constitute the crime. *People v. Kane*, 42 St. Rep. 724; 131 N. Y., 113; rev'g 39 St. Rep., 752; 15 N. Y. Supp., 612.



This section relates to acts unlawfully and willfully done to the property of another. *People v. Christy*, 47 St. Rep., 926; 65 Hun, 350; 20 N. Y. Supp., 278.

The intention with which the offense was committed is not material to be proved by the people. *People v. Kane*, 42 St. Rep., 724; 181 N. Y., 113; rev'g 89 St. Rep., 752; 15 N. Y. Supp., 612. The accused may give evidence in proof of a justification for his act. *Id.* If the act was done in defense of the possession of property, the criminality which constitutes the punishable offense is lacking. *Id.*

In order to establish the offense under this section, the elements of an unlawful and of a willful destruction of property must exist and be proved. *Id.* Though a destruction may be willful, whether it is unlawful may be a question which must be decided by the jury upon the evidence showing the cause or motive. *Id.*

If a person unlawfully and willfully destroys or injures the real or personal property of another, he is guilty of a criminal offense. *Wrench v. Samenfeld*, 47 St. Rep., 879.

**What property included.**—The term "personal property," as used in this section, cannot be construed to mean only inanimate property. *People v. Christy*, 47 St. Rep., 926; 65 Hun, 350; 20 N. Y. Supp., 278.

The offense of willfully killing a horse or other animal by poison is punishable by indictment under this section. *Id.* All acts that might possibly be included in sections 655 and 660, *post*, are not excluded from the operation of this section. *Id.*

The malicious killing of a domestic animal is a misdemeanor. *People v. Woodward*, 81 Hun, 58; *People v. Smith*, 5 Cow., 258; *Bump v. Betts*, 16 Wend., 421.

See *People v. Bosworth*, 45 St. Rep., 516; 64 Hun, 78; 19 N. Y. Supp., 117.

**§ 654a. Throwing any substance on highway to injure cycle.**—Whoever, with intent to prevent the free use of a cycle thereon, shall throw, drop or place, or shall cause or procure to be thrown, dropped or placed, in or upon any cycle path, avenue, street, sidewalk, alley, road, highway or public way or place, any glass, tacks, nails, pieces of metal, brier, thorn or other substance which might injure or puncture any tire used on a cycle, or which might wound, disable or injure any person using such cycle, shall be guilty of a misdemeanor and on conviction be fined not less than five nor more than fifty dollars.

Added by chap. 304 of 1896. In effect April 17, 1896.

## TITLE XVI.

### CRUELTY TO ANIMALS.

**SECTION 655. Overdriving animal; failing to provide proper sustenance.**

656. Abandonment of disabled animal, a misdemeanor.

657. Failure to provide proper food and drink to impounded animal.

658. Selling or offering to sell or exposing disabled animal.

659. Carrying animal in a cruel manner, a misdemeanor.

660. Animal wantonly poisoned, or attempted to be poisoned, a misdemeanor.

661. Throwing substance injurious to animals in public place, a misdemeanor.

662. Keeping milch cows in unhealthy places and feeding them with food producing unwholesome milk a misdemeanor.

663. Transporting animals for more than 24 consecutive hours a misdemeanor.

664. Setting on foot fights between birds and animals, a misdemeanor.

665. Keeping place used for fighting birds, etc., a misdemeanor.

666. Running horses on highway, a misdemeanor.

667. Leaving state to elude provisions of this title.

SECTION 668. Fines and penalties to be paid over to a society.

669. Definitions.

For offenses against the "Game Laws" of this state, see sections 51, 82, 120, 148, 174, 196, 217 and 245 of chap. 488 of 1892, as amended.

§ 655. **Overdriving animal; failing to provide proper sustenance.**—A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates, or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor.

See subd. 27 of section 56 of Code of Criminal Procedure.

**Common law.**—At common law, cruelty to an animal was not indictable merely upon the ground that it gave pain to the animal, and for the protection or for the sake of the animal. *People v. Brunell*, 48 How., 435. But, under certain circumstances, acts of cruelty were indictable at common law; for instance, when publicly committed to the annoyance of the public, or when committed with a malicious intent to injure the owner of the animal. *Id.*

**Application.**—This section and section 660, *post*, relate to acts unjustifiably done without reference to the ownership. *People v. Christy*, 47 St. Rep., 926; 65 Hun, 350; 20 N. Y. Supp., 279; 8 N. Y. Cr., 482.

The subject of "cruelty to animals" relates rather to the manner in which an act is done than to an interference with the property rights of others. *Id.*

**Intent.**—The commission of the offense does not rest upon the question of intent. *People v. Tinsdale*, 10 Abb. N. S., 374. The intent is assumed from the act itself. *Id.*

**Servant liable.**—A servant acting under his master's orders is liable. *Id.*

**Criminal.**—Dislocating the limbs of animals to be slaughtered, while they are yet alive, and plunging them, while yet alive, in boiling water, were held, in *Davis v. Society, etc.*, 16 Abb. N. S., 73, to be criminal offenses.

**Not criminal.**—The use of a dog upon a "treadmill" or an "inclined plane," or in any mode by which his strength or docility may be made serviceable to man, is not criminal. *People ex rel. Walker v. Court, etc.*, 4 Hun, 445. But if he is cruelly used, it becomes a crime. *Id.*

Driving a horse, while ignorant that it is sick or sore, was held not to be, *per se*, tormenting or torturing it, within the meaning of the acts of 1866 and 1867. *Stage Horse Cases*, 16 Abb. N. S., 51.

§ 656. **Abandonment of disabled animal, a misdemeanor.**—A person being the owner or possessor, or having charge or custody of a maimed, diseased, disabled or infirm animal, who abandons such animal, or leaves it to die in a street, road or public place, or who allows it to lie in a public street, road or public place more than three hours after he receives notice that it is left disabled, is guilty of a misdemeanor. Any agent or officer of the American Society for the Prevention of Cruelty to

Animals, or of any society duly incorporated for that purpose may lawfully destroy or cause to be destroyed any animal found abandoned and not properly cared for, appearing in the judgment of two reputable citizens called by him to view the same in his presence, to be glaundered, injured or diseased past recovery for any useful purpose. When any person arrested is, at the time of such arrest, in charge of any animal or of any vehicle drawn by or containing any animal, any agent of said society may take charge of such animal and of such vehicle and its contents, and deposit the same in a safe place of custody, or deliver the same into the possession of the police or sheriff of the county or place wherein such arrest was made, who shall thereupon assume the custody thereof; and all necessary expenses incurred in taking charge of such property shall be a lien thereon.

Am'd by chap. 144 of 1888.

This amendment added to the original section all subsequent to the first provision.

Am'd by chapter 490 of 1888.

This amendment inserted after the words "cruelty to animals," the words "or of any society duly incorporated for that purpose."

See *People v. Christy*, 47 St. Rep., 926; 65 Hun, 351; 20 N. Y. Supp., 278

**§ 657. Failure to provide proper food and drink to impounded animal.**—A person who having impounded or confined any animal, refuses or neglects to supply to such animal during its confinement, a sufficient supply of good and wholesome air, food, shelter and water, is guilty of a misdemeanor.

**§ 658. Selling or offering to sell or exposing disabled animal.**—A person who willfully sells or offers to sell, uses, exposes, or causes or permits to be sold, offered for sale, used or exposed, any horse or other animal having the disease known as glanders or farcy, or other contagious or infectious disease dangerous to the life or health of human beings, or animals, or which is diseased past recovery, or who refuses upon demand to deprive of life an animal affected with any such disease, is guilty of a misdemeanor.

This section is a substantial re-enactment of chap. 28 of 1878.

**§ 659. Carrying animal in a cruel manner, a misdemeanor.**—A person who carries or causes to be carried in or upon any vessel or vehicle or otherwise, any animal in a cruel or inhuman manner, or so as to produce torture, is guilty of a misdemeanor.

See section 663, *post*.

**§ 660. Animal wantonly poisoned or attempted to be poisoned, a misdemeanor.**—A person who unjustifiably administers any poisonous or noxious drug or substance to an animal, or unjustifiably exposes any such drug or substance with

intent that the same shall be taken by an animal, whether such animal be the property of himself or another, is guilty of a misdemeanor.

See subds. 27 and 31 of section 56 of Code of Criminal Procedure.

See *People v. Christy*, 47 St. Rep., 926; 65 Hun, 851; 20 N. Y. Supp., 279.

**§ 661. Throwing substances injurious to animals in public place, a misdemeanor.**—A person who willfully throws, drops or places, or causes to be thrown, dropped or placed upon any road, highway, street or public place, any glass, nails, pieces of metal, or other substance which might wound, disable or injure any animal, is guilty of a misdemeanor.

Am'd by chap. 528 of 1885.

This amendment omitted the first provision of the original section, and inserted after the word "any" the word "glass," in the part retained.

The amendment of 1885 to this section did not repeal section 1938 of the consolidation act of 1882. *People v. Sheridan*, 15 St. Rep., 938; 1 N. Y. Supp., 61. See note in 25 Abb. N. C., 40.

**§ 662. Keeping milch cows in unhealthy places, and feeding them with food producing unwholesome milk, a misdemeanor.**—A person who keeps a cow or any animal for the production of milk, in a crowded or unhealthy place, or in a diseased condition, or feeds such cow or animal upon any food that produces impure or unwholesome milk, is punishable by a fine not less than fifty dollars, or imprisonment not exceeding one year, or by both.

**§ 663. Transporting animals for more than twenty-four consecutive hours, a misdemeanor.**—A railway corporation, or an owner, agent, consignee, or person in charge of any horses, sheep, cattle, or swine, in the course of, or for transportation, who confines, or causes or suffers the same to be confined, in cars for a longer period than twenty-four consecutive hours, without unloading for rest, water and feeding, during ten consecutive hours, unless prevented by storm or inevitable accident, is guilty of a misdemeanor. In estimating such confinement, the time during which the animals have been confined without rest, on connecting roads from which they are received, must be computed. If the owner, agent, consignee, or other person in charge of any such animals, refuses or neglects, upon demand, to pay for the care or feed of the animals while so unloaded or rested, the railway company, or other carriers thereof, may charge the expense thereof to the owner or consignee and shall have a lien thereon for such expense.

This section is broader in its application than the former act of 1866. *Hastings v. N. Y., O. & W. R. R. Co.*, 3 Silv. (Sup. Ct.), 424; 25 St. Rep., 251; 6 N. Y. Supp., 838.

It includes confinement for twenty-four hours, "in the course of, or for, transportation." *Id.*

The act of 1866 was repealed by chap. 593 of 1886. *Id.*

**§ 664. Setting on foot fights between birds and animals, a misdemeanor.**—A person who sets on foot, instigates, promotes, or carries on, or does any act as assistant, umpire, or principal, or is a witness of, or in any way aids in or engages in the furtherance of any fight between cocks or other birds, or dogs, bulls, bears, or other animals, premeditated by any person owning, or having custody of such birds or animals, is guilty of a misdemeanor punishable by fine not less than ten dollars, nor more than one thousand dollars, or by imprisonment not less than ten days nor more than one year, or both.

**§ 665. Keeping place used for fighting birds, etc., a misdemeanor.**—A person who keeps or uses, or is in any manner connected with, or interested in the management of, or receives money for the admission of any person to, a house, apartment, pit or place kept or used for baiting or fighting any bird or animal, and any owner or occupant of a house, apartment, pit or place who willfully procures or permits the same to be used or occupied for such baiting or fighting, is guilty of a misdemeanor. Upon complaint under oath or affirmation to any magistrate authorized to issue warrants in criminal cases, that the complainant has just and reasonable cause to suspect that any of the provisions of law relating to or in any wise affecting animals are being or about to be violated in any particular building or place, such magistrate shall immediately issue and deliver a warrant to any person authorized by law to make arrests for such offenses, authorizing him to enter and search such building or place, and to arrest any person there present found violating any of said laws, and to bring such person before the nearest magistrate of competent jurisdiction, to be dealt with according to law.

Am'd by ch. 144 of 1888. See *People v. Klock*, 16 St. Rep., 515; 4 Hun, 278.

**§ 666. Running horses on highway a misdemeanor.**—A person driving any vehicle upon any plank road, turnpike or public highway, who unjustifiably runs the horses drawing the same, or causes, or permits them to run, is guilty of a misdemeanor.

Amended by chap. 539, Laws 1904. In effect May 3, 1904.

**§ 667. Leaving state to elude provisions of this title.**—A person who leaves this state with intent to elude any of the provisions of this title or to commit any act out of this state which is prohibited by them, or who, being a resident of this state, does any act without this state, pursuant to such intent, which would

be punishable under such provisions, if committed within this state, is punishable in the same manner as if such act had been committed within this state.

**§ 668. Imposition of fine and penalties.**—All fines, penalties or forfeitures imposed or collected for a violation of the provisions of this title, or of any act for the prevention of cruelty to animals, now in force or hereafter passed, must be paid on demand to the American Society for the Prevention of Cruelty to Animals; except where the prosecution shall be instituted or conducted by a society for the prevention of cruelty to animals duly incorporated under the general laws of this state, in which case such fine, penalty or forfeiture must be paid on demand to such society. A constable or police officer must, and any agent or officer of any of said societies may, arrest and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of this title. Any officer or agent of any of said societies may lawfully interfere to prevent the perpetration of any act of cruelty upon any animal in his presence. Any person who shall interfere with or obstruct any such officer or agent in the discharge of his duty shall be guilty of a misdemeanor. Any of said societies may prefer a complaint before any court, tribunal or magistrate having jurisdiction, for the violation of any law relating to or affecting animals, and may aid in presenting the law and facts before such court, tribunal or magistrate in any proceeding taken. The officers and agents of all duly incorporated societies for the prevention of cruelty to animals or children are hereby declared to be peace officers within the provisions of section one hundred and fifty-four of the Code of Criminal Procedure.

Am'd by chap. 144 of 1888.

This amendment substituted for the latter provision of the original section, provisions as to arrests, interference with officers, and as to peace officer.

Am'd by chap. 490 of 1888.

This amendment inserted an exception to the first provision, and substituted "societies" for "society" in the remaining portion of the section.

All fines collected by the recorder of the city of Cohoes, from persons convicted before him of cruelty to animals, under this title, must be paid on demand to the "American Society for the Prevention of Cruelty to Animals." *American Society, etc., v. City of Cohoes*, 4 St. Rep., 809; 25 W. Dig., 229. Section 32, chap. 440 of 1884, does not require them to be paid to the chamberlain of said city. *Id.*

**§ 669. Definitions.**—1. The word "animal," as used in this title, does not include the human race, but includes every other living creature;

2. The word "torture" or "cruelty" includes every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted;

3. The words "impure and unwholesome milk" include all milk obtained from animals in a diseased or unhealthy con-



dition, or who are fed on distillery waste, usually called "swill" or upon any substance in a state of putrefaction or fermentation.

By this section, the word "animal" is defined to include every living creature except the human race. *People v. Klock*, 16 St. Rep., 565; 48 Hun, 277.

## TITLE XVII.

### OF MISCELLANEOUS CRIMES.

**SECTION 670.** Attorneys forbidden to defend criminal prosecutions carried on by their partners, or formerly by themselves.

671. Attorneys may defend themselves.

672. Fraudulently presenting bills or claims to public officers for payment.

673. Endangering life by refusal to labor.

674. Publishing false messages.

674a. Unauthorized wearing badge of loyal legion.

674b. Converting military property; unlawfully wearing uniform.

674c. Introduction of spiritous or malt liquors into arsenal or armory.

674d. Unlawfully exacting toll of a member of the national guard.

674e. Failure to respond to military duty.

675. Disorderly conduct on public conveyances.

676. Acts committed out of the state.

**§ 670. Attorneys forbidden to defend criminal prosecutions carried on by their partners, or formerly by themselves.**—An attorney, who directly or indirectly advises in relation to, or aids or promotes the defense of any action or proceeding in any court, the prosecution of which is carried on, aided or promoted by a person as district attorney or other public prosecutor, with whom such attorney is directly or indirectly connected as a partner; or who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court, as district attorney or other public prosecutor, afterwards directly or indirectly advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise; or who takes or receives any valuable consideration from or on behalf of any defendant in any such action, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a misdemeanor.

See sections 136, 139, 148 and 149, *ante*.

**§ 671. Attorneys may defend themselves.**—The last section does not affect §§ 78, 79, 80 and 81 of the Code of Civil Procedure, and does not prohibit an attorney from defending himself in person, as attorney or as counsel, when prosecuted either civilly or criminally.

**§ 672. Fraudulently presenting bills or claims to public officers for payment.**—A person who, knowingly, with intent to defraud, presents, for audit, or allowance, or for payment, to any officer or board of officers of the state, or of any county, town, city or village, authorized to audit, or allow or to pay bills, claims or charges, any false or fraudulent claim, bill, account,

writing or voucher, or any bill, account or demand, containing false or fraudulent charges, items or claims, is guilty of a felony.

See sections 165 and 166, *ante*.

**§ 673. Endangering life by refusal to labor.**—A person, who willfully and maliciously, either alone or in combination with others, breaks a contract of service or hiring, knowing, or having reasonable cause to believe, that the probable consequence of his so doing will be to endanger human life, or to cause grievous bodily injury, or to expose valuable property to destruction or serious injury, is guilty of a misdemeanor.

See sections 168, 170 and 653, *ante*.

The case of *People v. Barondess*, 41 St. Rep., 659; 8 N. Y. Cr., 234; 61 Hun, 577; 16 N. Y. Supp., 439, was reversed in 45 St. Rep., 248; 8 N. Y. Cr., 376.

**§ 674. Publishing false message.**—A person, who prints, publishes or circulates, as true, any message, order or proclamation purporting to be the message, order or proclamation of the executive of the United States or of this state, or of any other state of the United States now or hereafter admitted, or of any territory of the United States, knowing the same not to be genuine, is punishable, by imprisonment in a state prison not exceeding five years, or by fine not exceeding one thousand dollars, or by both. An indictment for this offence may be found in any county in which the message, address or proclamation is printed, published or circulated, but not in more than one county of this state.

**§ 674a. Unauthorized wearing or use of badges, name, title or\* officers, insignia, ritual or ceremonies of certain orders and societies.**—Any person who wilfully wears the badge or the button of the Grand Army of the Republic, the insignia, badge or rosette of the military Order of the Loyal Legion of the United States, or of the Military Order of Foreign Wars of the United States, or the badge or button of the Spanish War Veterans, or the Order of Patrons of Husbandry, or the Benevolent and Protective Order of Elks of the United States of America, or of any society, order or organization, of ten years standing in the state of New York, or uses the same to obtain aid or assistance within this state, or wilfully uses the name of such society, order or organization, the titles of its officers, or its insignia, ritual or ceremonies, unless entitled to use or wear the same under the constitution and by-laws, rules and regulations of such order or of such society, order or organization, is guilty of a misdemeanor.

Am'd by chap. 590, Laws 1905. Took effect May 19, 1905.

\* So in original.

**§ 674b. Converting military property; unlawfully wearing uniform.**—Any person who shall secrete, sell, dispose of, offer for sale, purchase, retain after demand made by a commissioned officer of the national guard, or in any manner pawn or pledge any arms, uniforms or equipments, issued under the provisions of the military code, and any person not a member of the national guard, except members of organizations specially authorized to do so by the military code, who shall wear any uniform or designation of grade similar to those in use by the national guard, issued or authorized under the provisions of said code, is guilty of a misdemeanor.

**§ 674c. Introduction of spirituous or malt liquors into arsenal or armory.**—Any person who introduces any wine, spirituous or malt liquors into any arsenal or armory, except when prescribed for medicinal purposes by a medical officer of the national guard, is guilty of misdemeanor.

**§ 674d. Unlawfully exacting toll of a member of the national guard.**—Any person, master or keeper of a toll-gate, toll-bridge or ferry, or any person in charge thereof who willfully hinders or delays any member of the national guard or refuses free passage to any such member going to or returning from any parade, encampment, drill or meeting which he may be by law required to attend, or willfully hinders, delays or refuses free passage to any conveyance or military property of the state in charge of a member of said guard, is guilty of a misdemeanor.

**§ 674e. Failure to respond to military duty.**—Every member of an independent military organization not regularly organized as an organization of the national guard, who fails to respond or to do military duty, or refuses to enlist when lawfully called upon to do so by the commander-in-chief, in cases of emergency or necessity, is guilty of a misdemeanor.

**§ 674f.** Any person who shall collect money or attempt to collect money or any valuable article, or to sell tickets for any ball or entertainment for the benefit of any pretended benevolent, humane, or charitable organization which has no corporate existence, or for any benevolent, humane, or charitable institution, that has been duly incorporated or recognized by the authorities of the state of New York, without first having obtained written authority of the officers of the said institution or organization, attested under the seal of the said institution, according to its rules, shall be guilty of a misdemeanor.

Am'd by chap. 827 of 1899. In force Sept. 1, 1899.

**§ 674g.** Any person molesting, damaging, destroying, stealing, or in any way wrongfully withholding or interfering with the life-buoys, life-ladders, rubber or cork life-preservers, boats, or other life-saving apparatus, or of the flags, pennants, signs, badges of office, buttons or medals of any humane or life-saving association of the state of New York, shall be guilty of a misdemeanor.

Am'd by chap. 827 of 1899. In force Sept. 1, 1899.

**§ 675. Disorderly conduct on public conveyances.**—Any person who shall by any offensive or disorderly act or language, annoy or interfere with any person or persons in any place or with the passengers of any public stage, railroad car, ferry boat or other public conveyance, or who shall disturb or offend the occupants of such stage, car, boat or conveyance, by any disorderly act, language, or display, although such act, conduct or display may not amount to an assault or battery, shall be deemed guilty of a misdemeanor. A person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly prescribed by this Code, is guilty of a misdemeanor; but nothing in this Code contained shall be so construed as to prevent any person from demanding an increase of wages, or from assembling and using all lawful means to induce employers to pay such wages to all persons employed by them, as shall be a just and fair compensation for services rendered.

Am'd by chap. 384 of 1882.

This amendment was made before the Code went into effect.

Am'd by chap. 827 of 1891.

This amendment introduced the provision at the beginning of the original section.

See section 170, *ante*.

The case of *People v. Richards*, 7 St. Rep. 656; 44 Hun, 278; 5 N. Y. Cr. 855, was reversed in 13 St. Rep. 515; 108 N. Y. 137.

The case of *People v. Barondess*, 41 St. Rep. 659; 8 N. Y. Cr. 234; 61 Hun, 577; 15 N. Y. Supp. 439, was reversed in 45 St. Rep. 248; 8 N. Y. Cr. 378.

This section authorizes persons to demand an increase of wages, or provides that it shall not be unlawful to do so. *Reynolds v. Everett*, 50 St. Rep. 897; 22 N. Y. Supp. 313; 67 Hun, 304. It also provides that it shall not be a violation of law to assemble and use all lawful means to induce employers to pay such wages to all persons employed by them as shall be a just and fair compensation for services rendered. *Id.* But the standard is not laid down in the section to determine what shall be "a just and fair compensation for services rendered," or to be rendered. *Id.*

**§ 675a. Unlawful removal of poor person.**—Any person who shall send, remove or entice to remove, or bring, or cause to be sent, removed or brought, any poor or indigent person, from any city, town or county, to any other city, town or county without legal authority, and there leave such person for the purpose of avoiding the charge of such poor or indigent person upon the city, town or county, from which he is so sent, removed or brought or enticed to remove, shall be guilty of a misdemeanor, and on conviction, shall be imprisoned not exceeding six months, or fined not exceeding one hundred dollars, or both.

Added by chap. 550 of 1896. In effect Sept. 1, 1896.

**§ 676. Acts committed out of the state.**—A person who commits an act without this state which affects persons or property within this state, or the public health, morals or decency

a state, and which, if committed within this state, would be a crime, is punishable as if the act were committed within this state. section, 16, *ante*; section 698, *post*.

## TITLE XVIII

### GENERAL PROVISIONS.

- § 677.** When crimes punishable in different ways.
- 678.** Acts punishable under foreign law.
- 679.** Foreign conviction or acquittal.
- 680.** Contempt, how punished.
- 681.** Mitigation of punishment in certain cases.
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- 684.** Omission to perform duty.
- 685, 686.** Attempts to commit crimes.
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- 696.** Convict, when sentenced for life.
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- 700.** Sentences of certain males to state reformatory.
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- 706.** Limit of fine.
- 707.** Forfeiture.
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- 719, 720.** Application of this Code to prior offenses.
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- 722.** Civil remedies, preserved.
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- 725.** Certain statutes continuing in force.
- 726.** General repeal.
- 727.** When act do take effect.
- 728.** Proviso as to amendatory and repealing statutes.

**§ 677. When crimes punishable in different ways.**—An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision.

**Single transaction.**—There may be more crimes than one in a single transaction. *People v. Church*, 1 How., N. S., 366. Where an illegal act offends against two or more statutes, a prosecution under any one of them is proper. *Id.*

**Bar.**—No person can be punished twice for the same offense. *People ex rel. McDonald v. Keeler*, 99 N. Y. Cr., 354

Under the former excise law of 1857, it was held, *it seems*, that a person guilty of a sale on Sunday, if he had no license, would be liable to indictment under either section 13 or 21 of such act; but that a conviction under one would bar a prosecution for the same sale under the other section. *People v. Krank*, 18 St. Rep., 418; 110 N. Y., 492; rev'g 12 St. Rep., 845; 46 Hun, 682.

See *People v. Christy*, 47 St. Rep., 926; 65 Hun, 352; 20 N. Y. Supp., 279.

**§ 678. Acts punishable under foreign law.**—An act or omission declared punishable by this Code, is not less so because it is also punishable under the laws of another state, government or country, unless the contrary is expressly declared in this Code.

See section 676, *ante*.

**§ 679. Foreign conviction or acquittal.**—Whenever it appears upon the trial of an indictment, that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state, or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

See section 139 of Code of Criminal Procedure.

**§ 680. Contempt, how punishable.**—A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court.

See section 143, *ante*.

The case of *Matter of McDonald*, 2 N. Y. Cr., 82, was reversed in *People ex rel. McDonald v. Keeler*, *id.*, 141. This case was, itself, reversed by the court of appeals in 99 N. Y., 474; 8 N. Y. Cr., 348.

See *People ex rel. McDonald v. Keeler*, 99 N. Y., 475; 8 N. Y. Cr., 354.

**§ 681. Mitigation of punishment in certain cases.**—Where it appears, at the time of passing sentence on a person convicted that he has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order adjudging it a contempt, the court, passing sentence, may mitigate the punishment to be imposed, in its discretion.

See section 143, *ante*.

See *People ex rel. McDonald v. Keeler*, 99 N. Y., 475; 8 N. Y. Cr., 354.

**§ 682. Rule for punishment of accessory.**—When an act or omission is declared by statute to be a misdemeanor, and no punishment for aiding or abetting in the doing thereof is expressly prescribed, every person who aids, or abets another in such act or omission is also guilty of a misdemeanor.

See section 31, *ante*.

**Agents.**—Agents acting for principals are liable for crimes committed personally by them or in whose commission they aided or abetted. *People v. Clark*, 8 N. Y. Cr., 201; 14 N. Y. Supp., 649.

**Abettors.**—Every person who aids and abets another in an act or omission which as to the latter amounts to a misdemeanor, is also guilty of a misdemeanor as a principal and may be indicted and punished as such. *Id.*

a person is guilty of a misdemeanor—not a different misdemeanor only. *Id.*

By a statute declaring an act or omission to be a misdemeanor without mention of aiders and abettors in the doing thereof, every person who aids and abets another in such an act or omission, is also guilty of a misdemeanor as a principal, and may be indicted and punished as a principal. *Id.*

**3. Sending letter, when deemed complete.**—In the various sections in which the sending of a letter is made criminal by this Code, the letter is deemed complete from the time when such letter is deposited in the post-office or other place, or delivered to any person, with intent that it be forwarded. And the party may be indicted and tried in any place wherein such letter is so deposited or delivered, or in which it is received by the person to whom it is addressed.

Sections 235, 558 and 559, *ante*.

**4. Omission to perform duty.**—No person is punishable for an omission to perform an act, where such act has been performed by another person acting in his behalf, and competent by law to perform it.

Sections 117 and 154, *ante*.

**5. Attempts to commit crimes.**—A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the defendant and directs the defendant to be tried for the crime itself.

Sections 34 and 35, *ante*.

**Application.**—This section seems to be applicable only to a trial upon indictment for an attempt to commit a crime, and not to a trial upon indictment for the crime itself. *People v. Dartmore*, 15 St. Rep. 838; 1 N. Y. Cr. 323; 2 N. Y. Supp. 311.

Section 400 of Code of Criminal Procedure seems to have been enacted in view to the provisions of this section. *Id.*

**Suicide.**—An attempt to commit suicide cannot come within the provisions of this section. *Darrow v. Family Fund Society*, 27 St. Rep. 476; 1 N. Y. Cr. 543; *aff'd* 3 St. Rep. 745; 42 Hun, 427.

*People v. O'Connell*, 38 St. Rep. 108; 60 Hun, 113; 14 N. Y. Supp. 485.

**6. Attempts to commit crimes.**—A person who unsuccessfully attempts to commit a crime is indictable and punishable, unless otherwise specially prescribed by statute, as follows:

If the crime attempted is punishable by the death of the offender, or imprisonment for life, the person convicted of the attempt is punishable by imprisonment, for not more than twenty-five years.

In any other case, he is punishable by imprisonment for not more than one-half of the longest term, or by a fine not more than one-half of the sum prescribed upon conviction for the commission of the offense attempted, or by both such fine and imprisonment.

Added by chap. 116, Laws 1902. To take effect September 1, 1902.

Notes under preceding section.

A person who unsuccessfully attempts to commit a crime is made punishable by this section. *People v. Moran*, 33 St. Rep. 398; 123 N. Y. Cr. 106; *rev'd* 27 St. Rep. 20; 54 Hun, 279; 7 N. Y. Cr. 336.

*Darrow v. Family F. Soc.* 27 St. Rep. 477; 116 N. Y. 537; *aff'd* 3 St. Rep. 45; 42 Hun, 247. *People v. Phelps*, 39 St. Rep. 599; 15 N. Y. Supp. 11 Hun, 117; *People v. Johnson*, 16 St. Rep. 846; 110 N. Y. 141; 3 St. Rep. 48; 46 Hun, 670; *People v. O'Connell*, 38 St. Rep. 108; 14 N. Y. Supp. 485; 60 Hun, 113.

**7.—Restrictions upon preceding sections.**—The last section is added to protect a person who in attempting unsuccessfully to commit a crime accomplishes the commission of another and different crime, whether more or less in guilt, from suffering the punishment prescribed by law for the crime committed.



**§ 687a.** A person never before convicted of a crime punishable by imprisonment in the state prison, who is convicted in any court in this state of a felony, the maximum penalty for which, exclusive of fines, is imprisonment for five years or less, and sentenced to a state prison, shall be sentenced thereto under an indeterminate sentence, the minimum of which shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum, and the maximum of which shall not be more than the longest period fixed by law for which the crime is punishable of which the offender is convicted. The maximum limit of such sentence shall be so fixed as to comply with the provisions of section six hundred and ninety-seven of the penal code. In any other case whenever any person, never before convicted of a felony, shall be convicted of a felony, other than murder or arson, the maximum penalty for which, exclusive of fines, exceeds five years' imprisonment in a state prison, the court may either pronounce a definite sentence for a fixed term as provided by law, or may in its discretion impose upon such person a sentence of imprisonment therein for an indeterminate term the minimum of which shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum, and the maximum of which shall not be more than the longest period fixed by law for which the crime is punishable of which the offender is convicted. The maximum limit of such sentence shall be so fixed as to comply with the provisions of section six hundred and ninety-seven of the penal code.

Added by ch. 425, Laws 1901, and am'd by ch. 282, Laws 1902. T. effect April 18, 1902.

**§ 688. Second offense.**—A person, who, after having been convicted within this state, of a felony, or an attempt to commit a felony, or petty larceny, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any crime, within this state, is punishable upon conviction of a second offense, as follows:

1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment in a state prison for life;

2. If the subsequent crime is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than natural life, then such person must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term prescribed upon a first conviction.

**Revised statutes.**—As to provisions under Revised Statutes see *People v. Caesar*, 1 Park 645; *Gibsen v. People*, 5 Hun, 542.

**Design.**—The design of this section evidently was to punish severely a second felony, and to declare absolutely the punishment by abrogating the discretion as to the term which might otherwise be designated. *People v. Raymond*, 32 Hun, 126; 2 N. Y. Cr. 300; 19 W. Dig. 137; *aff'd* N. Y. 38.

The provision, requiring such allegation, is, in the interest of the public, to prevent criminals guilty of a second offense from escaping the full measure of punishment imposed by statute. *People v. Cook*, 9 St. Rep. 445 Hun, 37.

This and the following section provide for additional burdens upon offenders, and are not affected by the provision of section 714, *post*, permitting persons convicted of any crime to be competent witnesses in any civil or criminal cause. *People v. Bosworth*, 45 St. Rep. 517; 64 Hun, 80; N. Y. Supp. 118.

**Application.**—This section applies to cases where the first offense was committed before the Penal Code went into effect. *People v. Raymond*, 96 N. Y. 38. It is not limited in its application by the provision of section 719, *post*. *Id.*

This section is not limited to cases where the second conviction is for an offense of the same character and grade as that which resulted in the first conviction. *Id.*

The language of this section makes no reference to second offenses of the same character or grade with the first. *People v. Bosworth*, 45 St. Rep. 517; 64 Hun, 80; 19 N. Y. Supp. 118. It contains no such limitation and none was intended. *Id.*

The first offense is not made an element of, or included in, the second, but is simply a fact in the past history of the criminal to be taken into consideration in prescribing punishment therefor. *People v. Raymond*, 96 N. Y., 88; *People v. Bosworth*, *ante*.

If the second offense is such that, upon a first conviction of it, he might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment for life for such subsequent crime. *People v. Raymond*, 32 Hun, 125; 2 N. Y. Cr., 299; 19 W. Dig., 137; *aff'd*, 96 N. Y., 88. This section does not require the subsequent crime to be similar in degree to the first offense. *Id.*

**Discretion.**—Under the first subdivision of this section, the court has no discretion as to the sentence to be imposed, but it is bound to sentence the defendant to imprisonment for life. *People v. Raymond*, 32 Hun, 123; 2 N. Y. Cr., 295; 19 W. Dig., 137.

**Pardon.**—The fact of previous conviction is made descriptive of the renewed offense, irrespective of the fact of pardon. *People v. Price*, 24 St. Rep., 934; 53 Hun, 188; 6 N. Y. Supp., 835; *aff'd*, 119 N. Y., 650, without written opinion. See same case in 2 N. Y. Supp., 416.

**Another state.**—This section provides that a person who, after having been convicted, under the laws of any other state, of a crime which, if committed within this state, would be a felony, commits any crime within this state, is, on conviction, subject to additional punishment. *People v. Price*, 6 N. Y. Cr., 144.

The first offense, though the conviction was in another state, is properly alleged in the indictment for the second offense, and proved on the trial, and a pardon does not exempt him from the increased punishment prescribed by this section. *People v. Price*, 24 St. Rep., 936; 53 Hun, 189; 6 N. Y. Supp., 835; *aff'd*, 119 N. Y., 650, without written opinion.

**Indictment.**—A prior conviction, to be available in increasing punishment for a second offense, must be alleged in the indictment. *People v. Bosworth*, 45 St. Rep., 517; 64 Hun, 79; 19 N. Y. Supp., 118; *People v. Price*, 6 N. Y. Cr., 141; *People v. Young*, 1 Caines, 37.

It is to be deemed a first offense, unless the contrary is charged. *People v. Cook*, 9 St. Rep., 412; 45 Hun, 37.

This and the following section are valid. *People v. Bosworth*, 64 Hun, 80; 19 N. Y. Supp., 118; 45 St. Rep., 517. It is proper to allege, in the indictment, the evidence which will establish that the crime charged therein was a second offense, and to give proof thereof on the trial. *Id.* See *People v. Price*, 24 St. Rep., 936; 53 Hun, 185; 6 N. Y. Supp., 835; *aff'd*, 119 N. Y., 650, without written opinion.

The facts of the imprisonment upon the prior conviction, and the manner of the discharge must be alleged and proved. *Phelps v. People*, 72 N. Y., 355; *Wood v. People*, 53 *id.*, 511; *Gibson v. People*, 5 Hun, 542.

**Punishment.**—The punishment to be imposed under this section, upon any person, who has been convicted of a felony within the state, and thereafter is convicted of the commission of any crime therein, is stated in *People v. Raymond*, 32 Hun, 123; 2 N. Y. Cr., 295; 19 W. Dig., 137; *aff'd*, 96 N. Y., 88.

**§ 689. Second offense.**—A person who, having been convicted within this state of a misdemeanor, afterwards commits and is convicted of a felony, must be sentenced to imprisonment for the longest term prescribed for the punishment upon a first conviction for the felony.

See notes under last preceding section.

See notes under section 688, *ante*.

See chap. 306 of 1898, establishing a state prison for women.

See *People v. Bosworth*, 45 St. Rep., 517; 64 Hun, 80; 19 N. Y. Supp., 118.

**§ 690. Habitual criminals.**—Where a person is hereafter convicted of a felony, who has been, before that conviction, convicted in this state, of any other crime, or where a person is hereafter convicted of a misdemeanor who has been already five times convicted in this state of a misdemeanor, he may be adjudged by the court, in addition to any other punishment inflicted upon him, to be an habitual criminal.

See section 510 of Code of Criminal Procedure.

The act of 1890, called "the habitual criminal act," is not unconstitutional. *People v. McCarthy*, 45 How., 97.

**§ 691. Person, etc., of habitual criminal.**—The person of an habitual criminal shall be at all times subject to the supervision of every judicial magistrate of the county, and of the supervisors and overseers of the poor of the town where the criminal may be found, to the same extent that a minor is subject to the control of his parent or guardian.

See section 514 of Code of Criminal Code.

**§ 692. Effect of pardon.**—The governor may grant a pardon which shall relieve from judgment of habitual criminality as from any other sentence; but upon a subsequent conviction for felony of a person so pardoned, a judgment of habitual criminality may be again pronounced on account of the first conviction, notwithstanding such pardon.

This section is obviously inserted, because needed with respect to habitual criminals, but not needed in the cases mentioned in section 688, *ante*, because there the fact of previous conviction is made descriptive of the renewed offense, irrespective of the fact of pardon. *People v. Price*, 24 St. Rep., 936; 53 Hun, 188; 6 N. Y. Supp., 835; *aff'd* 119 N. Y., 650, without written opinion.

**§ 693. Women concealing birth of issue.**—A woman, who, having been convicted of endeavoring to conceal the still birth of any issue of her body, which, if born alive, would be a bastard, or the death of any such issue under the age of two years, subsequently to such conviction endeavors to conceal any such birth or death, is punishable by imprisonment in a state prison not exceeding five years, and not less than two years.

See section 297, *ante*; section 698, *post*.

**§ 694. Imprisonment on two or more convictions.**—Where a person is convicted of two or more offenses, before sentence has been pronounced upon him for either offense, the imprisonment, to which he is sentenced upon the second or other subsequent conviction, must commence at the termination of the first or other prior term or terms of imprisonment, to which he is sentenced.

This section embodies section 11 of 2 R. S., 700. The former statute was held, in *People ex rel. Tweed v. Liscomb*, 60 N. Y., 559, to apply only to separate convictions upon distinct trials, and not to convictions upon the same trial of several offenses joined in one indictment.

**§ 695. Imprisonment on two or more convictions.—**

Where a person, under sentence for a felony, afterwards commits any other felony, and is thereof convicted and sentenced to another term of imprisonment, the latter term shall not begin until the expiration of all the terms of imprisonment, to which he is already sentenced.

Where the defendant, at the time of his conviction for murder, was under sentence for a term of imprisonment, part of which was then unexpired, it was held, in *Thomas v. People*, 67 N. Y., 218, that this did not prevent his being sentenced to be hanged before the expiration of such term.

See *Haggerty v. People*, 6 Lans., 347; *aff'd*, 53 N. Y., 642, without written opinion.

**§ 696. Convict, when sentenced for life.—**When a crime is declared by statute to be punishable by imprisonment for not less than a specified number of years, and no limit of the duration of the imprisonment is declared, the court authorized to pronounce judgment upon conviction may, in its discretion, sentence the offender to imprisonment during his natural life, or for any number of years not less than the amount prescribed.

When a crime is declared by any of the provisions of this Code to be punishable by imprisonment for not more than a specified number of years, the court authorized to pronounce judgment upon conviction may, in its discretion, sentence the offender to imprisonment for any time less than that prescribed by the provisions of this act.

*Am'd by chap. 662 of 1892.*

This amendment added the last provision of the present section.

**§ 697. Sentences of conviction, how limited.—**When a convict is to be sentenced to imprisonment in a state prison or a penitentiary, the court before which the conviction was had must limit the term of the sentence, having reference to the probability of the the convict earning a reduction of his term for good behaviour, as provided by chapter twenty-one of the laws of eighteen hundred and eighty-six, and assuming that such reduction will be earned, so that the sentence will expire during either of the following months: April, May, June, July, August, September and October.

But the provisions of this section shall not apply in the following cases:

1. Where the sentence is to be for the term of one year or less.
2. Where the term of imprisonment for the crime of which the convict was convicted absolutely fixes a single definite period of time.
3. Where a judgment of conviction has been affirmed upon an appeal, and it becomes necessary for the court to impose the same sentence as that originally imposed. The officers of every prison or penitentiary are hereby expressly prohibited from taking into

their custody any convict sentenced in violation of the provisions of this section, and any convict so illegally sentenced shall be returned by the sheriff of the county where the conviction was had to the court to be re-sentenced in conformity to the provisions of this section. Provided that if it shall appear to the officers of any prison or penitentiary at the time it is sought to incarcerate a convict therein that the court which imposed the sentence has adjourned, then it shall be lawful for said officers to receive said convict and hold him in their custody until he can be re-sentenced as herein provided, and the second or re-sentence shall be deemed to have begun on the date of the convict's reception under his first sentence. The officers of any prison or penitentiary shall, in the case of a convict so illegally sentenced to imprisonment therein, immediately notify the court of their action.

Am'd by chap. 68 of 1886.

This amendment inserted, after the word "sentence" in the original section, the words "having reference to the probability of the convict earning a reduction of his or her term for good behavior, as provided by statute, and assuming that such reduction will be earned."

Am'd by chap. 492 of 1888.

This amendment substituted for the words "between the month of March and the month of November," the words "during either of the following months: April, May, June, July, August, September and October," and the balance of the present section in place of the words, "unless the exact period of the sentence is fixed by law."

See section 74, chap. 382 of 1889.

A court, which has pronounced a sentence in violation of this section, in that it does not expire between the months of March and November, has power to correct the sentence on its own motion and at the same term. *People v. Trimble*, 38 St. Rep., 999; 60 Hun, 367; 15 N. Y. Supp., 61.

A person convicted of crime may be resentenced so that the termination of his sentence may be at the season required by this section, where the original sentence did not so provide. *People v. Davis*, 46 St. Rep., 215; 19 N. Y. Supp., 783. In such case, his rights are not prejudiced because his counsel is absent at the time. *Id.*

**§ 698. Imprisonment of female convict.**—Any woman over the age of sixteen years, who shall be convicted of a felony in any of the courts of this state, shall, when the sentence imposed is one year or more, be sentenced to imprisonment in the state prison for women at Auburn. When the sentence imposed is less than one year, she may be committed to the county jail of the county where convicted, or to a penitentiary, or to the state prison for women at Auburn. A woman between the ages of fifteen and thirty, convicted of a felony, who has not theretofore been convicted of a crime punishable by imprisonment in a state prison, may in the discretion of the trial court be sentenced to a house of refuge or reformatory for women, to be there confined under the provisions of law relating to such house of refuge or reformatory.

Am'd by ch. 114 of 1900. In effect Sept. 1, 1900.

Amended by chap. 374 of 1896. In effect April 22, 1896.

See section 693, *ante*.

See chap. 306 of 1893, establishing a state prison for women.

**§ 699. Imprisonment of minors.**—Where a male person between the ages of sixteen and twenty-one years is convicted of a felony, or where the term of imprisonment of a male convict for a felony is fixed by the trial court at one year or less, the court may direct the convict to be imprisoned in a county penitentiary, instead of a state prison, or in the county jail located in the county where sentence is imposed. The commission by a child under the age of sixteen years, of a crime, not capital or punishable by life imprisonment, which if committed by an adult would be a felony, renders such child guilty of a misdemeanor only, but any other person con-



cerned therein, whether as principal or accessory, shall be punishable in the same manner as if such child were not also concerned therein.

Am'd by chap. 655, Laws of 1905. Takes effect Sept. 1, 1905.

Am'd, chap. 103, Laws 1902. Took effect March 6, 1902.

**§ 700. Sentences of certain males to state reformatory.**—A male between the ages of sixteen and thirty, convicted of felony, who has not theretofore been convicted of a crime punishable by imprisonment in a state prison, may, in the discretion of the trial court be sentenced to imprisonment in the New York State Reformatory at Elmira, to be there confined under the provisions of law relating to that reformatory.

Am'd by chap. 145 of 1898.

This amendment inserted, after the word "crime," in the original section, the words "punishable by imprisonment in a state prison."

**Constitutional.**—This section, *it seems*, is constitutional. *People ex rel. Duntz v. Coon*, 51 St. Rep. 344; 23 N. Y. Supp., 870; 67 Hun, 525.

**Operation.**—Under this section, a person twenty-nine years old may be sent to the reformatory and perhaps be discharged within a year. *Id.*

**§ 701. House of Refuge, State Industrial School, and New York State Training School for Girls.**—Where a male person under the age of twelve years is convicted of a crime amounting to felony, or where a male person of twelve years and under the age of sixteen years is convicted of a crime, the trial court may, instead of sentencing him to imprisonment in a state prison or in a penitentiary, direct him to be confined in a house of refuge under the provisions of the statute relating thereto. Where the conviction is had and the sentence is inflicted in the first, second or third judicial district, the place of confinement must be a house of refuge established by the managers of the society for the reformation of juvenile delinquents in the city of New York. Where the conviction is had and the sentence inflicted in any other district, the place of confinement must be in the state industrial school. Where a female person not over the age of twelve years is convicted of a crime amounting to felony, or where a female person of the age of twelve years and not over the age of sixteen years is convicted of a crime, the trial court may, instead of sentencing her to imprisonment in a state prison or a penitentiary, direct her to be confined in the New York State Training School for Girls, under the provisions of the statute relating thereto. But nothing in this section shall affect any of the provisions contained in section seven hundred and thirteen.

Amended Laws 1904, chap. 388. In effect June 1, 1904.

**Object.**—This provision, in the humanity which the law extends to persons of immature years, was intended after conviction had been had, and the liability of imprisonment in the state prison incurred, to interpose and ameliorate, upon its being ascertained, upon examination, that the prisoner was under sixteen years of age, the punishment by incarceration in an institution reformatory in its character, but not entirely to relieve the party of the disabilities which a conviction of the crime inflicted. *Park v. People*, 1 Lans., 267. So, a prisoner under sixteen years of age, convicted of burglary in the third degree, and sentenced, after conviction, to the house of refuge, was held to be disqualified, until pardoned, from testifying as a witness, prior to the Code. *Id.*

**Discretion.**—The power conferred is a discretionary one, to be exercised as the judgment of the court may dictate, and as the circumstances of the case, in view of the statute, seem to dictate. *Id.*

**Commitment.**—In *People v. Degnen*, 6 Abb. N. S., 87; 54 Barb., 105, it was held that it was not necessary that a commitment of a juvenile offender to the house of refuge in the city of New York, should specify the period of imprisonment, as it was fixed by the statute.

**Repeal.**—Section 5, chap. 172 of 1865, is not inconsistent with any of the provisions of the Criminal or the Penal Code, and it is not repealed thereby. *Matter of Riley*, 18 W. Dig., 515; 31 Hun, 613.

**§ 702. Imprisonment in county jail.**—Where a person is convicted of a crime, for which the punishment inflicted is im-



prisonment for a term less than one year, the imprisonment must be inflicted by confinement in the county jail, or place of confinement designated by law to be used as the jail of the county, except when otherwise specially prescribed by statute.

The imprisonment for libel must be inflicted by confinement in a county jail or penitentiary, and not in a state prison. *People v. Parr*, 4 N. Y. Cr., 546.

See *People v. Hughes*, 50 St. Rep., 64.

**§ 703. Imprisonment in county jail or state prison.**—Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term of one year, he may be sentenced to, and the imprisonment may be inflicted by, confinement either in a county jail, or in a penitentiary or state prison. No person shall be sentenced to imprisonment in a state prison for less than one year.

See preceding section.

See chap. 114 of 1893, amending chap. 574 of 1869, authorizing the imprisonment of convicts in the penitentiaries of Syracuse and Albany.

The distinction between this section and section 222, *ante*, defined. *People ex rel. Devoe v. Kelly*, 2 N. Y. Cr., 432; 32 Hun, 536.

See *People v. Hughes*, 50 St. Rep., 64.

**§ 704. Imprisonment in state prison.**—Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term exceeding one year, or is sentenced to imprisonment for such a term, the imprisonment must be inflicted by confinement at hard labor in a state prison. But this and the two last sections shall not apply to a case where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders, nor to the cases specified in sections six hundred and ninety-eight, six hundred and ninety-nine, seven hundred and seven hundred and one.

See *People v. Hughes*, 50 St. Rep., 64; *People v. Dewey*, 33 St. Rep., 427; 11 N. Y. Supp., 603.

**§ 705. Place to be specified in sentence; removal.**—The place of the imprisonment must be specified in the judgment and sentence of the court. But convicts may be removed from one place of confinement to another, in a case, and by the authority designated by statute.

It was held, under the Revised Statutes, that the omission to state, in the sentence, in what prison the prisoner was to be confined was not error. *Weed v. People*, 31 N. Y., 465. The law determined the prison and the court had no authority to incarcerate the prisoner in any other. *Id.*

**§ 706. Limit of fine.**—Where, in this Code, or in any other statute making any crime punishable by a fine, the amount of the fine is not specified, a fine of not more than five hundred dollars may be imposed.

See section 14, *ante*.

**§ 707. Forfeiture.**—A sentence of imprisonment in a state prison for any term less than for life, forfeits all the public offices, and suspends, during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by, the person sentenced.

See notes under section 42, *ante*.

**Re enactment.**—This section is a substantial re-enactment of the provisions contained in section 19 of 2 R. S., 701. *Bowles v. Habermann*, 95 N. Y., 247.

The provisions of this section are merely declaratory of the common law. *Avery v. Everett*, 18 St. Rep., 213; 110 N. Y., 317; *La Chappelle v. Burpee*, 52 St. Rep., 703; 23 N. Y. Supp., 455.

**Application.**—The provision of this section does not apply to a sentence of imprisonment in a county penitentiary. *Bowles v. Habermann*, *ante*.

This is a highly penal statute, which imposes forfeitures upon a person thus sentenced and suspends his civil rights. *Id.* It should not be extended by implication or construction, but be enforced just as the legislature has enacted it. *Id.*

**Suspension.**—This section contains a general provision that a sentence to a state prison for any term less than life forfeits all the public offices held by the person sentenced. *People v. Meakim*, 44 St. Rep., 751; 8 N. Y. Cr., 410; 133 N. Y., 221; *aff'g* 61 Hun, 327; 40 St. Rep., 686.

The suspension of civil rights, which the statute declares to be the effect of a sentence to state prison, does not give him any immunity from actions, nor suspend the rights of others. *Davis v. Duffie*, 4 Abb. N. S., 478.

As to the rights of a person sentenced under this section, see *Bowles v. Habermann*, 95 N. Y., 246.

One under sentence for imprisonment for life, though civilly dead, may take by grant or devise, or transfer his property by will or deed. *Avery v. Everett*, 18 St. Rep., 213; 110 N. Y., 378; *La Chapelle v. Burpee*, 52 St. Rep., 703; 33 N. Y. Supp., 455. And it was held, in the last cited case, that one imprisoned for a term of years may also take or convey by grant or devise. So he may accept a devise of an estate on condition. *Id.*

**§ 708. Consequence of sentence.**—A person sentenced to imprisonment for life is thereafter deemed civilly dead.

See notes under section 42, *ante*.

The provision of section 20 of 2 R. S., 701, was re-enacted in this section of the Code. *Avery v. Everett*, 18 St. Rep., 213; 110 N. Y., 323; *aff'g* 36 Hun, 6. Such provision was declaratory of and restored the rule of the common law. *Id.* By the general rule of the common law, civil death did not operate as a divestiture of the estate of the convicted person. *Id.*

The provisions of this section and of the following two sections certainly leave a convicted felon some rights of person and property which may be defended and protected. *Bowles v. Habermann*, 95 N. Y., 249.

See *People v. Meakim*, 133 N. Y., 221; 44 St. Rep., 751; 8 N. Y. Cr., 410; *aff'g* 61 Hun, 327; 40 St. Rep., 686.

**§ 709. Convict protected by law.**—A convict sentenced to imprisonment is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he were not sentenced or convicted.

See *Bowles v. Habermann*, 95 N. Y., 249.

**§ 710. Certain forfeiture abolished.**—A conviction of a person for any crime does not work a forfeiture of any property, real or personal, or of any right or interest therein. All forfeit-

ures to the people of the state, in the nature of deodands, or in a case of suicide, or where a person flees from justice, are abolished.

See section 173, *ante*.

See section 819 of Code of Criminal Procedure.

See *Bowles v. Habermann*, 95 N. Y., 249.

**§ 711. Convict voting.**—The prohibition to vote at an election, contained in any statute of the state, shall not apply to a person heretofore or hereafter convicted of any crime, who has been sentenced or committed therefor to one of the houses of refuge, or other reformatories organized under the statutes of the state.

Under this section, a right to vote at any election, after arriving at age, is not taken away. *People v. Harrington*, 3 N. Y., Cr., 141; 1 How. N. S., 37; 15 Abb. N. C., 163.

**§ 712. Witnesses' testimony.**—The sections of this Code which declare that evidence obtained upon the examination of a person as a witness shall not be received against him in a criminal proceeding, do not forbid such evidence being proved against such person upon any charge of perjury committed in such examination.

See sections 79, 142, 241, 342 and 469, *ante*.

By this section, the provisions of section 79, *ante*, are so modified as not to forbid such evidence from being proved against the witness upon any charge of perjury committed on such examination. *People v. Sharp*, 12 St. Rep., 217; 107 N. Y., 489; 5 N. Y. Cr., 572.

**§ 713. Disposition to be made of persons under sixteen convicted of crime.**—When a person under the age of sixteen is convicted of a crime, he may, in the discretion of the court, instead of being sentenced to fine or imprisonment, be placed in charge of any suitable person or institution willing to receive him, and be thereafter, until majority or for a shorter term, subjected to such discipline and control of the person or institution receiving him as a parent or guardian may lawfully exercise over a minor. A child under sixteen years of age committed for misdemeanor, under any provision of this Code, must be committed to some reformatory, charitable or other institution authorized by law to receive and take charge of minors. And when any such child is committed to an institution, it shall, when practicable, be committed to an institution governed by persons of the same religious faith as the parents of such child.

Am'd by chap. 46 of 1884.

This amendment changed the age from "twelve" to "sixteen," substituted "crime" for "misdemeanor," inserted twice after the word person the words, "or institution," and added the last two sentences of the present section.

This section is imperative. *People ex rel. Mt. Magdalen School v. Dickson*, 82 St. Rep., 496; 57 Hun, 314; 10 N. Y. Supp., 605; aff'd, 123 N. Y., 639, without written opinion.

**§ 714. Convict as witness.**—A person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness, in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question.

See section 893 of Code of Criminal Procedure.

See section 833 of Code of Civil Procedure.

**Effect of section.**—This section does not affect the provisions of sections 668 and 689, *ante*. *People v. Bosworth*, 46 St. Rep., 517; 64 Hun, 80; 19 N. Y. Supp., 118.

The effect of this section and section 832 of the Code of Civil Procedure is to repeal by implication the provisions of section 43, title 7 of 8 Revised Statutes. *People v. McGloin*, 91 N. Y., 241; 1 N. Y. Cr., 161; 12 Abb. N. C., 172; affg. 1 N. Y. Cr., 112; 28 Hun, 155.

The design and effect of this section are to establish a uniform rule in regard to the testimony of convicts, and to permit the conviction for any crime to be proved. *People v. Burns*, 33 Hun, 300; 2 N. Y. Cr., 425. Whether it should affect the credibility of the witness is a question for the jury. *Id.*

This section seems to have reversed the law as previously existing. *People v. O'Neill*, 10 St. Rep., 1; 5 N. Y. Cr., 331.

A person is not rendered incompetent as a witness by reason of a conviction for any crime whatever. *People v. Parr*, 4 N. Y. Cr., 546.

Since the enactment of this section and section 832 of the Code of Civil Procedure, a new rule obtains, and the rule and policy of the law are to allow all testimony to go to, and be weighed by, the jury. *People v. Chapleau*, 30 St. Rep., 994; 121 N. Y., 276.

This provision makes it competent for a witness, though having been previously convicted of perjury, to go upon the stand and testify. *People v. O'Neill*, 10 St. Rep., 1; 5 N. Y. Cr., 332. Such evidence goes to the jury. *Id.*

No conviction for crime, not excepting perjury, disqualifies a witness. *People v. O'Neill*, 14 St. Rep., 829; 109 N. Y., 266; 6 N. Y. Cr., 55. An unconvicted perjurer is not an incompetent witness, whose testimony cannot be considered by the jury. *Id.*

The question what crimes were infamous used to be important, principally because a conviction for any of such crimes excluded the convicted person from being a witness. But that rule was abrogated by this section. *People v. Parr*, 42 Hun, 316.

The testimony of a witness, either before or after conviction for perjury, must be received and weighed by the jury. *People v. Chapleau*, 121 N. Y., 276; 30 St. Rep., 994.

**Credibility.**—It is proper to ask a witness if he has been convicted of a crime. *People v. Rose*, 22 St. Rep., 393; 52 Hun, 37; 4 N. Y. Supp., 789; *People v. Noelke*, 94 N. Y., 137; 1 N. Y. Cr., 500; but not to ask him if he has been arrested. *Id.*; *People v. Irving*, 95 N. Y., 541; *People v. Crapo*, 76 *id.*, 288; *People v. Brown*, 72 *id.*, 571. See, further, *People v. Kelly*, 35 Hun, 304; 3 N. Y. Cr., 35; *People v. Schewe*, 29 Hun, 124; *People v. Hoovey*, *id.*, 390.

Proof of a conviction by cross-examination is authorized by this section. *People v. Noelke*, 94 N. Y., 137; 1 N. Y. Cr., 500.

For the purpose of discrediting a witness who has given material testimony in favor of the party calling him, the opposite side may, on cross-examination, show that the witness has been convicted of a crime, and of what crime, and the witness may be compelled to answer. *Spiegel v. Hays*, 27 St. Rep., 858; 118 N. Y., 661; 2 Silv. (Ct. App.), 481.

See *Morenus v. Crawford*, 24 St. Rep., 184; 51 Hun, 96; 5 N. Y. Supp., 457.

**§ 715. Husband and wife as witnesses.**—The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage.

See sections 828 and 831 of Code of Civil Procedure.

See note in *Stowell v. Amer. Co-operative R. Ass'n*, 1 *Silv. (Sup. Ct.)*, 272.

**Former statute.**—Under section 2, chap. 182 of 1876, it was held that a wife could not, though willing so to do, be allowed to testify against her husband upon his trial for bigamy. *People v. Houghton*, 24 *Hun*, 501.

Under same statute, it was held, in *People v. Hovey*, 29 *Hun*, 390, that either might be compelled to be a witness, if the right conferred was exercised by the other, but that one could not be compelled to testify against the other at the call of a hostile party.

**Effect of section.**—The common law rule that husband and wife cannot be witnesses for or against each other has been modified by this section. *People v. Wood*, 36 *St. Rep.*, 966; 126 *N. Y.*, 271.

This section is aimed only at a compulsory disclosure by husband or wife. *People v. Petmecky*, 2 *N. Y. Cr.*, 459.

This section makes a husband and wife competent witnesses against each other, when either is on trial for a crime. *People v. Lewis*, 43 *St. Rep.*, 772; 16 *N. Y. Supp.*, 884. It merely declares that neither can be compelled to disclose a confidential communication made by one to the other during their marriage. *Id.*

A wife is a competent witness against her husband, with the exception that she cannot be compelled to disclose any confidential communications which have passed between them during their marriage. *People v. Petmecky*, 2 *N. Y. Cr.*, 452.

**Right of other party.**—This section does not leave the matter entirely to the discretion of the witness, but the other party interested may object to any such communication, and upon such objection being made, the witness not only cannot be compelled, but has no right to make the disclosure. *People v. Wood*, 36 *St. Rep.*, 966; 126 *N. Y.*, 271.

**Competent.**—The wife of an accomplice who is also under indictment, is a competent witness. *People v. Bosworth*, 45 *St. Rep.*, 517; 64 *Hun*, 82; 19 *N. Y. Supp.*, 119.

Letters written by defendant to his wife and delivered by her to the district attorney at his request without objection, under the belief that she was obliged so to do, though she did not wish to deliver them, are admissible against defendant and do not come within the prohibition of this section. *People v. Petmecky*, 2 *N. Y. Cr.*, 459.

See *People v. Wentworth*, 4 *N. Y. Cr.*, 210.

**§ 716. Creditor of convict.**—A person injured by the commission of a felony, for which the offender is sentenced to imprisonment in a state prison, is deemed the creditor of the offender, and of his estate after his death, within the provisions of the statutes relating thereto.

**§ 717. Damages, how ascertained.**—In a case specified in the last section, the damages sustained by the person injured by the felonious act, may be ascertained in an action brought for that purpose by him against the trustees of the estate of the offender, appointed under the provisions of the statutes, or the executor or administrator of the offender's estate.

**. Proprietor or publisher of newspaper, mis-  
ation by.**—Every proprietor or publisher of any news-  
periodical who shall willfully or knowingly misrepresent  
ion of such newspaper or periodical for the purpose of  
vertising or other patronage shall be deemed guilty of  
inor.

was added by chap. 650 of 1893.

**Construction of terms.**—In construing this Code,  
tment or other pleading in a case provided for by this  
ollowing rules must be observed, except when a con.  
is plainly declared in the provision to be construed,  
apparent from the context thereof:

of the terms “neglect,” “negligence,” “negligent,”  
gently,” imports a want of such attention to the nature  
consequences of the act or omission, as a prudent man  
bestows in acting in his own concerns;

of the terms “corrupt” and “corruptly” imports a  
esire to acquire, or cause some pecuniary or other ad-  
or by the person guilty of the act or omission referred  
other person;

of the terms “malice” and “maliciously” imports an  
or wish or design to vex, annoy, or injure another per-  
naltreat or injure an animal;

erm “knowingly” imports a knowledge that the facts  
constitute the act or omission a crime, and does not  
nowledge of the unlawfulness of the act or omission;

an intent to defraud constitutes a part of a crime, it  
sary to aver or prove an intent to defraud any partic-

erm “vessel” includes ships, steamers, canal-boats, and  
or structure adapted to navigation, or movement from  
ice by water, either upon the ocean, lakes, rivers, or or\*  
ater ways;

erm “signature” includes any memorandum, mark, or  
n with intent to authenticate any instrument or writing,  
ription of any person thereto;

erm “writing” includes both printing and writing;

terms “reputed house of prostitution or assignation,”  
prostitution,” “house of ill-fame or assignation,” “dis-  
ise,” include all premises which by common fame or  
used for purposes of prostitution or assignation.

\* So in original.

chap. 884 of 1892.

lment was made before the Code went into effect.

chap. 31 of 1886.

lment added the present sixteenth subdivision to the section.



Subd. 9 was repealed by chap. 677 of 1892, and section 3 of said act substituted.

Subdivisions 10, 11 and 12, of this section were repealed by chap. 677 of 1892.

Subdivision 13 was repealed by chap. 677 of 1892, and section 5 of that act substituted.

Subdivision 14 was repealed by chap. 677 of 1892, and section 3 of such act substituted.

Subd. 15 was repealed by chap. 677 of 1892, and section 4 of that act substituted.

The case of *People v. Martin*, 2 N. Y. Cr., 52, was reversed in 3 N. Y. Cr., 122; 36 Hun, 462.

Subd. 13 of this section is referred to in *People v. Long Island R. R. Co.*, 47 St. Rep., 650; 134 N. Y., 509; aff'g, 34 St. Rep., 715; 58 Hun, 412.

Subd. 15 of this section was referred to in the following cases: *People v. Christy*, 47 St. Rep., 926; 8 N. Y. Cr., 480; *People v. Stevens*, 38 Hun, 65; 3 N. Y. Cr., 586.

The case of *People v. Barondess*, 41 St. Rep., 659; 8 N. Y. Cr., 234; 61 Hun, 574; 16 N. Y. Supp., 441, was reversed in 45 St. Rep., 248; 8 N. Y. Cr., 376.

The definitions of the terms, "willful" and "willfully," as originally contained in this section were omitted by the amendment made by chap. 384 of 1882. *Anderson v. How*, 26 St. Rep., 790; 116 N. Y., 841.

Subd 1.—*Moebus v. Hermann*, 13 St. Rep., 648; 108 N. Y., 353; *People v. Buddensieck*, 1 St. Rep., 436; 4 N. Y. Cr., 265.

Subd 3. By subd. 3 of this section, malice imports an evil intent, or wish or design to vex, annoy or injure some person. *People v. Stark*, 59 Hun, 57; 35 St. Rep., 154; 12 N. Y. Supp., 691. See *Anderson v. How*, 116 N. Y., 841; 26 St. Rep., 790.

See *People v. Camp*, 51 St. Rep., 34; 66 Hun, 535. 21 N. Y. Supp., 744.

Subd 5.—See section 721, *post*.

To constitute an offense under section 511, *ante*, an intent may, under subd. 5 of this section, be averred in general terms without alleging an intent to defraud any particular person. *People v. D'Argencour*, 32 Hun, 179; aff'd, 95 N. Y., 624; 2 N. Y. Cr., 267.

**Property.**—The term "personal property" includes chattels of every description. *People v. Christy*, 47 St. Rep., 926; 65 Hun, 351; 20 N. Y. Supp., 279.

The term "property" has been so defined by subdivisions 9, 14 and 15 of this section as to include the business itself and the loss resulting from its interruption. *People v. Barondess*, 45 St. Rep., 248; 8 N. Y. Cr., 376. See dissenting opinion of Justice Daniels, in 41 St. Rep., 669; 8 N. Y. Cr., 257, upon which the general term judgment was reversed by the court of appeals, without written opinion. Business is property, as much so as the articles themselves which are included in its transactions. *Id.* Since the decision of this case, these subdivisions have been repealed and sections 2, 3, and 4 of chap. 677 of 1892, substituted for them.

For the definition of the term "personal property," since the repeal of subd. 15 of this section in 1892, see section 4 of chap. 677 of 1892.

Subd 16.—*People v. Hatter*, 22 N. Y. Supp., 691.

*Collyer v. Collyer*, 21 St. Rep., 119, 50 Hun. 424; 3 N. Y. Supp., 311.

**§ 719. Application of this Code to prior offenses.**—Nothing contained in any provision of this Code applies to an offense committed or other act done, at any time before the day when this Code takes effect. Such an offense must be punished according to, and such act must be governed by, the provisions of law existing when it is done or committed, in the same manner as if this Code had not been passed; except that, whenever the punishment or penalty for an offense is mitigated by any provision of

this Code, such provision may be applied to any sentence or judgment imposed for the offense after this Code takes effect. An offense specified in this Code, committed after the beginning of the day when this Code takes effect, must be punished according to the provisions of this Code, and not otherwise.

See section 2, *ante*.

See section 962 of Code of Criminal Procedure.

The case of McDonald, 82 Hun, 589, note; 2 N. Y. Cr., 82, was reversed in People ex rel. McDonald, 32 Hun, 563; 2 N. Y. Cr., 141; but this general term decision was reversed by the court of appeals in 99 N. Y., 463; 3 N. Y. Cr., 548.

**Application.**—This section does not limit the application of the provisions of section 688, *ante*. People v. Raymond, 96 N. Y., 38.

**Punishment.**—An offense must be punished according to the law existing when it was done. People v. Dowling, 1 N. Y. Cr., 530.

See People ex rel. McDonald v. Keeler, 99 N. Y., 474; 3 N. Y. Cr., 354; People ex rel. Van Houten v. Sadler, 97 N. Y., 146; 8 N. Y. Cr., 147; People v. Jaehne, 3 St. Rep., 11; 103 N. Y., 189; 4 N. Y. Cr., 478; People v. Hollenbeck, 1 N. Y. Cr., 437, note; 65 How., 401; People v. McTameny, 1 N. Y. Cr., 442; 30 Hun, 505; 13 Abb. N. C., 56; 66 How., 70.

**§ 720. Application of this Code to prior offenses.**—The provisions of this Code are not to be deemed to affect any civil rights or remedies existing at the time when this Code takes effect, by virtue of the common law or of any provision of statute.

See Reynolds v. Everett, 50 St. Rep., 897; 22 N. Y. Supp., 313; 67 Hun, 304.

**§ 721. Intent to defraud.**—Whenever, by any of the provisions of this Code, an intent to defraud is required, in order to constitute an offense, it is sufficient if an intent appears to defraud any person, association or body politic or corporate, whatever.

See subd. 5 of section 718, *ante*.

**§ 722. Civil remedies preserved.**—The omission to specify or affirm in this Code any liability to any damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

**§ 723. Proceedings to impeach, etc., preserved.**—The omission to specify or affirm in this Code any ground or forfeiture of a public office or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose or suspend any public officer or other person holding any trust, appointment or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition or suspension.

See Collyer v. Collyer, 21 St. Rep., 119; 50 Hun, 424.

**§ 724. Military punishments, etc., preserved.** — This Code does not affect any power conferred by law upon any court-martial or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal or officers, to impose or inflict punishment for a contempt; nor any provisions of the laws relating to apprentices, bastards, disorderly persons, Indians and vagrants, except so far as any provisions therein are inconsistent with this Code.

**Legislature** — By virtue of the provisions of this section, the provision of the Revised Statutes, conferring upon either house of the legislature the power to punish, as for a contempt, a witness refusing to answer before it or before a committee in legislative proceedings, was not abrogated by the provisions of sections 69 and 719, *ante*. *People ex rel. McDonald v. Keeler*, 99 N. Y., 475; 8 N. Y. Cr., 348.

**Disorderly persons.** — By this section, it is declared that this Code shall not affect any of the provisions of law relating to disorderly persons not inconsistent therewith. *Matter of Riley*, 31 Hun, 613; 18 W. Dig., 515.

The provisions of law in relation to disorderly persons, except where inconsistent with this Code, are not affected by it. *Matter of McMahon*, 1 N. Y. Cr., 60; 64 How., 285.

**§ 725. Certain statutes continuing in force.** — Nothing in this Code affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of this Code; except so far as they have been repealed or affected by subsequent laws;

1. All acts incorporating municipal corporations, and acts amending acts of incorporation or charters of such corporation, or providing for the election or appointment of officers therein, or defining the powers and duties of such officers.

2. All acts relating to emigrants or other passengers in vessels coming from foreign countries, except as provided in section six hundred and twenty-six of this Code.

3. All acts for the punishment of intoxication or the suppression of intemperance or regulating the sale or disposition of intoxicating or spirituous liquors.

4. All acts defining and providing for the punishment of offenses and not defined and made punishable by this Code.

Am'd by chap. 384 of 1882.

This amendment was made before the Code went into effect.

The case of *People v. Moran*, 27 St. Rep., 20; 54 Hun, 279; 7 N. Y. Cr., 333, was reversed in 33 St. Rep., 398; 123 N. Y., 254; 8 N. Y. Cr., 106.

**Object.** — This section was not intended to preserve unimpaired all penal provisions in charter acts. *People v. Jaehne*, 3 St. Rep., 11; 103 N. Y., 198; 4 N. Y. Cr., 478. See 6 *id.*, 239. It saves only those penal provisions of charter acts, which are not covered by the provisions of the Penal Code. *Id.*

**Repeal.** — This and the following section do not repeal the provisions of section 9 of 3 Revised Statutes (7th Ed.), 1962. *Rockwood v. Oakfield*, 2 St. Rep., 335.

Nothing in the Penal or the Criminal Code can be effective to prevent a subsequent legislature from repealing a statute which these Codes sought to perpetuate. *People v. Page*, 22 St. Rep., 278; 7 N. Y. Cr., 7; 4 N. Y. Supp., 780.

The provisions of section 9 of 3 R. S. (7th Ed.), 1962, are not inconsistent with sections 336 and 340, *ante*, and are not repealed by this and the following section. *Rockwood v. Oakfield*, 2 St. Rep., 335.

See *People v. Rontey*, 21 St. Rep., 175; 6 N. Y. Cr., 249; 4 N. Y. Supp., 285; *aff'd*, 117 N. Y., 624, without written opinion; *Matter of McMahon*, 1 N. Y. Cr., 63; 64 How., 285; *People v. Bernardo*, 1 N. Y. Cr., 248.

**§ 726. General repeal.**—All acts and parts of acts which are inconsistent with the provisions of this act are repealed, so far as they impose any punishment for crime, except as herein provided.

See notes under preceding section.

**Express.**—This section contains the only express repealing provision in the Code. *People v. Jaehne*, 3 St. Rep., 11; 103 N. Y., 198; 4 N. Y. Cr., 478.

**Substitute.**—The enactments of the Code are intended as substitutes for those which previously existed. *People v. Hollenbeck*, 1 N. Y. Cr., 437, note; 65 How., 401.

**What acts repealed.**—This section repeals all acts, and parts of acts, which are inconsistent with the provisions of this Code. *Matter of McMahon*, 1 N. Y. Cr., 64; 64 How., 285.

It is only such acts and parts of acts as were inconsistent with the provisions of this Code that this section declares shall be repealed. *Matter of Riley*, 31 Hun, 613.

It is the obvious meaning of this section that punishments imposed by previous acts are to be repealed whenever they are inconsistent with the Code. *People v. Hollenbeck*, 1 N. Y. Cr., 437, note; 65 How., 401; *People v. McMarneny*, 1 N. Y. Cr., 442; 30 Hun, 505; 13 Abb. N. C., 56; 66 How., 70.

**Act of 1862.**—Section 3, chap. 374 of 1862, creating and defining the offense of an assault with intent to steal, has not been repealed by this Code. *People v. Bernardo*, 1 N. Y. Cr., 247.

**Act of 1872.**—Chap. 150 of 1872, authorizing the common council of the city of Kingston to suppress disorderly houses, was repealed by the Penal Code. *People v. Hatter*, 22 N. Y. Supp., 688.

See *People v. Rontey*, 21 St. Rep., 175; 6 N. Y. Cr., 249; 4 N. Y. Supp., 285; *aff'd*, 117 N. Y., 624; without written opinion; *People ex rel. McDonald v. Keeler*, 99 N. Y., 474; 3 N. Y. Cr., 354; *Rockwood v. Oakfield*, 2 St. Rep., 335.

**§ 727. When act to take effect.**—This act shall take effect on the first day of December, eighteen hundred and eighty-two. When construed in connection with other statutes, it must be deemed to have been enacted on the fourth day of January, eighteen hundred and eighty-one, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code.

*Am'd* by chap. 102 of 1882.

This amendment was made before the Code went into operation, and postponed the time of its taking effect to December 1, 1882.

The Penal Code, by its own direction, is to be deemed to have been enacted on the 4th of January, 1881, to take effect on the 1st of May, 1882. *People ex rel. Van Heck v. Catholic Protectory*, 38 Hun, 135. This decision was made before the amendment of 1882.

**Construction.**—This Code, when construed in connection with other statutes, must be deemed to have been enacted on the 4th day of January, 1881. *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr., 440.

See *People v. Beckwith*, 12 St. Rep., 795; 108 N. Y., 72; 7 N. Y. Cr., 162; *People ex rel. Laughlin v. Finn*, 26 Hun, 59.

**§ 728. Proviso as to amendatory and repealing statutes.**  
—No provision of this Code, or any part thereof, shall be deemed repealed, altered or amended by the passage of any subsequent statute inconsistent therewith, unless such statute shall explicitly refer thereto and directly repeal, alter or amend the Code accordingly.

This section was added by chap. 81 of 1886.

See sections 31 to 34, inclusive, of chap. 677 of 1892.

Chap. 33 of 1888 did not directly repeal, alter or amend the Penal Code. *People v. Hatter*, 22 N. Y. Supp., 690.

**§ 729. Producing unpublished undedicated or copyrighted opera, etc., without consent of owner.**—Any person who causes to be publicly performed or represented for profit any unpublished undedicated or copyrighted dramatic composition, or musical composition known as an opera, without the consent of its owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished undedicated or copyrighted and without the consent of its owner, or proprietor, permits, aids or takes part in such a performance or representation, shall be guilty of a misdemeanor.

Added by chap. 475 of 1899. In effect Sept. 1, 1899.







## APPENDIX TO Silvernail's Penal Code.

THE SECTIONS ARE INDICATED BY HEAVY FACE FIGURES.

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*Annotations of Decisions reported up to June 1, 1905, relating to the provisions of the Penal Code.*

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**2. Punishment.**—An offense committed, or other act done, at any time before the Code took effect, was punishable according to, and such act was governed by, the provisions of law existing when it was done or committed in the same manner as though the Code had not been passed. *People v. Madill* (Sup. Ct., 3 D., 1895), 71 S. R. 692.

**3. Consent.**—That no injury is done to the willing is a maxim of the criminal, as well as of the civil, law, if the one who consents is capable of consenting, and consents uninfluenced by fear, force or fraud. *People v. Gardner*, 57 St. Rep. 18; 73 Hun, 66; 25 N. Y. Supp. 1072. This rule is applicable, however, only to the alienable rights of the person consenting. *Id.* The consent of a person that another might take his life would be no justification of a homicide. *Id.*

Whether certain acts are, or are not, criminal, depends entirely on the fact whether the person, on or against whom they are perpetrated, consents to, and participates in those acts. *Id.* Such acts do not constitute a crime in case the assent of the person, against whom they are committed is freely given. *Id.*

The word "crime" is not used in the Criminal Code in a sense broad enough to include petty offenses subject to summary convictions by a magistrate. *Steinert v. Sobey*, 14 A. D. 505; 78 S. R. 146; 44 S. 146.

**Crime and punishment, several.**—At common law, every crime, so far as respects the guilt and punishment of the parties

engaged in its perpetration, is several. *People v. Girard*, 56 St. Rep. 47; 73 Hun, 457; 26 N. Y. Supp. 272; *Palmer v. Conley*, 4 Denio, 378. If two or more persons concur in the commission of an offense, each offender is liable to a several punishment. *Id.*

**Intoxication.**—The charge of intoxication in a public place is a misdemeanor, and a police justice sitting as a police court has jurisdiction. *People ex rel. Shortell v. Markell*, 12 N. Y. Cr. 312; 79 S. R. (45 S.) 904.

**Motive.**—Crime is never committed without a motive. *People v. Dailey*, 57 St. Rep. 10; 73 Hun, 16; 25 St. Rep. 1050. On the trial of a person charged with crime, it is always competent to give evidence showing the motive which induced the criminal act. *Id.* Where the crime is clearly proved, and the criminal positively identified, it is not important to prove motives. *Id.* But, where the case depends upon circumstantial evidence, and the circumstances point to any particular person as the criminal, the case is much fortified by proof that he had a motive to commit the crime. *Id.* Where the motive appears, the probabilities created by the other evidence are much strengthened. *Id.*

**Subsequent enactment.**—Even though there may be already a section or sections of the Penal Code which cover a subject, that does not render the further enactment of the legislature upon the same subject void. *People v. Cannon*; *People v. Quinn*; *People v. Bartholf*, 54 St. Rep. 431; 139 N. Y. 32; aff'g 43 St. Rep. 427, and rev'g 44 id. 820 and 49 id. 368.

4. 5. 6. A New York city magistrate has no jurisdiction to try a party accused of felony or misdemeanor as defined in these sections. *People ex rel. Smith v. Van De Carr*, 17 N. Y. Crim. Rep. 455; 86 App. Div. 9. See *People ex rel. Shortell v. Markell*, 20 Misc. 149; 79 S. R. 904; 45 S. 904.

5. **Police Justice of Rochester.**—Chap. 384 of 1887 and chap. 561 of 1890, conferring jurisdiction upon the police justice of Rochester to hear, try and determine all offenses as are now defined to be misdemeanors by this and the following section, are unconstitutional. *People v. Upson*, 61 St. Rep. 158; 79 Hun, 87; 29 Supp. 615.

6. **Hours of labor.**—The provision of sec. 504, chap. 105 of 1891, is not penal in its character, and cannot be made the basis for a criminal indictment of any person for a misdemeanor.

**People ex rel. Warren v. Beck**, 63 St. Rep. 96; 144 N. Y. 225; 39 N. E. 80; rev'g 62 St. Rep. 396; 10 Misc. 77; 30 Supp. 473.

**Misdemeanor.**—Any violation of the provisions of chap. 602 of 1892, as amended by chap. 66 of 1893, is made a misdemeanor. **People v. O'Connell** (Sup. Ct. 1 D., 1896), 93 Hun, 110.

**Intoxication.**—The offense of intoxication in a public place is a misdemeanor. **People v. Carter** (Sup. Ct., 4 D., 1895), 68 S. R., 584; 88 Hun, 304.

See notes under the preceding section.

**Plumbers.**—Whenever a person holds himself out to the public as a plumber, undertaking to do work as such, he must, if he employs assistants to perform the work, comply with the law and procure his certificate. **People ex rel. Nechameus v. Wardens, etc.**, 64 St. Rep. 51; 144 N. Y. 529; rev'g 63 St. Rep. 283; 81 Hun, 434; 30 Supp. 1095.

**Public driveway.**—The violation of sec. 3 of chap. 248 of 1895, which establishes a public driveway on that portion of Washington avenue, in the city of Albany, lying between Quail street on the east, and the east line of the Manning Boulevard, intersecting said Washington Avenue, on the west, is made a misdemeanor.

**Public Health Law.**—Sec. 153 of the Public Health Law makes the practice of medicine by any person "after conviction of a felony," a misdemeanor. **People v. Hawker**, 152 N. Y. 231; rev'g, 14 A. D. 188.

10. **Less degree.**—Upon an indictment charging only the higher degree of the crime, a person may be convicted of any less degree of it. **People ex rel. Young v. Stout**, 63 St. Rep. 154; 81 Hun, 336; 30 Supp. 898. This is upon the theory that the less is included in the higher degree of the offense. *Id.*

11. **Construction.**—The construction of this Code should be strict, to preserve the substantial interest of the accused; but it should be liberal, where the interests of justice require it; and no vested rights of the accused are affected. **People v. Adler**, 55 St. Rep. 669; 140 N. Y. 331; aff'g 53 St. Rep. 936.

12. **Suspension of sentence.**—Amended by chap. 655, Laws 1905. The power to suspend sentence after conviction was inherent in all courts of superior criminal jurisdiction at common law. **People ex rel. Forsyth v. Court of Sessions**, 57 St. Rep. 404; 141 N. Y. 288; rev'g 50 St. Rep. 234.

The power to suspend sentence was always a part of the judicial power. *Id.*

The provision of this section, even prior to the amendment of 1893, was not intended to, and did not, abrogate any power or the judgment which the courts possessed before. *Id.* It is declaratory of the law as it always existed. *Id.* It was always the duty of the court to impose the punishment upon conviction. *Id.* This duty was never supposed to be inconsistent with the power to suspend the judgment till the next term of the court or indefinitely. *Id.*

The amendment of 1893 does not encroach upon the power of the governor to grant reprieves and pardons. *Id.*

Since the amendment of 1893, the court may suspend sentence as before but it can do nothing to preclude itself or its successors, from passing the proper sentence whenever such course appears to be advisable. *Id.*

This section confers on the court of special sessions the power to suspend the sentence of a defendant convicted on the plea of guilty, and to impose a sentence and commit defendant thereat at a later date. *People ex rel. Dunnigan v. Webster* (Sup. Ct. S. T., 1895), 71 S. R. 676. This power to suspend was added to the section by the legislature of 1893 and modifies the provision of the Revised Statutes in regard to courts of special sessions, now incorporated in sec. 717 of the Code of Criminal Procedure, which requires, upon a plea of guilty or conviction, the court to render judgment thereon of fine or imprisonment or both. *Id.*

13. See *People ex rel. Zeese v. Masten*, 61 St. Rep. 531; 78 Hun, 580; 29 Supp. 891.

**Highway labor.**—Chap. 266 of 1894 provides for the employment of state prison convicts upon the public highways and repeals chap. 312 of 1893.

15. See *People ex rel. O'Brien v. Woodworth*, 60 St. Rep. 768; 78 Hun, 586; 29 Supp. 211.

See *People ex rel. Knatt v. Davy*, 65 St. Rep. 162; 32 Supp. 106.

**Other provision.**—This section is not applicable to a case where there is some other statutory provision in force at the time of the conviction and sentence. *People ex rel. Zeese v. Masten*, 61 St. Rep. 581; 79 Hun, 580; 29 Supp. 891.

**Punishment.**—Prior to the amendment of 1895 to sec. 41, <sup>1895</sup> the defendant was punishable, under the provisions of this section, by fine or imprisonment. *People v. Madill* (Sup. Ct., 3 D., 1895), 71 S. R. 692. But after such amendment, the punishment for the offense was imprisonment only. *Id.*

**17. Insanity.**—Where one of the defenses interposed to an indictment for murder was insanity, it is not error to permit the prosecution, after evidence has been given on the part of the defense as to words and actions of defendant on an occasion specified which, it was claimed, indicated insanity, to show that on that occasion defendant was intoxicated. *People v. Miles*, 62 St. Rep. 346; 143 N. Y. 383; 38 N. E. 456.

**19. Age.**—The testimony of a party, proving his own age, is competent. *Stevenson v. Kaiser*, 59 St. Rep. 515; 29 Supp. 1122. Capacity of child aged eleven years. See *People v. Squazza*, 40 Misc. Rep. 71; *People v. Domenico*, 45 Misc. 309.

**20. Evidence.**—When insanity is set up as a defense to an alleged criminal act, and the defendant offers evidence tending to prove that he was insane at the time of the homicide, the legal presumption of sanity is rebutted, and the prosecution must prove sanity by a preponderance of evidence. *People v. Barberi*, 12 N. Y. Cr. 423; 81 S. R. 168; 47 S. 168. So, if defendant's evidence creates a reasonable doubt as to his sanity at the time of the homicide, the people must remove such doubt by a preponderance of evidence. *Id.*

A question, which is not one calling for the opinion of an expert, but relates merely to facts which are within his knowledge, is not obnoxious to the objection that the witness has not been shown to be an expert. *People v. Koerner*, 154 N. Y. 355; 12 N. Y. Cr. 503. On a trial for murder, where defect of reason is interposed as a defense, witnesses for the prosecution, who examined the defendant immediately after the homicide and qualify as medical experts and state the grounds of their opinions, may testify that he was simulating or shamming unconsciousness. *Id.* Upon a question of sanity or insanity, lay witnesses may be examined as to the acts and conduct of the party, and may, upon giving such evidence, be permitted to testify whether such acts or conduct impressed them as rational or irrational. *Id.* There is no authority or principle of the law of evidence that will admit proof of insanity or other disease by mere reputation in the family. *Id.*



**What constitutes.**—In order that a psychical epileptic attack shall constitute a defense in a prosecution for homicide, it must deprive the defendant, for the time, of reason, and cause him to act in an automatic and unconscious manner, without understanding the nature and quality of the act, or that it was wrong. *Id.*

**21. Earlier examination.**—On the issue of insanity in a murder trial, the prosecution may elicit from a competent witness evidence as to the mental condition of the defendant at the time of the trial, as bearing upon his condition at the time of the homicide. *People v. Hoch*, 150 N. Y. 291.

Where, in such case, the defendant has introduced into a hypothetical question to an expert witness the events of a former trial and conviction of the defendant for a criminal offense, the array of facts for the opinion as to his insanity, and it appears that the witness had then examined the defendant for the purpose as to his sanity, it is not incompetent for the prosecution to elicit from the witness, on cross-examination, the facts about that earlier examination. *Id.*

**Evidence.** — Where insanity, interposed as a defense to a charge of murder, is asserted to have existed continuously from a period preceding the homicide up to the time of the trial, declarations made by the defendant to an insanity expert on an examination made subsequent to the homicide to test the defendant's mental condition at the time of such examination, are competent as bearing upon his condition at that time, and may be stated by the expert, on testifying on behalf of the defendant as to his mental condition, where such declarations enter into the basis of the expert's opinion of the defendant's mental condition at the time of such examination. *People v. Nino*, N. Y. 317. An instruction on the trial for murder, where the defense is insanity, that jurors ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction, and that, to establish a defense on the ground of insanity, it must be clearly proven that, at the time of the committing of the act, the party accused was laboring under such a defect of reason of the mind as not to know the nature and quality of the act he was doing, or, if he did know that he did not know that he was doing what was wrong, constitutes reversible error. If the defendant on a trial for mur

offers evidence tending to prove that he was innocent at the time of the homicide, the legal presumption of sanity is rebutted and the prosecution must prove sanity by a preponderance of evidence. *Id.* If the defendant's evidence creates in the minds of the jury a reasonable doubt as to his sanity at the time of the killing, the prosecution must remove that doubt by a preponderance of evidence. *Id.* A charge, which is calculated to mislead the jury on these points, to the prejudice of the defendant, is erroneous. *Id.*

Persons not experts, after testifying to facts and incidents in relation to a person, tending to show soundness or unsoundness of mind, may testify to the impression produced upon them thereby, and as to whether the acts and declarations testified to impress them as rational or irrational. *People v. Strait*, 148 N. Y. 566. An expert witness cannot give an opinion as to the mental condition of a person, based upon statements made to him by such person not in evidence. *Id.* The statements of a party as to his past conduct, made several months after the commission of an alleged criminal act, cannot be the basis of an expert opinion as to his mental condition at the time of committing the act. *Id.* Evidence of a man's illicit relations with a woman, while he was separated from his wife, from whom he was afterwards divorced, is not admissible against him on a trial for murdering a woman to whom he had been subsequently married and who had separated from him, as bearing upon his regard for the marriage relation and the effect of the separation from his second wife upon his mind, where the defense is insanity, claimed to have been caused by the separation from his second wife. *Id.*

**Insanity.**—The heat of passion and feeling, produced by motives of anger, hatred or revenge, is not insanity. *People v. Foy*, 53 St. Rep. 268; 138 N. Y. 667. The law holds the doer of the act, under such conditions, responsible for the crime. *Id.*

A person is not excused from criminal liability on account of insanity, where there is no connection between the alleged delusions and the homicide. *People v. Ferraro*, 161 N. Y. 365.

**Intoxication.**—When the prosecution, after defendant rests his defense, based upon insanity, introduces evidence tending to show that he was intoxicated and that the acts and conditions, relied upon by him as proof of insanity, should be attributed to intoxication, he may contradict the fact and theory of intoxi-

cation, and such evidence cannot be excluded on the ground that it is reopening of the case. *People v. Strait*, 154 N. Y. 165; 12 N. Y. Cr. 479.

**What constitutes insanity.**—On the trial of an indictment for homicide, where the defense of insanity was interposed, the first question the jury have to determine is whether the defendant, at the time of killing his wife, was laboring under such a defect of reason as either not to know the nature or quality of the act he was doing, or not know the act was wrong. *People v. Conroy*, 153 N. Y. 174, 183; 12 N. Y. Cr. 299.

It is not every weak or disordered mind that is excused from the consequences of crime. It is only those who, at the time of committing the criminal act, were laboring under such a defect of reason as either not to know the nature and quality of the act they were doing or not to know that the act was wrong. *People v. Burgess*, 153 N. Y. 561; 12 N. Y. Cr. 450.

**22. Drunkenness.**—At common law, drunkenness was not only not an excuse for crime, but evidence of intoxication, while admissible, and to be considered in some cases, was yet generally of no avail. *People v. Leonardi*, 62 St. Rep. 354; 143 N. Y. 360; 38 N. E. Rep. 372. If a man made himself voluntarily drunk, it was no excuse for any crime he might commit while he was so, and he had to take the responsibility of his own voluntary act. *Id.* If the assault was unprovoked, the fact of intoxication would not be allowed to affect the legal character of the crime. *Id.* The fact of intoxication was not to be permitted to be even considered by the jury upon the question of premeditation. *Id.*; *People v. Rogers*, 18 N. Y. 9; *Kenny v. People*, 31 *id.* 330; *Flannigan v. People*, 86 *id.* 554. The strict rule of the common law has been slightly relaxed by this section of the Penal Code. *Id.* The intoxication need not be to such an extent as necessarily and actually to preclude the defendant from forming an intent or from being actuated by a motive, before the jury would have the right to regard it as having any legal effect upon the character of defendant's act. *Id.* Any intoxication may be considered by the jury, and the decision as to its effect rests with them. *Id.* Voluntary drunkenness is never an excuse for crime. *Id.* If the accused is sober enough to, and does, form an intent and deliberate upon and premeditate the crime, he is responsible as though he had been perfectly sober and is guilty even though intoxicated. *Id.* The jury should be

instructed that, if the intoxication has extended so far in its effects that the necessary intent, deliberation and premeditation were absent, the fact of such intoxication must be considered and a verdict rendered in accordance therewith. *Id.*

A charge to the jury, on a murder trial involving the question of the defendant's intoxication at the time of committing the act is erroneous, if it fails to state the rule on the subject with sufficient clearness to enable the jury to understand that partial intoxication may be considered upon the question of motive or intent in determining the grade or degree of the crime committed. *People v. Corey*, 148 N. Y. 476.

This section provides that, while no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of being in that condition, yet, where the purpose, motive or intent is a necessary element in constituting the crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the intent with which the act was committed. *People v. Gaynor*, 33 A. D. 98; 87 S. R. 86; 53 S. 86.

Where the blow was inflicted by the defendant while he was under the influence of liquor, a charge that he is presumed to have intended the probable consequences of the blow, resulting in death, is erroneous. *People v. Martin*, 33 A. D. 282; 87 S. R. 745; 53 S. 745. In such a case, the jury is at liberty to presume that the prisoner intended to accomplish the probable consequences of his act, but the law does not raise such a presumption. *Id.* Whether the defendant, in effecting the death of deceased is guilty of murder in the second degree or of manslaughter in the first degree, depended on his intent. *Id.* If he struck the deceased with a club with an intent to cause his death, his offense was murder; if his act was with an intent merely to injure him, and not to cause his death, his crime was manslaughter. *Id.* Under this statute the intent of the defendant, in striking him with a club, was a question to be determined by the jury. *Id.* And this was the case whether the defendant was sober or intoxicated at the time. *Id.*

29. A person who, by counsel or assistance, procures the commission of a crime is equally responsible as the actor; and when it is shown that he advised or procured its commission, the fact that he may for some reason, have been incapable of committing it himself, is not controlling, or even material. *People v. Peck-*

ens, 153 N. Y. 576; 12 N. Y. Cr. 433. The effect of this provision is to permit the pleader to allege an act as the act of the defendant when he procures it to be performed by another; but it nowhere forbids setting out the facts showing that the acts of another are, in law, the acts for which a defendant is responsible. Id.

The allegations of such facts are equivalent to a charge that the act was that of the defendant. Id.

**Principals.**—Persons who would formerly have been accessories before the fact now become principals. *People v. McLaughlin* (Sup. Ct. 1 D. 1896), 2 App. Div. 419. A person charged in an indictment with the commission of a felony may be convicted upon proof that, though absent when the crime was committed, he advised and procured its commission. Id. It is not necessary to set out in the indictment the facts which tend to show that the crime was committed through the agency of another. Id.

A count in an indictment, which not only charges the uttering of a forged paper, but also the procuring of the forgery to be committed, charges in effect the accused as a principal in the crime of committing a forgery under this section. *People v. Sebring* (Sup. Ct. O. & T. 1895), 69 S. R. 612; 14 Misc. 31.

Under this section, a defendant can be convicted of the offense of arson as a principal though he did not strictly cause the fire, and the person who did was not identified. *People v. Kelly* (Sup. Ct. 3 D. 1896), 11 A. D. 495; 76 S. R. 756; 42 S. 756. Where the fire was started by an unknown incendiary, and the evidence is sufficient to establish the defendant's connection with the act, or to show that he aided or abetted in the commission of the offense, or directly or indirectly counseled, induced or procured the criminal act by the unknown party, he can be held as a principal. Id.

A person may not be indicted and convicted as the principal for a crime he did not personally commit, by proving circumstances from which a jury might infer that he had been associated with another in other transactions in the commission of other and different crimes, and then permitting the jury to infer from such other inferences that he was guilty of the crime for which he was tried. *People v. McLaughlin*, 150 N. Y. 365. The commission of one crime is not admissible in evidence to establish the guilt of a party of another crime. Id. But, if the

evidence is material and relevant to the issue, it is not inadmissible simply because it tends to prove the defendant guilty of another crime. *Id.*; *Coleman v. People*, 55 N. Y. 81; *People v. Corbin*, 56 id. 363; *People v. Shulman*, 80 id. 376; *People v. Sharp*, 107 id. 427; *People v. Greenwall*, 108 id. 296; *People v. Shea*, 147 id. 79; *People v. McKane*, 143 id. 455; *People v. Murphy*, 135 id. 450; *Hope v. People*, 83 id. 418. There is no principle of criminal law, which recognizes the relation of principal and agent in the sense in which the term is used in reference to business or commercial transactions. *Id.*

Any participation in a general felonious plan, provided such participation be concerted and there be constructive presence, is enough to make one a principal. *People v. Winant*, 24 Misc. 361; 87 S. R. 695; 53 S. 695.

In the criminal law, a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission, and whether present or absent, or, directly or indirectly, counsels, commands, induces or procures another to commit the crime, is a principal. *People v. Fitzgerald*, 156 N. Y. 253; 13 N. Y. Cr. 36.

At common law, in misdemeanors, there are no accessories—all concerned, whether instigators or perpetrators being principals and subject to indictment as such. *People v. Pelton*, 36 A. D. 450.

**Procurement.**—Under sec. 41c, post, no person, but the members and clerks of the registry boards, can be guilty of the acts specified in said section, involving neglect of official duty and other misconduct as public officers, since he has no duty to perform with regard to the registry lists. *People v. McKane*, 62 St. Rep. 832; 143 N. Y. 455; 38 N. E. Rep. 950; aff'g 62 St. Rep. 6. He may induce and procure the inspectors to commit such an offense by command, counsel or advice. *Id.* And the fact that he may, for some reason, be incapable of committing the same offense himself, is not material, so long as it can be traced to him as the moving cause by instigating others to do what he could not do himself. *Id.* A person who induces or procures the members of a board of registry willfully to violate sec. 33 of the Election Law, in relation to the registration of voters, may be indicted as a principal jointly with the members of the board. *Id.* Device to palm off worthless stock on purchasers. *People v. Putnam*, 90 App. Div. 125; 18 N. Y. Crim. Rep. 103.



Attempt to unlawfully remove public records. *People v. Mills*, 17 N. Y. Crim. Rep. 466; 41 Misc. 195.

**30. Accessory.**—In order to the conviction of an accessory to an alleged felony, the prosecution has to prove three things: (1) That the principal was guilty of alleged principal felony; (2) that the defendant had “knowledge or reasonable ground to believe” that the principal was guilty of such felony and liable to arrest; (3) that having such knowledge or reasonable ground of belief, he harbored, concealed or aided the prisoner, with intent that he might “avoid or escape from arrest.” *People v. Pedro* (Kings S. T. 1897), 19 Misc. 300; 77 S. R. 44; 43 S. 44. One cannot be found guilty as an accessory to a felony, except upon proof that he gave personal assistance to the felon with intent to enable him to get away physically, such as to conceal him, to rescue him, to furnish him with a horse and the like. *Id.*

**31. Principals.**—All the parties to a misdemeanor are principals. *People v. Mullins* (Sup. Ct. 1 D. 1896), 5 A. D. 172; 39 S. 361.

**34. Attempt to commit extortion.**—Where a threat is made with intent to commit the crime of extortion, and tends, but fails to effect its commission, it is plainly, within this section, an attempt to commit the crime. *People v. Gardner*, 63 St. Rep. 21; 144 N. Y. 119; 38 N. E. Rep. 1003, modifying and affirming 57 St. Rep. 18; 73 Hun, 66; 25 Supp. 1072. This crime depends upon the mind and intent of the wrongdoer, and not on the effect or result upon the person sought to be coerced. *Id.* The accused cannot protect himself from responsibility by showing that, by reason of some fact, unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance. *Id.* On the trial of an indictment for an attempt to commit the crime of extortion, the defendant may, in order to show the reason for his intimacy and rides with, and visits to and with, the prosecutrix, which were established by the prosecution, prove that he acted, in so doing, under the general instructions of the Society for the Prevention of Crime, whose agent he was, and that he reported his acts to its officers and followed their directions. *Id.*

At common law, if a person, intending to steal an article, takes it with the owner's consent, it is not larceny. *People v. Gardner*, 57 St. Rep. 18; 73 Hun, 66; 25 N. Y. Supp. 1072; *Thorne v. Turck*, 94 N. Y. 90-95.

In *People v. Moran*, 33 St. Rep. 397; 123 N. Y. 254, the defendant committed a trespass on a person with intent to steal, and, if he had accomplished the act which he attempted and intended, the crime of larceny would have been committed.

A boy so young, that he is deemed incapable of perpetrating a rape cannot be convicted of an attempt to commit that offense, nor of assault with intent to ravish, but he may be convicted of assault and battery. *People v. Gardner*, ante; *People v. Randolph*, 2 Park. 213.

If an assault, with intent to ravish, should be made on a man dressed as a woman, under the belief that the person assaulted is a woman, he cannot be convicted of an attempt to ravish, because, in such a case, the commission of the crime of rape would be a legal impossibility. *People v. Gardner*, ante.

**Attempt to commit.**—To constitute an attempt to commit a crime there must appear to have been more than the mere design or intention to commit it. *People v. Kane*, 161 N. Y. 380; *People v. Lawton*, 56 Barb. 126.

An attempt to commit a crime is clearly a separate and distinct offense and does not necessarily require or depend upon the concurrence of a third party. *The People v. Spolasco*, 33 Misc. 22; 15 N. Y. Crim. Rep. 184. See *People v. Mills*, 17 N. Y. Crim. Rep. 466; 41 Misc. 195.

35. See *People v. Smith*, 60 St. Rep. 246; 78 Hun, 179; 28 Supp. 912.

**Less degree.**—The defendant may be convicted of any less degree of the crime upon an indictment charging only the higher degree thereof. *People ex rel. Young v. Stout*, 65 St. Rep. 154; 81 Hun, 336; 30 Supp. 898. Where, upon the trial of an indictment for assault in the second degree, the evidence may be sufficient to justify the jury in finding the intent necessary to constitute such crime, the defendant may properly be convicted of the crime of assault in the third degree, if the jury have a reasonable doubt as to his intent but no doubt whatever as to the assault. *People v. Brockett*, 65 St. Rep. 667; 85 Hun, 138; 32 Supp. 423.

41. Amended by chap. 625, Laws 1905. See *People v. Lewis* (Sup. Ct. O. & T. 1895), 70 S. R. 482; 14 Misc. 264.

Sub. 10 amended chap. 371, Laws 1901.

**Limitation.**—Chap. 721 of 1895, which amends this section of the Code by adding the words, “punishable by imprisonment for not more than one year,” repealed this section of the Code, in so far as it permitted a fine. *People v. Madill* (Sup. Ct. 3

D. 1895), 71 S. R. 692. But it cannot be deemed to have intended that the amendments to this section should apply to offenses committed before the act took effect. *Id.*

**41a.** Amended chap. 371, Laws 1901. Amended chap. 371, Laws 1905.

**41aa.** Changed to 41c, chap. 625, Laws 1905.

**41c.** Made 41aa and amended by chap. 625, Laws 1905.

**Application.**—This section applies only to the members and clerks of registry boards. *People v. McKane*, 62 St. R. 832; 143 N. Y. 455; 38 N. E. Rep. 950; *aff'g* 62 St. R. 832. A person other than such officer or clerk, cannot be guilty of the acts specified in this section, involving neglect of official duty and other misconduct as public officer, since he has no duty to perform with regard to the registry lists. *Id.* But see note under sec. 29, ante.

**Conspiracy.**—An indictment for inducing or procuring members of a board of registry to violate sec. 33 of the Election Law need not charge a conspiracy, but the conspiracy, if proved, is evidence in support of the charge made. *People v. McKane*, 62 St. R. 820; 143 N. Y. 455; 38 N. E. Rep. 950; *aff'g* 62 St. R. 820. When evidence given on the subject of a conspiracy is sufficient for the jury, the declarations of the conspirators in furtherance of its purpose and object, are competent. In the circumstances of the arrest of the persons, who were engaged in search of the lists or watching the election, are admissible. Under circumstances of this case, the power that the defendant wielded through public offices or through the receipt and disbursement of large sums of money was held to be a proper subject of inquiry. Evidence as to the arrangement of the election and the number of legal voters in the town, is properly received. *Id.* The poll-lists were properly admitted in evidence. The questions, relating to defendant's official acts which had a bearing upon his power, influence and patronage, were admissible, on cross-examination, within a reasonable discretion. The statement of the person in charge that the registry lists could not be seen without an order from defendant was competent, especially where the defendant subsequently admitted that such person was then acting under his orders. *Id.* So that an order of the court, in a proceeding to obtain a copy of the several lists, was served upon the chairman of the board of the first district, and what was stated to him at the time was proper. *Id.* So, proof of the absence of an alleged conspiracy from other important duties, to attend the registry board.

a somewhat remote circumstance, cannot be said to be prejudicial error. *Id.* And, where the defendant makes reputation a subject of inquiry, the people have the right to put before the jury what that reputation is, though it includes the ability to influence and control elections. *Id.*

**41b. Residence.**—Amended chap. 317, Laws 1901. Amended chap. 625, Laws 1905. If the person applying for registration has, at the time of such application, a bona fide residence at the place from which he desired to be registered, it will not be lost by the subsequent demolition of the building. *People ex rel. Perry v. Hagan*, 88 S. R. 826; 54 S. 826; 13 N. Y. Cr. 418.

**41d.** Amended by chap. 625, Laws 1905.

**41e.** Amended by chap. 714 of 1894.

**41g.** Amended by chap. 625, Laws 1905.

**41i.** Amended by chap. 625, Laws 1905.

**41k.** Amended by chap. 77 of 1894. Amended by chap. 625, Laws 1905.

See *People v. Pillion*, 60 St. Rep. 811; 78 Hun, 74; 29 Supp. 267. See *Kline v. Hibbard*, 61 St. Rep. 342; 80 Hun, 50; 29 Supp. 807.

See *People v. Cleary* (Ct. Sess. 1895), 70 S. R. 209; 13 Misc. 546.

**41l.** Repealed by chap. 371, Laws 1901. Re-enacted, see chap. 625, Laws 1905.

**41m.** Amended by chap. 77 of 1894. 41m is designated as 41l and amended by chap. 371, Laws 1901.

Amended by chap. 282 of 1894.

This amendment extends the provisions of this section to town meetings and includes the offense of voting or offering to vote under another name. To take effect Sept. 1, 1904.

41n is changed to 41m by chap. 371, Laws 1901.

**41o. Promotion of election.**—41o is changed to 41n by chap. 371, Laws of 1901. 41o amended by chap. 625, Laws 1905. If it can be said that a contract is entered into with the sole design of promoting the election of one or more persons, or if it is a mere device or cover by which such election is to be accomplished, such contract is violative of subdivision 4 of this section. *Smith v. Babcock* (Sup. Ct. 4 D. 1896), 2 A. D. 6; 73 S. R. 14; 37 S. 965. But a contract to perform the duties of another as chairman of a county committee is not against public policy. *Id.* If the contract is entered into for some ulterior purpose, and with the design to defeat or evade the statute in its true intent and meaning, it is void. *Id.* But until

that is made to appear the onus is upon the party setting up **such** defense. *Id.*

**41p.** Amended by chap. 714 of 1894. Changed to 41o and amended by chap. 371, Laws 1901. Amended by chap. 625, Laws 1905.

**41q.** Amended by chap. 714 of 1894. 41q changed to 41**p** and amended by chap. 371, Laws 1901.

**41r. Bribery.**—41r changed to 41q by chap. 371, Laws 1901. This section provides that the giving of testimony offered **by** the bribe giver or bribe taker shall be a bar to any criminal **prose-** cution against the person so testifying. *People v. Lewis* (Sup. Ct. O. & T. 1895), 70 S. R. 482; 14 Misc. 264. But this section **n** relates solely to bribery respecting the exercise of right of fran- **d** chise and does not touch the matter of bribery at caucuses and conventions. *Id.*

**41s.** Changed to 41t by chap. 371, Laws 1901.

**41t.** Amended by chap. 714 of 1894. Amended by chap- 625, Laws 1905.

**41u.** This section was added by chap. 714 of 1894, and wen **t** into effect May 17, 1894. Changed to 41t by chap. 371, Law**s** 1901.

**41v.** The number of this section was changed from 41u to 41**v** by chap. 714 of 1894. Changed to 41u by chap. 371, Law**s** 1901.

**41w.** The number of this section was changed from 41v to 41w by chap. 714 of 1894. Changed to 41v by chap. 371, Law**s** 1901.

**41x.** The number of this section was changed from 41w to 41x by chap. 714 of 1894. Changed to 41w by chap. 371, Laws 1901.

**41zz.** Added by chap. 371, Laws 1901. Amended by chap. 625, Laws 1905.

**43.** As to the rights and liabilities of de facto officers, see *People v. McDowell*, 53 St. Rep. 446, 448; 70 Hun, 1; 23 N. Y. Supp. 950.

**De facto officers.**—A person, who applies, in good faith, for a license to a de facto board of excise commissioners, believing them to be a legally constituted board, pays for his license and sells under it, is protected by such license against an indictment charging him with selling liquor without a license. *Id.*

**48b.** As to the employment of state prison convicts upon the public highway, see chap. 366 of 1894. This act repealed chap. 312 of 1893.

51. See *People v. Welch*, 57 St. Rep. 42; 74 Hun, 474; 26 N. Y. Supp. 694.

**Extradition.**—This section has reference only to interstate extradition, and does not apply to extradition from foreign countries, as the governor can have no power under an international treaty, to make demand upon a foreign government for the surrender of such fugitive. *Ellis v. Jacob*, 17 A. D. 471; 79 S. R. 177; 45 S. 177.

52. **Appointment to office.**—An applicant when appointed deputy sheriff, at once becomes by that appointment a peace officer of the county. *Deyo v. Woodsworth*, 63 St. Rep. 732; 144 N. Y. 448; affirming 53 St. Rep. 613. An agreement by him, in consideration for such appointment, to pay to the sheriff a portion of the fees received by him as such peace officer, is a misdemeanor and void. *Id.*

53. See *Deyoe v. Woodworth*, 63 St. Rep. 732; 144 N. Y. 448; affirming 53 St. Rep. 613, and notes under the preceding section. See, also, *People v. Frazier*, 16 N. Y. Crim. Rep. 226; 36 App. Div. 280.

56. **Public office.**—In a prosecution for intruding into a public office, under this section, the defendant may show that he entered under a bona fide claim of right, which he might reasonably believe entitled him to take possession. *People v. Bates*, 61 St. Rep. 582; 79 Hun, 584; 29 Supp. 894.

71. **Juror.**—Bribery of a juror or offer to bribe a juror is a crime by itself under this section of the Penal Code. *People v. Winant*, 24 Misc. 361; 87 S. R. 695; 53 S. 695. The acceptance of a bribe by a juror is a separate offense, made so by this section of the same Code. *Id.*

Meaning of "value of any kind." *People v. Van De San*, 87 App. Div. 386.

72. The words "values of any kind" are more comprehensive than "property," and where an alderman informed the commission of street cleaning that he would vote for an appropriation for his department if he would reinstate an employe it tends to show that he is guilty of violating said section. *People v. Van De Carr*, 87 App. Div. 386, 18 N. Y. Crim. Rep. 37.

75. See *People v. Glinin*, 64 App. Div. 167; 15 N. Y. Crim. Rep. 547.

76. Amended by chap. 692, Laws 1905.

79. **Protection.**—This section protects a witness against liability for a charge of perjury, in case his testimony before the grand jury should differ materially from that before given by



him, touching the same matter on his examination before county judge. *People v. Lewis* (Sup. Ct. O. & T. 1895) R. 482; 14 Misc. 264. It provides immunity from prosecution for such bribery only to the bribe giver and not to the bribe taker. *Id.* Nothing short of absolute immunity from prosecution can take the place of the privilege by which the law affords protection to the witness.

80. Sub. 16 amended by chap. 80, Laws 1905.

85. **Escape.**—This section, which is but a re-enactment of previous provisions of the Revised Statutes, provides for the punishment of escaping prisoners. *People v. Sickles*, 84 N. Y. 377; 50 S. 377. A prisoner who, confined in prison, or in lawful custody, by force or fraud escapes therefrom, is guilty of a felony, if such custody, or confinement is upon a charge, arrest, commitment, or conviction for a felony, and of a misdemeanor if such custody or confinement is upon a charge, commitment, or conviction for a misdemeanor. *Id.* See *People v. Flanigan*, 174 N. Y. 357.

87. See *People v. Buckley*, 91 App. Div. 586. See also the same case; 18 N. Y. Crim. Rep. 224.

90. **Cigarettes.**—This section, which prohibits the sale of cigarettes to children under the age of sixteen years, can be construed so sweepingly as to hold that it takes the entire force out of the prohibition against monopolies. *People v. Du Pont* (N. Y. Gen. Sessions, 1897), 19 Misc. 292; 78 S. R. 336; 336.

91. **Breach of peace.**—Where a warrant of commitment is issued for a breach of peace in threatening to commit a crime, which recites that "an order having been this day made by me that Bebe be held to answer to the court of Oneida county, next term of grand jury, upon a charge of breach of peace," etc., but does not recite or show that the relator was required to give an undertaking in any sum or amount, or the omission to give security is void. *People ex rel. Day v. Reese*, 24 Misc. 528; 87 S. R. 153 S. 965; 13 N. Y. Cr. 334. In such case, *habeas corpus* is the proper remedy to secure the discharge of the person committed. *Id.*

94. Theft of public records. See *People v. Mills*, 178 N. Y. 274; 18 N. Y. Crim. Rep. 269.

96. **Indictment.**—An indictment for perjury, which charges that the defendant willfully, knowingly and corruptly swore an oath that the affidavit subscribed by him was true, that he made in an action, that it was false, and that such fals

ents were material and used in the action, is sufficient without specially alleging that the affidavit was delivered by the defendant to another person with an intent that it should be uttered or published as true. *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354; aff'd 149 N. Y. 1.

Upon the trial of an indictment for perjury, the people are bound to establish beyond a reasonable doubt the fact that the defendant in giving material testimony, willfully and knowingly testified falsely. *People v. Gibson*, 82 S. R. 861; 38 S. R. 1. That is not a matter which can be established by the opinion of anybody. *Id.* The inference of falsity can only be drawn from the facts which are made to appear to the jury. *Id.*

**Intent.**—Perjury requires that the false oath must have been willfully and knowingly false. Intent, therefore, is an element of proof which must be established in order to warrant a conviction. *Ward v. City of Brooklyn*, 32 A. D. 430; 87 S. R. 41; 8 S. 41.

**What constitutes.**—In the absence of any statute regulating the matter, it has been held that the crime of perjury in swearing to an affidavit, was complete when the oath was taken by the defendant in a judicial proceeding or a course of justice, though the affidavit was never delivered or used, provided the matter sworn to was false and known to the affiant to be so, and was material. *People v. Williams*, 149 N. Y. 1; aff'g 71 S. R. 541; 92 Hun, 354. An indictment for perjury need not allege the delivery of the affidavit by the defendant to another person with intent that it should be uttered or published as true. *Id.* But proof of such delivery must be made upon the trial in order to sustain the charge of perjury. *Id.* It is sufficient that the indictment charges that the defendant "made" the affidavit. *Id.*

False testimony as to not remembering is perjury. *People v. Brady*, 16 N. Y. Crim. Rep. 466; 72 App. Div. 372; aff'd 177 N. Y. Crim. Rep. 69; 172 N. Y. 165. Not limited to affidavits required by laws of New York. *People v. Martin*, 77 App. Div. 8; 17 N. Y. Crim. Rep. 150; aff'd 17 N. Y. Crim. Rep. 401.

**77. Administering oath.**—This section provides that any irregularities in the mode of administering oaths is no defense to the prosecution of that crime. *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354; aff'd 149 N. Y. 1.

**Oath.**—This section prescribes that the term "oath" includes affirmation and every other mode authorized by law of attesting the truth of that which is stated. *People v. Nolte*, 19 Misc. R. 1; 78 S. R. 443; 44 S. 443. To make a valid oath, for the

falsity of which perjury will lie, there must be, in some form, the presence of an officer authorized to administer it, an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath. *Id.*; *O'Reilly v. People*, 86 N. Y. 161. An oath, administered by the clerk of the court in open court and under the direction of the court, is an oath administered by the court. *Id.*

**98. Incompetency.**—This section provides that the incompetency of the witness is no defense. *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354; *aff'd* 149 N. Y.

**99. Materiality.**—This section provides that the witness's knowledge of the materiality of his testimony or statement is no defense. *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354; *aff'd* 141 N. Y. 1.

**100. False affidavit.**—This section should not be construed as being so far a part of section 96, ante, which defines the crime of perjury, as to make it a part of the statutory definition of the crime, but its purpose was to establish a rule of evidence as to when a deposition is to be deemed complete. *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354; *aff'd* 149 N. Y. 1.

But it is a statutory ruling defining what shall be sufficient to constitute the making of an affidavit so as to bring it within the operation of section 96, ante. *People v. Williams*, 149 N. Y. 1; *aff'g* 71 S. R. 541; 92 Hun, 354. By force of this section, an indictment charging the making of a false affidavit will not be supported, unless it appears on the trial that something more had been done than the mere taking of the oath by the affiant. *Id.* He must in addition have delivered the affidavit with the intent stated. *Id.* Until that has been done, he has made no affidavit within the meaning of the statute of perjury. *Id.*

**102. Arrest of witness.**—The trial court has power, and it is within its discretion, to commit one of defendant's witnesses to jail, in the presence of the jury, by reason of the character of his testimony. *People v. Hayes*, 56 St. Rep. 484; 140 N. Y. 45; *aff'g* 54 St. Rep. 184; 26 N. Y. Supp. 194.

Where a witness admits, on cross-examination, that he has made a false certificate as a notary public, it is the duty of the court, at the close of his testimony, to direct his committal for such offense. *People v. Hayes*, 54 St. Rep. 184; 26 N. Y. Supp. 194.

**105. Subornation of perjury.**—It is not error to permit the people to show that during the period when defendant is alleged to have been searching for witnesses, he and his agent made

effort to induce others, than those who subsequently took the stand, to swear falsely. *People v. Van Tassel*, 156 N. Y. 561; 13 N. Y. Cr. 289.

**106. Ex post facto.**—The amendment of chap. 662 of 1892 to this section changed the penalty previously prescribed for this offense by abolishing the minimum limitation. *People v. Hayes*, 54 S. R. 184; 26 Supp. 194.

The amendment is not ex post facto as to perjury committed prior to its enactment. *Id.*

A statute which permits the infliction of a less degree of the same kind of punishment than was permissible when the offense was committed, cannot be termed or regarded as an ex post facto law. *People v. Hayes*, 56 S. R. 456; 140 N. Y. 484; *aff'g*, 54 S. R. 184; 26 S. 194.

A law which aggravates a crime or makes it greater than it was when committed, or one which changes the punishment or inflicts a greater punishment than the law annexed to the crime when committed, or one which changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the crime, in order to convict the offender, is included in the definition of an ex post facto law. *Id.*

**107. False accounts.**—Under this section and sec. 109, which make the party who procures a forged and false book of accounts to be made and prepared with intent to produce it in evidence, guilty of felony, it is essential that the acts charged against him should be committed in a proceeding authorized by law. *People v. Levy* (N. Y. Gen. Sess. 1896), 16 Misc. 615; 40 S. 743.

**117. Failure of captain to suppress house of ill-fame.** *People v. Herlihy*, 16 N. Y. Crim. Rep. 235; 66 App. Div. 534; *People v. Glennon*, 78 App. Div. 271; 17 N. Y. Crim. Rep. 213.

**124.** See *Kline v. Hibbard*, 61 St. Rep. 342; 80 Hun, 50; 29 Supp. 807.

**139. Notary public.**—For a violation of the provisions of sec. 5, art. 13 of the State Constitution by a notary public, an action by the people is maintainable against him to have his office adjudged to be forfeited. *People v. Rathbone*, 65 St. Rep. 404; 145 N. Y. 434.

**143.** See *Matter of Taylor*, 60 St. Rep. 138; 8 Misc. 159; 28 Supp. 500; which was affirmed by the general term in 59 St. Rep. 887, but the latter judgment was reversed in 62 St. Rep. 175; 143 N. Y. 219. Witness who refuses to answer proper questions at investigation of charge of use of premises for gambling guilty of misdemeanor. *People ex rel. Lewisohn v. Wyatt*, 39 Misc. 456.

**147. Contempt.**—This action defines criminal contempt of court and, while it makes them misdemeanors, it does not deprive the court the power of inflicting punishment. *People ex rel. Barnes v. Court of Sessions*, 63 St. Rep. 834; 82 Hun 31 Supp. 373. Subdivision 7 of this section makes the publication of any false or grossly inaccurate report of its proceedings a contempt of court. *Id.*

**148. What constitutes.**—This section provides “that an attorney or counsellor who is guilty of any deceit or collusion with intent to deceive the court or any party” is guilty of a misdemeanor. *People v. Oishei*, 12 N. Y. Cr. 362; 79 S. R. S. 49. Substantially the same language is used in section 165 of the Code of Civil Procedure, which provides a civil remedy for the injured party, and also declares it to be a misdemeanor. A party must, under this statute, be guilty of “deceit;” if he is guilty only of an intent to deceive, the offense does not fall within the statute. *Id.*

When a person uses means which are deceitful, or which are intended to deceive the court or another person, such as lying or procuring false papers, it would be too strict to hold that although he intended to deceive, but as he failed in accomplishing any deception he was not in fact guilty of using deceit. *Id.*

The alteration of an order of the surrogate’s court, so as to make it false and misleading is a deceit within the meaning of this section. *Id.*

**148a.** Added by chap. 203, Laws 1902.

**154.** See *Fox v. Mohawk & H. R. Humane Soc.*, 82 Hun 625, 628; 48 S. 625, 628.

**155.** See *People ex rel. Warren v. Beck*, 62 St. Rep. 3 Misc. 77; 30 Supp. 473.

**160.** Amended by chap. 333, Laws 1903.

**165. Fraudulent claim.**—Where the supervisor is indicted for procuring the audit of a fraudulent claim, in violation of the provisions of this section of the Penal Code, and the facts are certain of his acts, when standing alone, constitute a crime under section 672, cannot be of importance when those acts are the essential ingredients of the crime specified in section 165. *People v. Klipfel*, 37 A. D. 224.

Section 672 and the crime defined in it, are plainly distinguishable from this section. *People v. Stock*, 21 Misc. 1 N. Y. Cr. 420; 81 S. R. 94; 47 S. 94. The one is malfeasance

in office by the official in auditing or paying a false claim, while the other is the presentation of a fraudulent claim to an auditing board for allowance or payment. *Id.* Only a public official can be guilty of the crime charged in one section, while in the other it is not the official, but the person presenting the claim, who commits the felony. *Id.*

The distinction between the crimes, provided for by this section and sec. 672, is that the first crime can be committed only by a public officer, while the second may be committed by any person who, in the form prescribed by law, presents for audit a false and fraudulent charge or claim against a municipal corporation. *People v. Klipfel*, 160 N. Y. 371.

168. See *People v. Bates*, 61 St. Rep. 584; 79 Hun, 584; 29 Supp. 894; *People v. McFarlin*, 43 Misc. 591.

**Combination.**—If persons enter into an organization agreement for the purpose of controlling the price of a commodity and managing the business of its sale so as to prevent competition in price between the members of the exchange, it is illegal; and, if this is their intent and the price of such commodity is raised in pursuance of the agreement to effect its object, the crime of conspiracy is established. *People v. Sheldon*, 54 St. Rep. 513, 520; 139 N. Y. 231; *aff'g* 50 St. Rep. 231.

By the statutes of this state, it is a misdemeanor to commit any act injurious to trade or commerce. *Dueber Watchcase Mfg. Co. v. E. Howard Watch and Clock Co.*, 3 Misc. Rep. 585. In this case it was held that a combination to create a monopoly, and to ruin all who will not unite in the undertaking, came under this section.

A combination on the part of the milk dealers and creamery men in and about the city of New York to fix and control the price that they should pay for milk, is unlawful. *People v. Milk Exchange*, 64 St. Rep. 694; 145 N. Y. 267.

Where the object is to destroy and prevent competition in the sale of an article of prime necessity, the combination between the dealers, followed by overt acts, is a conspiracy within the meaning of this section. *Drake v. Siebold*, 62 St. Rep. 695; 81 Hun, 178; 30 Supp. 697; *People v. Sheldon*, 54 St. Rep. 513; 139 N. Y. 251.

**Conspiracy.**—A conspiracy to injure a person's business by preventing, by means of threats and intimidation, persons from entering his employment, is a crime at common law and under



the Penal Code. *Davis v. Zimmerman* (Sup. Ct. 1 D. 1897), 71 S. R. 385; 91 Hun, 489.

A conspiracy consists in the unlawful combination or agreement of two or more persons to do an act unlawful in itself or to do a lawful act by unlawful means. *People v. Duke* (N. Y. Gen. Sess. 1897), 19 Misc. 292; 78 S. R. 336; 44 S. 336.

**Corporation.**—A corporation cannot be liable for conspiracy. *People v. Duke* (N. Y. Gen. Sess. 1897), 19 Misc. 292; 78 S. R. 336; 44 S. 336. Individuals cannot shield themselves from the consequences of wrongdoing by pleading that their wrong acts were corporate acts. *Id.*

In determining whether there has been a conspiracy in restraint of trade, the character of the trade sought to be monopolized is immaterial, as long as it is a lawful one. *People v. Duke* (N. Y. Gen. Sess. 1897), 19 Misc. 292; 78 S. R. 336; 44 S. 336. The officers and agents of a trading corporation may become criminally liable if they confederate to secure a monopoly by threats and menaces directed against competitors to force and coerce them to relinquish the rights to the full enjoyment of which all are entitled. *Id.*

**Due administration of law.**—A public officer having charge of the disbursement of public money in a great city for public works, who enters into an agreement with a private party to effect that he will violate the law and omit or neglect to impose the legal safeguards which have been placed in his hands for the protection of the city and the contractors, in order to enable his co-conspirators to levy tribute upon the contractors, may be indicted for a conspiracy to pervert and obstruct the administration of law. *People v. Willis*, 158 N. Y. 392.

A conspiracy by two or more persons for the perversion or obstruction of justice or of the due administration of the law is indictable. *People v. Willis*, 158 N. Y. 392.

**Evidence.**—Where there is sufficient evidence to justify a conclusion that different persons charged with a crime were acting with a common purpose and design, although it does not appear there has been a previous combination or confederacy to commit the particular offense, the acts and declarations of each from the commencement to the consummation of the offense, may be evidence against the others. *People v. Van Tassel*, 156 N. Y. 561; 13 N. Y. Cr. 289. A conspiracy may be proved by circumstantial evidence, and parties performing disconn-

overt acts, all contributing to the same result, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be confederators in the commission of the offense. *Id.*

**Illegal.**—A combination formed for the purpose of controlling the prices, limiting the production, preventing competition among manufacturers, and also preventing further improvement in float spring-tooth harrows, is contrary to public policy. *Nat. Harrow Co. v. E. Bement & Sons*, 21 A. D. 290; 81 S. R. 462; 47 S. 462; *Strait v. Harrow Co.*, 18 S. 224; *Harrow Co. v. Quick*, 67 Fed. 131; *Harrow Co. v. Hench*, 76 *id.* 667.

A combination to control the price and production of a certain article may be illegal, though its manufacture is protected by patents. *National Harrow Co. v. E. Bement & Sons*, ante.

**Intent.**—Where a conspiracy is alleged, proof by the people of other acts of a similar fraudulent nature, practiced by the same parties upon persons other than the complainant, is limited in its effect to the question as to the intent of the defendant in the transaction under consideration. *People v. Wicks* (Sup. Ct. 4 D. 1896), 11 A. D. 539; 76 S. R. 630; 42 S. 630.

**Merger.**—A demurrer to an indictment for conspiracy to commit felony, charging overt acts which show that the felony was actually committed, must be sustained on the ground that the misdemeanor was merged in the felony. *People v. McKane*, 57 St. Rep. 723; 7 Misc. 478; 28 N. Y. Supp. 175. Where two crimes are of equal grade, there can be no legal technical merger. *Id.* But the doctrine of merger is applicable, where the crime is of a higher grade than the conspiracy, and the object of the conspiracy has been fully accomplished. *Id.*

**Proof.**—A conspiracy may be proved by circumstantial evidence, and parties performing disconnected acts, contributing to the same general result may, by the proof of circumstances and their general connection with each other, be satisfactorily shown to be confederates in the commission of an offense. *People v. Peckens*, 153 N. Y. 576; 12 N. Y. Cr. 433.

See *People v. Chandler*, 54 App. Div. 111; 15 N. Y. Crim. Rep. 165. In order to establish a conspiracy there must be an introduction of some overt act. *People v. Fritz*, 15 N. Y. Crim. Rep. 174. It is no ground for the postponement of trial of a conspiracy to institute action, that the said action is still

pending in the Supreme Court. *People v. Peterson*, 15 N. Y. Crim. Rep. 421; 60 App. Div. 118.

**170. Sanction of law.**—The organization, or the co-operation of workmen must be regarded as having the sanction of law, when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate. *Curran v. Galen*, 152 N. Y. 33. See *People v. McFarlin*, 43 Misc. 591.

But the social principle which justifies such organization is departed from, when they are so extended in their operation as either to intend, or to accomplish, injury to others. *Id.*

**171. Overt act.**—The object of the statute is to require something more than a mere agreement to constitute a criminal conspiracy. *People v. Sheldon*, 54 St. Rep. 513, 523; 139 N. Y. 251; *aff'g* 50 St. Rep. 231. There must be some act in pursuance thereof and done to effect its object, before the crime is consummated. *Id.* A mere agreement, followed by no act, is insufficient. *Id.*

Though the raising of the price of a commodity by a dealer, unconnected with any conspiracy, is not unlawful, yet, if there is a conspiracy to regulate the price, and that conspiracy is illegal, the raising of the price is an act done to effect its object, whether the price fixed is reasonable or excessive. *Id.* The object of the statute is accomplished when the parties have proceeded to act upon the agreement and done anything towards effecting its object. *Id.*

An agreement does not amount to a conspiracy, unless some act beside such agreement be done to effect the object thereof by one or more of the parties to such an agreement. *People v. Willis*, 158 N. Y. 392.

**171b.** Added by chap. 349, Laws 1903.

**171c.** Added by chap. 349, Laws 1903.

**180. Assault.**—Upon the trial of an indictment for murder the defendant cannot be convicted of an assault. *People v. Connors* (Ct. Sess. 1895), 70 S. R. 169; 13 Misc. 582.

**181. Proof.**—When a sufficient cause to produce a given result is proved, it is not necessary, under this section, to negative every other possible contingency which might produce the same result. *People v. O'Connell*, 60 St. Rep. 752; 78 Hun, 323; 29 Supp. 195.

After the death of the deceased is first shown by direct testimony, the district attorney is required to show whether the death has been produced by criminal means, and if so, by

whom. *People v. Benham*, 160 N. Y. 402. It is competent to establish these questions by circumstantial, as well as by direct, evidence. *Id.*; *People v. Bennett*, 49 *id.* 137, 143.

**Corpus delicti.**—The corpus delicti, in case of murder or manslaughter, means the body of a crime, and is divided into two component parts, the first of which is the death of the person, and the second is that the death is produced through criminal agency. *People v. Benham*, 160 N. Y. 402. The first must be established by direct evidence, and the latter by direct or circumstantial evidence, to the satisfaction of the jury, beyond a reasonable doubt. *People v. Benham*, 160 N. Y. 402; *Ruloff v. People*, 18 N. Y. 178; *People v. Beckwith*, 108 *id.* 67; *People v. Bennett*, 49 *id.* 137; *People v. Palmer*, 109 *id.* 110; *People v. Place*, 157 *id.* 584, 602.

183. See *People v. Gallo*, 149 N. Y. 106.

As to insanity as a defense, see *People v. Nino*, 149 N. Y. 317.

**Anger.**—The fact that a fatal act was done in anger and while in a fit of passion, does not save it from constituting murder in the first degree, if it is done with deliberation and premeditation. *People v. Tuczkewitz*, 149 N. Y. 240.

An interval between the formation of an intent to kill and the infliction of a mortal wound sufficient to admit of defendant's drawing a razor from an inside pocket of his coat or vest, opening it and placing his hand upon the deceased's shoulder, is not so short as necessarily to negative an inference of premeditation and deliberation. *People v. Ferraro*, 161 N. Y. 365; *People v. Majone*, 91 *id.* 212; *People v. Clark*, 7 *id.* 393; *People v. Conroy*, 97 *id.* 62, 76; *Leighton v. People*, 88 *id.* 117; *People v. Constantino*, 153 *id.* 24; *People v. Decker*, 157 *id.* 186, 194; *People v. Kennedy*, 159 N. Y. 346, 352.

**Circumstantial evidence.**—In the administration of the criminal law the People are generally required to rely to a great extent upon the collateral circumstances which point to the crime and the perpetrator of it. *People v. Place*, 157 N. Y. 584. While to justify a conviction for a crime upon circumstantial evidence, there must be positive proof of the facts from which the inference of guilt is to be drawn, an inference must be shown to be the only one that can be reasonably drawn from the facts, yet, where the evidence, taken together, leads irresistibly and exclusively to a conclusion of guilt, with which no material

fact to establish it is at variance, it constitutes the higher form of evidence, and may not be disregarded by a court or jury. *Id.*

**Conduct.**—The demeanor, conduct and acts of a person charged with crime, such attempted flight, a desire to elude discovery, an anxiety to conceal the crime, or the evidence of it, are always proper subjects of consideration, as indicative of a guilty mind, and in determining the question of the guilt or innocence of the person charged. *People v. Place*, 157 N. Y. 584; *Greenfield v. People*, 85 N. Y. 85; *People v. O'Neill*, 112 N. Y. 355, 363; *Pierson v. People*, 79 N. Y. 424; *Rex v. Clews*, 4 C. & P. 221; *Reg. v. Crickner*, 16 Cox's Cr. Law Cases, 701; *People v. Hughson*, 154 N. Y. 153, 162; *People v. Ogle*, 104 N. Y. 511, 514; *Hope v. People*, 83 N. Y. 418; *People v. Barber*, 115 N. Y. 475; *Coleman v. People*, 55 *id.* 81; *People v. Murphy*, 135 *id.* 450; *People v. Shea*, 147 *id.* 79; *Lindsay v. People*, 53 *id.* 143, 154; *Ryan v. People*, 79 *id.* 593, 601; *People v. Conroy*, 97 *id.* 62, 80.

**Deliberation and premeditation.**—The defendant is not guilty of murder in the first degree, unless the act is perpetrated not only with the intent to kill, but also with deliberation and premeditation. *People v. Barberi*, 149 N. Y. 256. These three elements must exist in every case in order to constitute that deliberate malice and malignity of heart which is the essential ingredient of the offense. *Id.* If the defendant inflicts a wound in a sudden transport of passion, excited by what the deceased then said and by the preceding events which, for the time, disturbs his reasoning faculties and deprives him of the capacity to reflect, or while under the influence of some sudden and uncontrollable emotion excited by the final culmination of his misfortunes, the act does not constitute murder in the first degree. *Id.* Evidence of the precedent train of events and of the relations of the parties, which can reasonably be presumed to have influenced his mind, are relevant. *Id.*

The evidence in *People v. Leach*, 71 S. R. 337; 146 N. Y. 392, was held sufficient to sustain the inference, drawn by the jury from it, of the defendant's having deliberately murdered the deceased.

Conflicting evidence as to deliberation and premeditation on a trial for murder, held sufficient to warrant the submission of

the case to the jury and to sustain their verdict, objected to as against the weight of evidence. *People v. Barone*, 161 N. Y. 451.

The evidence as to deliberation and premeditation, adduced on the trial of a man for killing his wife by stabbing, reviewed and found to justify a verdict of murder in the first degree. *People v. Rice*, 159 N. Y. 400.

If there was an intention to kill, which was deliberate and premeditated, and the killing followed, the crime was complete. *People v. Kennedy*, 159 N. Y. 346; *People v. Majone*, 91 N. Y. 211; *Leighton v. People*, 88 id. 117; *People v. Beckwith*, 103 id. 364; *People v. Conroy*, 97 id. 76; *People v. Hawkins*, 109 id. 408; *People v. Johnson*, 139 id. 358; *People v. Constantino*, 153 id. 24; *People v. Decker*, 157 id. 194.

The circumstantial evidence in this case was held sufficient to furnish proof of the commission of the crime in addition to the confession, and warrant the inference of deliberation and premeditation. *People v. Pullerson*, 159 N. Y. 339.

In *People v. Geoghan*, 53 St. Rep. 295; 138 N. Y. 677, it was held that the facts made out a clear case of murder in the first degree.

**Disturbing meeting.**—Under this section, the killing of a human being, while engaged in disturbing a lawful meeting, seems to constitute the crime of manslaughter in the first degree. *People ex rel. Taylor v. Seaman*, 59 St. Rep. 462; 8 Misc. 154.

**District attorney.**—If the district attorney lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest. *People v. Fielding*, 158 N. Y. 542.

He should put himself under proper restraint, and should not in his remarks, in the hearing of the jury, go beyond the evidence or the bounds of a reasonable moderation. *Id.*

Where the admonition of the court does not prove sufficient to prevent improper and dangerous appeals to the prejudice of jurors, it becomes necessary to rigidly enforce the general rule that requires a reversal whenever the error is raised by a proper exception. *Id.*



**Evidence.**—Upon the trial of an indictment for the murder of a woman with whom the defendant was living in adultery, it is competent for the prosecution to prove the fact that the deceased was the wife of another man, that defendant had enticed her away from her husband, and was living in meretricious relations with her at the house where the offense was committed. The relations of the parties to each other, and the facts leading up to such relations, are competent for the consideration of the jury. *People v. Sutherland*, 154 N. Y. 345; 12 N. Y. Cr. 495.

Where the defendant admits the shooting and puts his defense upon the fact that he was, at the time it was done, unconscious and not criminally responsible for his acts, his actions, conduct and statements shortly afterward, become competent, as bearing upon his mental condition. *People v. Hughson*, 154 N. Y. 153; 12 N. Y. Cr. 485. If the defendant, at the time he was charged with the crime, knew that the shooting had been done by himself, and denied it, it is a circumstance which the jury may properly consider as bearing upon the question of his guilt and his mental responsibility. *Id.* The fact that the trial judge in defining murder in the first degree included statutory provisions inapplicable to the case, does not present reversible error, where, though he did not in specific terms withdraw such provisions from the jury, he limited their consideration to the killing with deliberation and premeditation. *Id.*

Previous threats and subsequent declarations as to his intention have an important bearing upon what was passing through his mind just before he inflicted the fatal injury. *People v. Corey*, 157 N. Y. 332; 13 N. Y. Cr. 384.

**Felony against person.**—The word “otherwise,” in this section, is not confined to felonies against property simply, but also includes a felony against a person other than the one killed. *People v. Miles*, 62 St. Rep. 346; 143 N. Y. 383; 38 N. E. Rep. 456.

**Ill-treatment.**—Among the circumstances from which malice in the killing by a husband of his wife may be inferred, is that of long-continued ill-treatment. *People v. Benham*, 160 N. Y. 402.

**Insanity.**—The evidence on the trial of a man for killing his wife by stabbing her when visiting him in a state prison where he was confined, reviewed and found to justify the verdict of

murder in the first degree, ordered over the defense of insanity, *People v. Braun*, 158 N. Y. 558.

**Killing.**—To justify a conviction, the prosecution was required to establish the death of the person killed and the fact of killing by the defendant as alleged in the indictment. *People v. Place*, 157 N. Y. 584. The former is required to be established by direct proof, and the latter beyond a reasonable doubt. *Id.* Homicidal suffocation is a crime which it is always difficult to detect, and the mere physical condition of the body after death, as distinct and satisfactory indications of the fact, will seldom exist. Therefore, resort must be had to collateral proof to show that the death was not the result of natural or accidental causes, and to show circumstances which point to the real cause and the means employed to effect it. *Id.*

**Marital infidelity.**—On a trial for wife murder, evidence of open and notorious acts of marital infidelity on the part of the defendant, shortly before the death of his wife, committed under such circumstances that they could hardly fail to come to the attention of his wife and neighbors, is admissible, upon the question of motive. *People v. Benham*, 160 N. Y. 402.

**Means of commission.**—On a trial for murder, evidence is competent which tends to show that the defendant had the means of committing one of the acts which attended or preceded the homicide and which may have induced it. *People v. Place*, 157 N. Y. 584.

**Medical experts.**—Medical experts who have performed an autopsy upon the body of the deceased, have stated the extent of their examination and described what they found, may state that they did not discover any natural cause of death. *People v. Benham*, 160 N. Y. 402.

A regularly educated practicing physician, who has read the leading authorities upon the effect of prussic acid, may give his opinion as to the presence of the effect of prussic acid, based upon the pathological conditions observed by him in performing an autopsy. *Id.*

An expert for the prosecution, on a trial for murder, who, in reply to a competent conclusion, may be cross examined with reference thereto. *People v. Barone*, 161 N. Y. 451. The defendant should not be obliged to resort to a motion to strike out, or to request for an instruction to disregard. *Id.*

**Erroneous charge.**—In commenting upon its charge upon the testimony of a witness as to an alleged confession by defendant it is reversible error for the trial court on a trial for the murder to state that some one must have told the witness how the killing occurred, as he could not have divined it, where it is not impossible that the witness invented the story, adapting it to the fact generally known to the public and those specially known to himself. *People v. Barone*, 161 N. Y. 451.

The question whether the evidence of the physician was entitled to greater weight than any other evidence was not one of law but of fact. *People v. Ferraro*, 161 N. Y. 365. The court may properly leave the subject to the jury, with the instruction that it was a question of fact for them to determine, at the same time telling them it was their right to disregard such evidence entirely, or to regard it. *Id.*

**Motive.**—The prosecution is never bound to prove a motive for the commission of a crime. *People v. Johnson*, 139 N. Y. 358; 54 S. R. 587. Motive furnishes corroboration in a case depending upon circumstantial evidence. *Id.* But, where there is no dispute about the killing and the other ingredients of the crime are established, motive is unimportant, and a conviction may be proper though no motive for the crime can be shown or discerned. *Id.* It is one of the facts tending to the identification of the criminal, or characterizing the criminal act, but is never, as matter of law, essential. *Id.*; *People v. Fish*, 34 St. Rep. 840; 125 N. Y. 136; *People v. Trezza*, 36 St. Rep. 149; 125 N. Y. 740.

Where, upon the trial of an indictment for murder, the evidence points unmistakably to the guilt of the defendant, the question of motive is comparatively unimportant, and the absence of evidence as to what led to the tragedy is immaterial. *People v. Feigenbaum*, 148 N. Y. 636.

The motive for the commission of a homicide is always open to inquiry at the trial, and considerable latitude in the proof is always allowed. *People v. Sutherland*, 154 N. Y. 345; 12 N. Y. Cr. 495. Evidence that the defendant, on the afternoon of the day of the shooting, showed the witness a pistol, remarking at the same time that "this means business some day," is competent, as tending to prove, not only that the defendant had the pistol in his possession at the time but that he intended to use it upon some one. *Id.* Letters written by the

deceased to defendant, which apprised him of claims which the deceased made and of her dependence upon him, are admissible, not for the purpose of proving any facts stated in them, but only for the purpose of showing how the deceased regarded her relations with defendant. *Id.* Letters of the deceased, sent to the defendant and found in his possession, are not, as matter of law, incompetent evidence under all circumstances on the trial of an indictment for homicide. *Id.* It depends upon the contents of the letters and the nature of the information which they convey to the minds of the accused. *Id.*

Evidence which discloses the existence of jealousy and a desire of revenging real or fancied wrongs may be held sufficient to justify the jury in finding a motive for the commission of the offense of murder. *People v. Place*, 157 N. Y. 584.

Evidence of the defendant's threats, of frequent quarrels between the parties, and the admission of the defendant that he killed his wife, constitutes sufficient proof of motive upon the part of the defendant. *People v. Decker*, 157 N. Y. 186; 13 N. Y. Cr. 364.

The absence of a sufficient motive, while always significant, is not conclusive. *People v. Ferraro*, 161 N. Y. 365; *People v. Sutherland*, 154 id. 345, 353; *People v. Johnson*, 139 id. 358, 361.

When it clearly shows that the fatal act was committed wilfully by the defendant, the nature of his motive is unimportant. *People v. Ferraro*, ante; *People v. Feigenbaum*, 148 id. 636, 639; *People v. Scott*, 153 id. 40.

Evidence that there had been a personal encounter between the defendant and decedent, in which the former had been practically defeated, and humiliated by his defeat and inspired by a spirit of revenge, returned to the place of the first affray and made a second attack, is sufficient to justify the jury in finding that the defendant had a motive for the commission of this offense. *People v. Kennedy*, 159 N. Y. 346.

**Premeditation.**—In *People v. Delfino*, 54 St. Rep. 715; 139 N. Y. 625, the evidence was held sufficient to show premeditation.

In *People v. Johnson*, 54 St. Rep. 587; 139 N. Y. 358, it was held that, though the transaction occupied but a few moments, there was time, though very brief, for deliberation and premeditation.

Where the proof establishes that the decedent stood in front of the defendant while he had his pistol in his hand, threatening to kill the decedent, from a half a minute to ten minutes, the fact that the court took out his watch and illustrated to the jury a minute of time, while presenting the question whether there was sufficient time for such a degree of deliberation and premeditation as would constitute the crime of murder in the first degree, is not error. *People v. Constantino*, 153 N. Y. 24; 12 N. Y. Cr. 339.

If it appears that a man charged with murder in the first degree armed himself with a deadly weapon before making the fatal assault, it points strongly towards "a deliberate and premeditated design to effect the death of the person killed;" but it is quite different if he first makes an assault with his fist, and during the struggle that follows seizes a weapon ready to his hand, and at once inflicts a mortal wound with it, for both the shortness of the time and the excitement of the occasion make it much less probable that he acted with deliberation, as it is known in the criminal law. *People v. Corey*, 157 N. Y. 332; 13 N. Y. Cr. 384.

Under the statute, there must be, not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such designs must precede the killing by some appreciable space of time. But the time need not be long. *People v. Decker*, 157 N. Y. 186; 13 N. Y. Cr. 364. Where the evidence is sufficient to justify the jury in finding that the killing of the decedent was with premeditation and deliberation on the part of the defendant, the court may properly decline to withdraw that question from the consideration of the jury. *Id.*

**Proof.**—Upon the trial of an indictment for murder in killing his wife, evidence is relevant to show that the formed intention of defendant to be possessed of her estate was accomplished by securing the fruits of his crime. *People v. Buchanan*, 64 St. Rep. 427; 145 N. Y. 1. Where it appears that a physician, called to attend the deceased, gave her prescription to be taken in doses of one teaspoonful, and that an hour later the defendant gave her two teaspoonfuls of some liquid, the taste of which was bitter, it is competent, upon the theory of the prosecution that morphine was then given to permit an experienced apothecary to show how the morphine could be combined with the prescription of the physician, that the taste would be bitter, and that it was

necessary for the defendant to give two teaspoonfuls in order to dispose of four grains of the drug. *Id.*

Upon such trial, declarations by the defendant during his married life, which reflected upon his wife, exhibited his feelings toward her or showed a desire to be rid of her, are admissible. *Id.*

A conviction of murder in the first degree will not be set aside because of the submission to the jury of the contradictory testimony of an unintelligent boy, the son of one of the defendants, where such testimony is submitted with careful instructions as to its consideration, and the other evidence is sufficient to morally satisfy the mind of the guilt of the defendants. *People v. Ledwon* (Buff. Supr. Ct. 1895), 15 Misc. 280.

The evidence, in this case, was held to be insufficient to sustain a finding that death resulted from a blow inflicted by the defendant. *People v. Kerrigan* (Sup. Ct. 2 D. 1895), 65 S. R. 574; 84 Hun, 609.

Subd. 1 and 3.

See *People v. Wilson*, 71 S. R. 350; 145 N. Y. 628.

Upon the trial of an indictment for homicide, alleged to have been committed with a revolver, the fact that defendant pawned his overcoat in order to raise money to get his revolver back into his possession, only five days before the homicide, bears strongly upon the question of deliberation and premeditation. *People v. Scott*, 153 N. Y. 40; 12 N. Y. Cr. 374. When a husband is charged with the murder of his wife, it is competent to show his relations with a paramour, as it tends to prove the absence of affection for the deceased and to establish a motive for getting rid of her. *Id.*

Upon the trial of an indictment for the murder of a woman with whom defendant was living in adultery, it is competent for the prosecution to prove the fact that the deceased was the wife of another man; that defendant had enticed her away from her husband, and was living in meretricious relations with her at the house where the offense was committed. *People v. Sutherland*, 154 N. Y. 345; 12 N. Y. Cr. 495. The relations of the parties to each other, and the facts leading up to such relations, are competent for the consideration of the jury. *Id.* While an adequate motive for the act is not indispensable to a conviction, yet any fact from which the jury may legitimately find or infer that such motive was acting upon the defendant's mind is competent. *Id.*

**Self defense.**—When one believes himself about to be attacked by another, and to receive great bodily injury, it is his



duty to avoid the attack, if in his power so to do, and the right of attack for the purpose of self defense does not arise until he has done everything in his power to avoid the necessity. *People v. Constantino*, 153 N. Y. 24; 12 N. Y. Cr. 339.

The evidence on a trial for the killing, by shooting, of a time-keeper by a laborer, from whom he had deducted time, reviewed and found to justify the verdict of murder in the first degree, over the claim of self-defense. *People v. McDonald*, 159 N. Y. 309.

**Similar crime.**—The commission of one crime is not admissible in evidence upon the trial for another, where its sole purpose is to show that the defendant has been guilty of other crimes, and would, consequently, be more liable to commit the offense charged. But if the evidence is material and relevant to the issue, it is not inadmissible because it tends to establish the defendant's guilt of a crime other than the one charged. *People v. Place*, 157 N. Y. 584; *People v. McLaughlin*, 150 N. Y. 365, 386.

**Murder.**—The evidence upon a trial for murder examined and held sufficient to sustain a verdict convicting defendant of murder where it was committed without design while committing a felony. *People v. Wise*, 163 N. Y. 140; see *People v. Sullivan*, 172 N. Y. 122; 17 N. Y. Crim. Rep. 180. Homicide committed while attempting to escape from prison is murder. *People v. Flanagan*, 174 N. Y. 357; *People v. Dankberg*, 91 App. Div. 67.

**184.—Distinction.**—The distinction between the degrees of murder is the existence of deliberation and premeditation in the commission of the offense. *People v. Hoch*, 150 N. Y. 291.

**Mistake.**—On the review of a conviction for murder in the first degree, reversible error is not predicable upon a mistake of the trial judge in substituting the word "first" for "second" in reading to the jury the statutory definition of murder in the second degree, where the proper distinction between the two degrees, as regards premeditation and deliberation, are clearly explained in subsequent portions of the charge. *People v. Hoch*, 150 N. Y. 291.

**188.** Manslaughter is one of the grades of criminal homicide. *People v. Welch*, 57 St. Rep. 392; 141 N. Y. 266; affg, 57 St. Rep. 42; 74 Hun. 474; 26 N. Y. Supp. 694.

See *People v. Fitzsimmons* (Ct. Sess. 1895), 69 S. R. 191.

**189. Conducting gas.**—Under this section, the killing of a human being, while engaged in conducting a deadly gas to a room, in which a lawful meeting is then held, for the purpose of disturbing such meeting, seems to constitute the crime

of manslaughter in the first degree. *People ex rel. Taylor v. Seaman*, 59 St. Rep. 463; 8 Misc. 152; 29 Supp. 329.

**Intent.**—It is not necessary that a person, who commits a homicide while engaged in committing a misdemeanor, intends to violate the law, though he must have an intent to commit the act which constitutes the misdemeanor. *People v. Fitzsimmons* (Ct. Sess. 1895), 69 S. R. 191.

The last sentence of this section contemplates a case where the prisoner acts in the heat of passion, in a cruel or unusual manner, or with a dangerous weapon. *Id.*

193. See *People v. Welch*, 57 St. Rep. 42; 74 Hun, 474; 26 N. Y. Supp. 694.

**Culpable negligence.**—At common law, the killing of a human being by culpable negligence was manslaughter. *People v. Welch*, 57 St. Rep. 392; 142 N. Y. 226; *aff'g*, 57 St. Rep. 42; 74 Hun, 474; 26 N. Y. Supp. 694.

203. See *People v. Fitzsimmons* (Ct. Sess. 1895), 69 S. R. 191.

204. **Resisting or fleeing from officer.**—This section defines cases where a person is deprived of his life in resisting or fleeing from a public officer in the administration of justice. *People v. Fitzsimmons* (Ct. Sess. 1895), 69 S. R. 191.

205. See *People v. Hess* (Sup. Ct. 3 D. 1896), 8 A. D. 143; 40 S. 486.

**Self-defense.**—Before one can justify the taking of life in self-defense, he must show that there was reasonable ground for believing that he was in great peril, and that the killing was necessary for his escape from the peril, and that no other safe means of escape was open to him. *People v. Johnson*, 54 St. Rep. 587; 139 N. Y. 358; *Shorter v. People*, 2 N. Y. 195; *People v. Sullivan*, 7 Id. 396; *People v. Carlton*, 26 St. Rep. 434; 115 N. Y. 618.

This section, in a general way, defines those cases where a person is acting in self-defense of his person or property, or the person or property of his family. *People v. Fitzsimmons* (Ct. Sess. 1895), 69 S. R. 191.

Before a party can justify the taking of life in self-defense, he must show that there was reasonable ground for believing he was in great peril; that the killing was necessary for his escape, and that no other safe means was open to him. *People v. Kennedy*, 159 N. Y. 346. When one believes himself about to be attacked by another, and to receive great bodily injury, it is his duty to avoid the attack if in his power to do so, and the right of attack for the purpose of self-defense

does not arise until he has done everything in his power to avoid its necessity. *Id.*

206. As to tattooing or permanent disfigurement of the body, limbs or features of any person or persons resulting from college hazing, see chap. 265 of 1894.

211. **Confinement.**—The first part of this section provides for all cases of kidnapping by seizure and confinement within the state. *People v. Camp*, 139 N. Y. 87; 54 S. R. 455; *aff'd* 51 *id.* 30.

**Evidence.**—Upon the issue as to the age of the complainant in a prosecution for abduction, a record by a former teacher in her own handwriting of the attendance of the complainant upon proof that she inquired of the pupils their ages when she opened school and set it down in the record, and, without looking at the record, she is unable to remember what the complainant told her as to her age, independently of the memorandum, is admissible. *People v. Brow* (Sup. Ct. 3 D. 1895) 70 S. R. 668.

**Inveigled.**—The latter part of this section, after the words “within this state,” relates to cases of removal of the person seized or inveigled from the state. *People v. Camp*, 139 N. Y. 87; 54 S. R. 455; *aff'd*, 51 *id.* 30.

When the person, seized or inveigled, is not removed from the state, the intent must be secret confinement within the state. *Id.*

**Public seizure.**—When a person is seized and removed in broad daylight, over public highways and railroads, in the view of many people, and taken to a public asylum, where there are public officials, numerous physicians and other people, it does not constitute the crime of kidnapping. *People v. Camp*, 139 N. Y. 87; 54 S. R. 455; *aff'd* 51 *id.* 30.

If a public officer, without authority of law, publicly seizes a person and takes him to the police station or jail, he is not, it seems, guilty of kidnapping. *Id.*

If a person, inflamed by undue religious zeal, should take his daughter by force and carry her to some church and compel her to sit in a pew by his side during religious services he would not, it seems, be guilty of this crime. *Id.*

**Revision.**—Subd. 1 of this section is a mere revision of the provisions contained in the Revised Statutes, and is not intended to embrace, within the definition of the crime, acts before innocent. *People v. Camp*, 54 St. Rep. 455; 139 N. Y. 87 *aff'd* 51 St. Rep. 30.

217. See *People v. Rockhill*, 55 St. Rep. 682; 26 N. Y. Supp. 222.

See *People ex rel. Young v. Hannan*, 61 St. Rep. 727; 9 Misc. 600; 30 Supp. 370.

See *People ex rel. Young v. Stout*, 63 St. Rep. 154; 81 Hun, 336; 30 Supp. 898.

218. See *People v. Barber*, 56 St. Rep. 304; 74 Hun, 368; 26 N. Y. Supp. 417.

College hazing prohibited. Chap. 265 of 1894.

**Distinction.**—The Code makes a distinction between the crimes of assault in the first and second degrees. *People ex rel. Young v. Hannon*, 61 St. Rep. 727; 9 Misc. 600; 30 Supp. 370.

**Subd. 4.** Discharging a pistol loaded with blank cartridges is not, as matter of law, an assault in the second degree. *People v. McKenzie* (Sup. Ct. 2 D. 1896), 6 A. D. 199; 39 S. 951. But, where the weapon used is of such a character or is used under such circumstances or in such manner, that it may be fairly disputed whether it is likely to produce grievous bodily harm, the question of fact is for the jury. *Id.*; *People v. Irving*, 95 N. Y. 541; *Nelson v. People*, 23 *id.* 293; *Abbott v. People*, 85 *id.* 471. In the case of a common assault, the putting the party assailed in fear of violence against his person may be sufficient, but, in the statutory offense, it is not the apparent character of the weapon or thing, but the actual character that constitutes the crime. *Id.*

219. See *People v. Parker*, 53 St. Rep. 411; 69 Hun, 130; 23 N. Y. Supp. 704. Previously annotated.

**Insufficient.**—Where, upon the trial of a complaint for assault, the testimony of the witnesses for the prosecution is inconsistent, and a strong defense is made out by witnesses who are not impeached, and it appears that the complainant had been drinking to excess for several hours before the assault, in regard to which he testified, was committed upon him, a conviction will not be sustained on appeal. *People v. Curren* (Sup. Ct. 1 D. 1896), 2 App. Div. 307.

**Throwing vitriol.**—The uncertainty of the evidence, in this case, as to the identity of the defendant as the thrower of the vitriol, was held, in *People v. Braccio*, 53 St. Rep. 227; 69 Hun, 206; 23 N. Y. Supp. 505, not to raise a doubt sufficient to call upon the general term to set aside the verdict.

221. This section gives the court power to sentence for a term of five years and to impose imprisonment for nonpayment of a fine in addition to the absolute imprisonment. *People ex rel. Gateley v. Sage* (Westchester Co. Ct. 1896), 17 Misc. 712; 41 S. 531; *aff'd*, 13 A. D. 135; 77 S. R. 372; 43 S. 372; *People v. Sutton*, 24 S. R. 726.

By this section, assault in the second degree is punished by imprisonment in a penitentiary or state prison for a term not exceeding five years, or by a fine of not more than \$1,000, or both. *People ex rel. Gateley v. Sage*, 13 A. D. 135; 77 S. 372; 43 S. 372; aff'g, 17 Misc. 712; 41 S. 531. The provision that the term of imprisonment should not exceed five years applies only to the term of absolute imprisonment which the defendant must necessarily undergo, and not the imprisonment to which he is subjected as a means to compel him to pay the fine. *Id.* It has always been the practice to enforce the payment of a fine, when imposed as a punishment for a crime, by a direction that the defendant stand committed until the fine is paid. *Id.*

**222.** See *People ex rel. Knatt v. Davy*, 65 St. Rep. 162 Supp. 106.

**224. Cross-examination.**—Where the accused, upon the trial of an indictment for the robbery of a store, in the commission of which the clerk in charge was assaulted, claims that the offense was committed by other persons, but is himself positively identified as the guilty party by such clerk, it is error, upon cross-examination of the clerk, to refuse to permit the accused to ask him whether he ever identified one of the persons with whom the accused claimed had participated in the crime, as the son who held the revolver to his head. *People v. Stack*, 4 A. D. 548; 92 S. R. (58 S.) 691.

**District attorney.**—A statement by the district attorney in his opening address to the jury, that the defendant and his alleged associate, had conducted themselves "very suspiciously" on an occasion prior to the robbery, is not objectionable, where it is simply his construction of the evidence which he proposed to introduce. *People v. Flanagan*, 12 N. Y. 549; 82 S. R. (48 S.) 241.

**Proof.**—On the trial of an indictment for robbery, evidence that the defendant, soon after the time of the transaction, displayed a quantity of money, is admissible. *People v. Minder*, 61 St. Rep. 523; 80 Hun, 40; 29 Supp. 842.

Where, upon the trial of an indictment for robbery, evidence has been given tending to identify the defendant with another as the persons who had participated in the transaction, though they were not seen together on the day or occasion when it was committed, it is competent to show that they were associates a short time before the occasion in question, though they were not at that time apparently engaged in any unlawful enterprise, especially where the defendant claims

that they were strangers. *People v. Flanagan*, 12 N. Y. Cr. 549; 82 S. R. 241; 48 S. 241.

242. See *Shea v. Sun Printing and Publishing Association* (N. Y. C. P. Sp. T. 1895), 70 S. R. 438; 14 Misc. 415.

244. In an action for libel, a defendant is not qualified to testify to his belief, without stating facts in support thereof. *People v. Sherlock*, 56 App. Div. 422; 15 N. Y. Crim. Rep. 297; 15 N. Y. Crim. Rep. 412; 166 N. Y. 180.

254a. See *Martin v. Bernheim* (Sup. Ct. Sp. T. 1895), 68 S. R. 718.

Amended by chap. 626 of 1894.

259. **Sabbath observance.**—The legislature, for the purpose of the moral and physical well-being of the people and the peace, quiet and good order of society, has authority to regulate the observance of the Christian Sabbath, and, by any appropriate legislation, prevent its desecration. *People v. Moses*, 55 St. Rep. 403; 140 N. Y. 214; aff'g 47 St. Rep. 181; *Lindenmuller v. People*, 33 Barb. 548; *Neuendorff v. Duryea*, 69 N. Y. 557.

It is not the meaning of this section that every act, which is claimed to be a violation thereof, must, in fact, be a serious interruption of the repose and religious liberty of the community; but the legislature, in subsequent sections, specified certain acts which are declared to be serious interruptions of the repose and religious liberty of the community, acts necessarily described in general and comprehensive terms, which the law-makers believed had a general tendency to interfere with Sunday as a day of rest and religious worship. *People v. Moses*, ante.

260. See *Steinert v. Sobey*, 14 A. D. 505; 78 S. R. 146; 44 S. 146; *People v. Tench*, 167 N. Y. 520.

263. **Barbering.**—The act, known as chapter 823 of 1895, which prohibits any person from carrying on or engaging in the business of shaving, hair cutting, or other work performed by a barber on the first day of the week is constitutional. *People v. Havnor* (Sup. Ct. 1 D. 1896), 1 App. Div. 459; aff'd, 149 N. Y. 195. The prohibition of the carrying on of a particular trade upon Sunday is a proper exercise of the police power. *Id.*

The peculiar character of the first day of the week, not simply on account of the obligations of religion, but as a day of rest and recreation, has been recognized for a time out of mind both by the legislature and the courts. *People v. Havnor*, 149 N. Y. 195; aff'g, 1 App. Div. 459. The said act is a valid exercise of the police power by the legislature, works no



deprivation of liberty or property within the meaning of the Constitution, and does not violate the fourteenth amendment to the Federal Constitution by denying the protection of the laws. *Id.*

**Defense.**—This section prohibits manual labor and manufactures on the Sabbath, but a master, in order to escape from liability for its negligence, cannot plead a violation on the part of the servant, of the Sunday law, which is invited. *Solarz v. Man. R. Co.*, 59 St. Rep. 538; 8 Misc. 656; 29 Supp. 1123; 31 Abb. N. C. 426. The servant may not be able to recover for services rendered on the faith of a contract, but he is not for that reason to be physically disabled. *Id.*

**Labor on Sunday.**—This section prohibits all labor on Sunday, excepting works of necessity or charity, and it matters not whether the prohibited labor is public or private; wherever it is performed, it is prohibited. *People v. Moses*, 55 St. Rep. 403; 140 N. Y. 214; *aff'g* 47 St. Rep. 181.

The Penal Code, while prohibiting all labor on Sunday, excepting works of necessity and charity, broadened the definition of work which was permitted by providing that in works of necessity and charity is included whatever is needful during the day for the good order, health or comfort of the community. *Tyrrell v. Mayor*, 34 A. D. 334; 88 S. R. (54 S.) 372.

**265. Baseball.**—Baseball playing on Sunday is a misdemeanor, and is prohibited by this section of the Penal Code. *Matter of Rupp*, 33 A. D. 468; 87 S. R. 927; 53 S. 927. But held not prohibited except where a serious interruption of repose of community. *People ex rel. Bedell v. Mott*, 15 N. Y. Crim. Rep. 551; 38 Misc. 171.

**Fishing.**—Fishing is prohibited on Sunday everywhere and under all circumstances. *People v. Moses*, 55 St. Rep. 403; 140 N. Y. 214; *aff'g* 47 St. Rep. 181.

**Playing ball.**—The case of *People v. Dennin*, 35 Hun, 327, was held, in *People v. Moses*, 140 N. Y. 214; 55 S. R. 403; *aff'g* 47 *id.* 181, not to have been correctly decided. It cannot be doubted that playing ball by several persons in a place open to the view of the people who may be in the vicinity, or may pass by, is condemned by the principles which lie at the bottom of the Sunday laws, and is an act of playing within the meaning of the statute. *Id.*

**Sabbath.**—The legislature has authority to protect the Christian Sabbath from desecration by such laws as it may deem necessary, and it is sole judge of the acts proper to be prohibited, with a view to the public peace on that day. *Matter of Rupp*, 33 A. D. 468; 87 S. R. 927; 53 S. 927.

These laws prohibit all labor on Sunday except works of necessity or charity. *Matter of Rupp*, 33 A. D. 468; 87 S. R. 927; 53 S. 927. They close the courts and public offices on that day and they secure the protection and sanctity of religious meetings. *Id.*

**Summary proceedings.**—Justices of the peace and magistrates generally have power under section 73, art. 8, tit. 8, chap. 20, part 1 of the Revised Statutes to entertain summary proceedings for the punishment of Sabbath breaking, as defined in the Penal Code. *Erbe v. Monteverde* (Sup. Ct. Sp. T. 1895), 69 S. R. 476; 13 Misc. 404.

**Warrant.**—A peace officer may without a warrant arrest a person for a crime committed or attempted in his presence. *Matter of Rupp*, 33 A. D. 468; 87 S. R. 927; 53 S. 927.

266. See *People v. Moses*, 55 St. Rep. 403; 140 N. Y. 214; *aff'g* 47 St. Rep. 181.

See notes under sec. 263, ante.

**Violation.**—While the sale of soda water, sarsaparilla and the like on Sunday is not a violation of the excise law, it is a clear violation of the statutes for the observance of the Sabbath and renders the violator liable to arrest. *Quinlan v. Conlin* (N. Y. Supr. Sp. T. 1895), 69 S. R. 119; 13 Misc. 568. This section forbids all trades upon the Sabbath, except the same are works of necessity. *Id.*

267. Amended by chap. 392, Laws 1901. See *People v. Moses*, 55 St. Rep. 403; 140 N. Y. 214; *aff'g* 47 St. Rep. 181.

**Sale.**—By this section, all manner of public selling or offering for sale of any property is prohibited, except that articles of food may be sold and supplied at any time before ten o'clock in the morning, and except that meals may be sold to be eaten on the premises where sold, or served elsewhere by caterers, and prepared tobacco in places other than where spirituous or malt liquors and wines are kept or offered for sale, and fruits, confectionery, newspapers, drugs, medicines and surgical appliances may be sold in a quiet and orderly manner at any time of the day. *Quinlan v. Conlin* (N. Y. Supr. Sp. T. 1895), 69 S. R. 119; 13 Misc. 568.

268. See *People v. Moses*, 55 St. Rep. 403; 140 N. Y. 214; *aff'g* 47 St. Rep. 181.

269. See *Erbe v. Monteverde* (Sup. Ct. Sp. T. 1895), 69 S. R. 476; 13 Misc. 404.

**Misdemeanor.**—This section provides that Sabbath breaking is a misdemeanor. *Quinlan v. Conlin* (N. Y. Supr. Sp. T. 1895), 69 S. R. 110; 13 Misc. 568.

270. See *Erbe v. Monteverde* (Sup. Ct. Sp. T. 1895), 69 S. R. 476; 13 Misc. 404.

271. **Service of process.**—Three separate and distinct acts are impliedly prohibited in this section: (1) the malicious procuring of the service of any process in a civil action on Saturday upon a person who keeps that day as holy time; (2) the service upon such a person of any process returnable on that day; and (3) the malicious procuring of an adjournment to that day of a hearing in a civil action to which such a person is a party. *Martin v. Goldstein*, 80 S. R. 961 (46 S. 961). In order to constitute an offense, so far as the first and third subdivisions above mentioned are concerned, the element of malice must be established, whereas such is not apparently the case as regards the second subdivision. *Id.* But a party who procures process against such person to be returned on Saturday through inadvertence, and without intent to fix the return on day kept holy by defendant, is not criminally liable, and such process is not void. *Id.*

274. **Disturbance of meeting.**—This section defines the offense of one, who willfully disturbs an assemblage met for religious worship, as a misdemeanor, and leaves its punishment open to the provisions concerning misdemeanors in general. *Steinert v. Sobey*, 14 A. D. 505; 78 S. R. 146; 44 S. 14. It is not necessary that the offense should be prosecuted by indictment, and a justice of the peace has power to try a person who is brought before him charged with that offense. *Id.*

277. Does not prohibit dancing on Sundays other than an exhibition or performance. 15 N. Y. Crim. Rep. 453; 13 Misc. 698.

278. **Age.**—In 1895 the section was amended so as to increase the limit of age, as applied to rape, to the period eighteen years, although under the Revised Statutes it was but ten years. *People v. Nelson*, 153 N. Y. 90; 12 N. Y. C. 368.

**Consent.**—The language of this section differs from that of the prior statute on the subject and is susceptible of a construction which renders sexual intercourse against the will, without the consent of the female, though under sixteen years of age, essential to the crime of rape. *People v. Flaherty*, 100 St. Rep. 199; 79 Hun, 48; 29 Supp. 641.

**Evidence.**—Where defendant is on trial for an act of sexual intercourse with a female under sixteen years of age, evidence that eight months after she reached such age she gave birth to a child is admissible. *People v. Flaherty*, 84 S. R. 574 (50 S. 574). On the trial of an indictment, it is always competent

first prove that the crime charged has been committed, by evidence which does not connect the defendant with the crime. *People v. Flaherty*, 84 S. R. (50 S.) 574. After it is established that a crime has been committed then the defendant's commission thereof must be shown. *Id.*

The fact that he attempted to obtain custody of her, by means of a forged letter, after she became pregnant, is admissible. *Id.*

Where defendant gives, on cross-examination, part of a conversation, it is competent for the people to give the remainder, which relates to the subject gone into by the defendant. *Id.*

It is competent to give evidence of a previous attempt by the defendant to commit rape on the complainant, although it involves the proof of another felony. *People v. Flaherty*, 84 S. R. 574; 50 S. 574; *People v. Grauer*, 12 A. D. 464; 42 S. 721.

Where defendant is on trial for an act of sexual intercourse with a female under sixteen years of age, evidence of other acts before she reached such age is admissible. *People v. Flaherty*, ante.

**Female under sixteen.**—On the trial of an indictment for having intercourse with a female under sixteen years of age, evidence that she had such connection about the same time with others than defendant, is admissible in refutation or contradiction of the charge made against him. *People v. Flaherty*, 79 Hun, 48; 61 S. R. 199; 29 S. 641. But such fact is no defense for him. *Id.*

The amendment of this section by chap. 693 of 1887 eliminated, on the trial of a criminal charge, the question of consent or resistance from the case of an assault upon a female under sixteen years of age. *Dean v. Raplee*, 64 St. Rep. 681; 145 N. Y. 319.

The amendment was evidently based upon the principle that consent or non-resistance on the part of a girl of that age was not to be understood in the same way as in the case of like acts committed upon a woman of more mature years. *Id.*

See *People v. O'Malley*, 52 App. Div. 46; 15 N. Y. Crim. Rep. 52; 98 St. Rep. 843; *People v. Tench*, 167 N. Y. 520; *People v. Dickerson*, 15 N. Y. Crim. Rep. 365; 58 App. Div. 202; *People v. Mosier*, 16 N. Y. Crim. Rep. 541; 73 App. Div. 5.

**282. Age.**—This section was amended by chap. 460 of 1895, and the amendment will go into effect September 1, 1895. In

subdivisions 1 and 4, it changes the word "sixteen" to "eighteen."

**Evidence.**—In *People v. Brown*, 55 St. Rep. 103; 71 Hun, 601; 24 N. Y. Supp. 1111, the evidence of the complainant and her witnesses was held to be sufficient to make out a case under this section.

As to evidence of age in case of abduction. See *People v. Ragone*, 15 N. Y. Crim. Rep. 368; 54 App. Div. 498. Testimony of person employed in house of ill-fame that she saw the girl and defendant in the hall of said house not sufficient corroboration of girl's story that she had been abducted. *People v. Miller*, 16 N. Y. Crim. Rep. 396; 70 App. Div. 592. Corroborative testimony. *People v. Swasey*, 77 App. Div. 185; 17 N. Y. Crim. Rep. 138.

283. See *People ex rel. Kenfield v. Lyon*, 64 St. Rep. 739; 83 Hun, 303; 31 Supp. 942.

See *People v. Brown*, 55 St. Rep. 109; 71 Hun, 601; 24 N. Y. Supp. 1111.

**Corroboration.**—The case of rape is an exception to the rule that the evidence of a witness cannot be corroborated or confirmed by proof that such witness stated the facts testified to on the trial, on some previous occasion. *People v. Terwilliger*, 56 St. Rep. 255; 74 Hun, 310; 26 N. Y. Supp. 674; *People v. O'Sullivan*, 5 St. Rep. 702; 104 N. Y. 481.

Under this section, it is not necessary that the prosecutrix should be corroborated upon all the material points of the testimony. *People v. Terwilliger*, ante.

This section is indefinite as to the character and extent of the supporting evidence required. *Id.*

A disclosure within proper time is said to be some corroboration. *Id.*; *People v. O'Sullivan*, 5 St. Rep. 702; 104 N. Y. 481.

It is not necessary that the corroborating evidence should be such as to exclude every hypothesis except that of guilt. *People v. Terwilliger*, ante.

The consent of the female need not be corroborated. *Id.*

The female need not be corroborated on every material fact, nor need the corroborating evidence be wholly inconsistent with the theory of the defendant's innocence. *Id.*; *People v. Elliott*, 8 St. Rep. 703; 106 N. Y. 283, 292.

There should be supporting or corroborating evidence fairly tending to prove: (1) that a rape has been actually committed; and (2) that the defendant is the person who committed it. *People v. Terwilliger*, ante.

That the defendant had the opportunity at least to commit

the offense charged, is corroborative evidence tending to connect him with the commission of the crime. *Id.*

The fact that the prosecutrix was a girl sixteen years of age, that she was a considerable distance from her home, with old people to whom it would not be natural for her to confide what had befallen her, that she was within a comparatively short distance of the defendant, who threatened to kill her if she disclosed what had occurred, that she expected shortly to return to her parents, her natural guardians and confidants, and that immediately upon her return home, before she removed her "wrap," she told her mother what had occurred, brings it within the line of exceptions to immediate disclosure, stated in the case of *People v. O'Sullivan*, ante. *Id.*

In *People v. O'Sullivan*, 5 St. Rep. 702; 104 N. Y. 481, the court held that the evidence was inadmissible, because the disclosure was not promptly made, and the reason upon which the rule is based for the reception of such evidence requires that the disclosure should be quite recent, and made at the first suitable opportunity; yet it is said: There may be circumstances which excuse delay, as when the prosecutrix is under the physical control of the defendant, when she is among strangers and there is no one in whom she can confide, when she is induced to silence by threats, and is so far within the power or reach of the defendant that the threats may be executed. See *People v. Terwilliger*, ante. In such and other like cases, delay may be excused, the disclosure may be proved, and all the facts submitted to the jury for them to determine what weight shall be given to the disclosure, and what effect the delay shall have. *Id.*

The rule in *People v. Plath*, 100 N. Y. 590, has been much modified in later decisions. *People v. Terwilliger*, ante; *People v. Kearney*, 17 St. Rep. 165; 110 N. Y. 188, 194; *People v. Elliott*, 8 St. Rep. 703; 106 N. Y. 188; *People v. Ogle*, 5 St. Rep. 740; 104 N. Y. 511, 515; *People v. Everhardt*, 5 St. Rep. 693; 104 N. Y. 591; *People v. Cullen*, 23 St. Rep. 559; 5 N. Y. Supp. 886.

The evidence, under this section to support that of the female need not be direct; it may be circumstantial. *People v. Grauer*, 12 A. D. 464; 76 S. R. 721; 42 S. 721. It need not be in and of itself convincing or conclusive, but it must be corroborative of the female's evidence. *Id.*

Upon the trial of an indictment for rape, the defendant could not be convicted upon the testimony of the girl "unsupported by other evidence." *People v. Page*, 162 N. Y. 272.

The corroborative evidence, whether consisting of acts or



admissions, must at least be of such a character and quality as tends to prove the guilt of the accused by connecting him with the crime. *People v. Page*, 162 N. Y. 272. The corroboration must extend to every material fact essential to constitute the crime. *Id.*; *People v. O'Sullivan*, 104 N. Y. 481; *People v. Kearney*, 110 *id.* 188; *People v. Plath*, 100 *id.* 590; *Kenyon v. People*, 26 *id.* 203.

Whether there is any evidence of corroboration in such cases is a question of law for the court, and if the case is submitted to the jury without any legal proof in support of the charge, except that coming directly or indirectly from the complainant herself, a conviction cannot be upheld. *People v. Page*, 162 N. Y. 272.

A witness cannot generally be corroborated by proving declarations made out of court of the same facts testified to in court. *People v. Page*, 162 N. Y. 272.

In cases of rape disclosures made by the female within a reasonable time after the outrage are admissible as a part of the people's case, and the female may testify when and to whom made and the nature of the disclosure. But it is not "other evidence" in support of her version of the affair within the meaning of the statute. *People v. Page*, 162 N. Y. 272.

An accused person is bound to deny neighborhood gossip with respect to his guilt at the peril of furnishing by silence evidence against himself when on trial upon the charge. *People v. Page*, 162 N. Y. 272.

His admission to another witness that he had "insulted the girl," is not corroborative evidence when it does not appear when, where or how the insult was given. *People v. Page*, 162 N. Y. 272.

**Reasonable doubt.**—It is incumbent upon the prosecution to prove beyond a reasonable doubt that the defendant violated the person of the girl without her consent, against her will and resistance. *People v. Page*, 162 N. Y. 272; *People v. Dohring*, 59 *id.* 374; *People v. Connor*, 126 *id.* 278.

Evidence of virginity twenty months after the alleged rape is not corroborative of complainant's statement of offense. *People v. Ragone*, 54 App. Div. 498; see *People v. Butler*, 15 N. Y. Crim. Rep. 207; 55 App. Div. 361. Any female abducted at the same time with complainant may testify as to such abduction, even though she was an accomplice. *People v. Panyko*, 16 N. Y. Crim. Rep. 438; 71 App. Div. 324. See *People v. Haischer*, 81 App. Div. 559; 17 N. Y. Crim. Rep.

**284. Age of consent.**—The age of consent, fixed by section 277 of the Penal Code, does not apply to the crime of seduction under the promise of marriage. *People v. Nelson*, 153 N. Y. 90; 12 N. Y. Cr. 368.

**Conditional promise.**—A promise on the part of a man to marry a woman, who consents to sexual intercourse with him, in case she becomes pregnant as a result of such intercourse, is not sufficient to base thereon a conviction under this section. *People v. Van Alstyne*, 63 St. Rep. 666; 144 N. Y. 361; rev'd, 61 St. Rep. 232; 78 Hun, 509; 29 Supp. 542.

The case of *People v. Duryea*, 63 St. Rep. 131; 81 Hun, 390; 30 Supp. 877, was held to have been well decided, and the reasoning of Brown, J., therein approved by the court of appeals in *People v. Van Alstyne*, ante.

Seduction, under promise of marriage in case the female becomes pregnant, is not within this section. *People v. Duryea*, ante. The case of the *People v. Hustis*, 32 Hun, 58, is the only authority that sustains a contrary view. *Id.* The decision in that case was by a divided court, and the correctness of the conclusion there reached was questioned in *People v. Van Alstyne*, 61 St. Rep. 232; 78 Hun, 509. The prevailing opinion in *People v. Hustis*, ante, is based upon the assertion that the question had been decided by the court of appeals in *Kenyon v. People*, 26 N. Y. 203, and *Boyce v. People*, 55 N. Y. 644. In the latter cases, the promise testified to was that the accused would marry the prosecutrix if she would consent to have connection with him, and neither case presented the question of a promise conditional upon pregnancy. *People v. Duryea*, ante. The court, in the last cited case, suggested that the case of *People v. Hustis*, ante, should be overruled.

**Definition.**—The term "previous chaste character," as used in this section, does not mean reputation for chastity but actual personal virtue. *People v. Nelson*, 153 N. Y. 90; 12 N. Y. Cr. 368.

**Evidence.**—Upon the trial of an indictment for seduction under promise of marriage, declarations of defendant in regard to the condition of the prosecutrix, and evidence that defendant tried to induce plaintiff to have an abortion performed, are properly admitted. *People v. Orr* (Sup. Ct. 4 D. 1895), 71 S. R. 169; 92 Hun, 199.

An admission by the accused of mere intercourse does not admit seduction under promise of marriage. *People v. Gu-maer*, 4 A. D. 412; 39 S. 326.

Merely having sexual intercourse with a female does not constitute seduction. *Id.* In order to constitute seduction,

the defendant must use insinuating arts to overcome the opposition of the seduced, and must, by his wiles and persuasions without force, debauch her. *Id.*; *Hogan v. Cregan*, 6 Robt 138, 150.

**Once.**—A woman can be seduced but once, at least under the section in question, and that the first voluntary act on her part, after she is able to understand its nature and comprehend its enormity is the only one in which she can participate as a victim. *People v. Nelson*, 153 N. Y. 90; 12 N. Y. Cr. 368.

**Promise of marriage.**—Seduction under promise of marriage was not a crime at common law, but was made such by chapter 111 of the Laws of 1848. This statute was substantially re-enacted in the Penal Code. *People v. Nelson*, 153 N. Y. 90; 12 N. Y. Cr. 368.

**Variance.**—Where an indictment for seduction charges that the offense was committed at the town of Forestburg in the county of Sullivan, and the evidence describes the seduction as occurring near Sand Spring, without showing that such locality was within the said county, a conviction will not be reversed on the ground that the crime was not committed in that county. *People v. Gumaer*, 61 St. Rep. 768; 80 Hun, 78; 30 Supp. 17.

**285. Limitation.**—The two years' limitation for the finding of an indictment for seduction under promise of marriage begins to run from the time of the commission of the first offense between the parties, notwithstanding the prosecutrix is then only fifteen years of age. *People v. Nelson*, 153 N. Y. 90; 12 N. Y. Cr. 368.

**286.** See *People ex rel. Kenfield v. Lyon*, 64 St. Rep. 739; 83 Hun, 303; 31 Supp. 942.

**Corroboration.**—Upon the trial of an indictment for seduction under the promise of marriage, the evidence required must be corroborative of the promise of marriage and the carnal connection and need not extend to the fact that the female seduced was of previous chaste character or unmarried. *People v. Orr* (Sup. Ct. 4 D. 1805), 71 S. R. 160; 92 Hun, 19. As to the promise of marriage the provision of this section is satisfied by proof of circumstances which actually attend an engagement of marriage. *Id.* And, as to the illicit intercourse and the inducement which led to the consent, evidence of opportunities and that the relations of the parties were such as indicated that confidence in and affection for the accused on the part of the female, which render it probable that the act may have been done are sufficient. *Id.* Proof of circum-

nces legitimately to establish the material facts are sufficient to authorize a conviction. *Id.* The testimony of a physician that he examined complainant at a certain time and found her in a certain condition, is admissible to corroborate her testimony as to the time when the alleged intercourse occurred. *Id.*

**Evidence.**—In an action for seduction under a promise of marriage, evidence of attentions of defendant upon the prosecutrix in the character of a suitor, furnishes some proof, which the jury has a right to consider as bearing upon the alleged promise of marriage and seduction, and, to some extent at least, corroborates her testimony upon that subject. *People v. Gumaer*, 61 St. Rep. 768; 80 Hun, 78; 30 Supp. 17.

287. Amended by chap. 376, Laws 1903.

Subd. 2 is constitutional. See *People v. Hagan*, 52 App. Div. 387; 99 St. Rep. 120; 15 N. Y. Crim. Rep. 136; *People v. Malley*, 52 App. Div. 46.

287a. Added by chap. 168, Laws 1905.

288. Amended by chap. 171 of 1894.

Chap. 171 of 1894 also repealed sec. 206 of chap. 661, 1893.

289. Added by chap. 655, Laws 1905.

290. **Cruelty to children.**—For incorporation of societies for the prevention of cruelty to children, see chap. 130 of 1875, as amended by chap. 105 of 1894.

**Cigarettes.**—This section, which prohibits the sale of cigarettes to children under the age of sixteen years, should not be construed so sweepingly as to hold that it takes the entire trade out of the prohibition against monopolies. *People v. Duke*, 19 Misc. 292; 78 S. R. 336; 44 S. 336.

**Sale of liquor to child.**—Provisions of chapter 112 of 1896 are not exclusive and do not repeal by implication the provision of the above section, which makes it a misdemeanor to sell liquors to a child actually or apparently under the age of sixteen years. *People v. Koenig* (Sup. Ct. 1 D. 1896), 9 A. D. 6; 41 S. 283. Such offense is cognizable in the court of special sessions of the city and county of New York, except in case where the accused demands a trial by jury or where the case is subsequently removed into the court of general sessions. *Id.*

Subd. 6 added by chap. 309, Laws 1903.

As to admission of children under sixteen. Section 290 precludes over section 1482 of the charter of Greater New York. *People v. Jensen*, 99 App. Div. 355.

290a. Repealed by chap. 171 of 1894.

291. Added by chap. 655, Laws 1905.

291. **Commitment.**—Where the child is under sixteen years of age, a commitment to the House of Refuge is proper, under

sections 713 and 291 of the Penal Code, as amended by chapter 31 of 1886, provided the magistrate acquires jurisdiction of the case. *People ex rel. Cronin v. Carpenter*, 25 Misc. 341; 89 S. R. 521; 55 S. 521.

Where a commitment to that institution of a child under sixteen years, charged with a misdemeanor, does not show that any notice was given to the parent or that the parent was present at the examination before the magistrate, the statutory provisions as to notice have not been obeyed, the magistrate has no jurisdiction, and the child must be discharged from the institution. *People ex rel. Cronin v. Carpenter*, 25 Misc. 341; 89 S. R. 521; 55 S. 521.

This provision was not contained in the Penal Code as originally enacted, but was an amendment made in 1886. *People ex rel. Cronin v. Carpenter*, 25 Misc. 341; 89 S. R. 521; 55 S. 521. After that amendment, the case of *People ex rel. Van Riper v. N. Y. Cath. Protectory*, 106 N. Y. 604, 605, came before the court of appeals, which held that the amendment implied that notice must be given to the parent, either under the Consolidation Act or under section 291 of the Code, as amended, and that the omission to give such notice was jurisdictional.

The provisions of subdivision 5 of this section of the Penal Code, as amended by chapter 31 of 1886, apply to the House of Refuge for the Reformation of Juvenile Delinquents in the city of New York. *People ex rel. Cronin v. Carpenter*, 25 Misc. 341; 89 S. R. 521; 55 S. 521.

**Criminal proceeding.**—A proceeding under this section for the commitment of a destitute child to a charitable institution is not a criminal proceeding. *Matter of Knowack*, 158 N. Y. 482.

**Custody by consent of parent.**—See *People v. Giles*, 152 N. Y. 136; 46 N. E. 326; rev'g, 12 A. D. 495.

To constitute an improper exposure of a child, authorizing its commitment in pursuance of this section, such exposure must have been by the parent or person in charge of such child, and, in the latter case, the charge must have been conferred by the parent. *People ex rel. James v. Society, etc.*, 1 Misc. 561; 12 N. Y. Cr. 86; 78 S. R. (44 S.), 1089. To authorize the society to detain the child, it must appear from the commitment that "the parent, guardian or custodian" of such child was present at the examination before the magistrate, and had such notice thereof as the magistrate deemed and adjudged sufficient. *Id.* A commitment of the child, under this section, which recites a charge that it was found without proper guardianship and adjudicates it to be shown by satis-

factory proof, can not be held sufficient on demurrer where the evidence is not returned. *Id.*

**Equity.**—The supreme court, having general jurisdiction in law and equity, has power to intervene and restore destitute children, of intemperate parents, who have been committed to a charitable institution, to the custody and care of their parents, where conditions have changed and are such that neither in law nor morals the separation of parent and child should be continued. *Matter of Knowack*, 158 N. Y. 482.

Chapter 438 of 1884 is still in force, and discloses a statutory scheme in regard to the committal and subsequent discharge from custody of poor children that is practically in line with the general chancery powers of the supreme court. *Matter of Knowack*, 158 N. Y. 482.

The provisions of this section cannot be read into chap. 253, Laws of 1886, since the two enactments are not found to be in *pari materia*. *People ex rel. Amato v. Roman Catholic House of Good Shepherd*, 14 N. Y. Crim. Rep. 304. As to proof necessary to establish offense of neglecting to restrain child from begging. See *People v. Malone*, 63 App. Div. 117; 16 N. Y. Crim. Rep. 25. Sub. 7 amended, chap. 331, Laws 1903. Sub. 8 added by chap. 50, Laws 1903.

**292. Application.**—This section is not to be construed as applying only when the exhibition offends against morals or decency, or endangers life or limb by what is required of the child actor. *People v. Ewer*, 141 N. Y. 129; 56 S. R. 688; *aff'g*, 54 S. R. 358; 24 S. 500. Its application is to all public exhibitions or shows. *Id.* That any and all such shall be deemed prejudicial to the interests of the child and contrary to the policy of the state to permit, was for the legislature to consider and say. *Id.*

**Constitutional.**—The extent of the exercise of the police power of the state is, within constitutional limits, a matter resting in the discretion of the legislature. *People v. Ewer*, 56 St. Rep. 668; 141 N. Y. 129; *aff'g* 54 St. Rep. 348; 24 N. Y. Supp. 500.

This section is not unconstitutional as infringing on the rights of parent or child. *Matter of Ewer*, 54 St. Rep. 348; 24 N. Y. Supp. 500; *People ex rel. Sanders v. Grant*, 54 St. Rep. 349; 70 Hun, 233; 24 N. Y. Supp. 776.

The legislature has no right, under the guise of protecting health or morals, to enact laws which, bearing but remotely, if at all, upon these matters of public concern deprive the citizen of the right to pursue a lawful occupation. *People v. Ewer*, 56 St. Rep. 668; 141 N. Y. 129; *aff'g* 54 St. Rep. 358; 24 N. Y. Supp. 500; *Matter of Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 977; *People v. Gilson*, 16 St. Rep. 185; 109



N. Y. 389; *People v. Rosenberg*, 53 St. Rep. 1; 138 N. Y. 4

But, by preventing the exhibition of children of tender and immature age upon the theatrical, or other public stage, the legislature is exercising that right of supervision and control over the child, which, in every civilized state, inheres in the government, and which nothing in the legal relation of parent and child should be deemed to forbid. *People v. Ewer*, ante.

The legislature cannot take from parents the right to employ their children in any lawful occupation, not indecent or immoral, or dangerous to life, limb, health or morals. *Id.*

**Prohibited acts.**—The prohibited acts, included in subd. 3 of this section are five in number: (1) singing; (2) dancing; (3) playing upon a musical instrument; (4) in a theatrical exhibition; (5) in any wandering occupation. *Matter of Steven*, 54 St. Rep. 559; 24 N. Y. Supp. 780. Each has a distinct and separate significance, and, therefore, no one is inclusive of the other. *Id.*

The mayor of a city has no power, under this section, to grant a consent for a theatrical exhibition which includes singing or dancing by a child. *Id.*

**Subd. 3.** Subd. 3 is not named in the final clause of this section for the reason that a violation of its parts was authorized when consent of the mayor was obtained. *Id.* This applies only to the term “theatrical exhibition,” leaving singing, dancing, playing upon a musical instrument and wandering occupation in the same status as the other subdivisions. *Id.*

Under subd. 3 of this section, the employment of a child under sixteen years of age, in singing, dancing, or playing upon a musical instrument, or in a theatrical exhibition, or in any wandering occupation, is an offense against the statute. *People ex rel. Sanders v. Grant*, 54 St. Rep. 349; 70 Hun, 23; 24 N. Y. Supp. 776.

**Subd. 5.** The whole permissive part of subd. 5 of this section relates to the musical question and nothing else; and the word “musician” qualifies both concert and theatrical exhibition. *Id.*

Reversal by appellate division of a conviction in court of special sessions of the city of New York. See *People v. Malone*, 160 N. Y. 568.

**293. Warrant.**—To authorize an arrest under this section a warrant was unnecessary. *People ex rel. James v. N. Y. Society for Prevention of Cruelty to Children*, 12 N. Y. Cr. & 78 S. R. 1098; 43 S. 1098.

**294. Inference.**—Suspicion cannot give probative force to testimony which in itself is insufficient to establish, or to justify

ly an inference of a particular fact, and proof of one offense cannot aid in establishing another, which is not only not proved, but as to which there is no affirmative evidence, from which a legal inference can be drawn. *People v. Van Zile*, 62 St. Rep. 159; 143 N. Y. 368; 38 N. E. Rep. 380. See *People v. O'Neill*, 15 N. Y. Crim. Rep. 391; 34 Misc. 285.

**Ingredients.**—Under this section, the crime is perpetrated by prescribing, supplying or administering to a woman, whether pregnant or not, any medicine, drug or substance with intent thereby to procure a miscarriage, or advising or causing a woman to take any medicine, drug or substance, unless the same is necessary to prolong the life of the woman, or the child with which she is pregnant. *People v. Van Zile*, 56 St. Rep. 201; 73 Hun, 543; 26 N. Y. Supp. 390. Or, secondly, using or causing to be used any instrument or other means to accomplish the same result. *Id.*

298. See *Fordham v. Gouverneur Village* (Sup. Ct. 3 D. 1896), 5 A. D. 565, 567; 39 S. 396.

299. See *Karstens v. Karstens*, 79 S. R. 966, 968; 45 S. 966, 968.

305. **Disinterring corpse.**—It is an indictable offense to disinter a corpse, unless the deceased in his lifetime had directed such a thing, or his relatives consent to it. *Wehle v. U. S. Mutual A. Ass'n*, 63 St. Rep. 465, 468; 11 Misc. 36; 31 Supp. 865. And the resurrecting it for the purpose of dissection does not relieve from criminality. *Id.*

308. See *Wehle v. U. S. Mutual A. Ass'n*, 63 St. Rep. 465, 468; 11 Misc. 36; 31 Supp. 865, and notes under sec. 305, ante. The words "not exceeding the sum of five hundred dollars" apply to the trial court and to the appellate division separately and not collectively. *People v. Ferran*, 162 N. Y. 545; 15 N. Y. Crim. Rep. 60.

309. See *Wehle v. U. S. Mutual A. Ass'n*, 63 St. Rep. 465, 468; 11 Misc. 36; 31 Supp. 865, and notes under sec. 305, ante.

311. **Removing.**—Removing dead bodies "for the purpose of selling the same," or "from mere wantonness," is punishable by fine and imprisonment. *Wehle v. U. S. Mutual A. Ass'n*, 63 St. Rep. 468; 11 Misc. 36; 31 Supp. 365.

316. **Certificate of conviction.**—As to the sufficiency of a certificate of conviction in a case under this section in a court of special sessions, see *People ex rel. Ryan v. Webster*, 67 St. Rep. 79; 33 Supp. 337.

317. **Obscene book, etc.**—It is the settled American rule that it is not necessary to set out matter in an indictment which the grand jury asserts to be too obscene for recital. *People v.*

Kaufman, 14 A. D. 305; 77 S. R. 1046; 43 S. 1046. It is only necessary to identify the obscene book or publication sufficiently to apprise the defendant of what particular book or publication is intended, and to aver its obscenity, giving as an excuse for not setting forth the obscene matter that it is so gross as to be offensive to the court and improper to be placed on its records. *Id.* The defendant must then be satisfied with such descriptive allegations as clearly identify the book or publication intended, together with the statement that the obscene matter which the grand jury deem too foul to be spread upon the record is contained therein. *Id.* If anything more is requisite for the protection of the defendant's rights, it may be left to the discretion of the court to compel the public prosecutor to furnish such further information or specification as may be needful. *Id.* A person, indicted for selling an obscene book, cannot be convicted upon proof that he purchased the book, for another, and the defendant is entitled to have the court, in its charge, make this distinction clear to the jury. *Id.*

**322.** Amended by chap. 270, Laws 1905. See *People v. Burns*, 12 N. Y. Cr. 247; 78 S. R. 1106; 44 S. 1106; *People v. Miller*, 17 N. Y. Crim. Rep. 263; 81 App. Div. 255.

**Leased building.**—This section expressly provides that it shall be construed to apply to any part or parts of a house used for any of the purposes herein specified. *People v. James* (Sup. Ct. 4 D. 1896), 11 A. D. 609; 77 S. R. 315; 43 S. 315.

**Positive crimes.**—Where the specified acts, which bring the alleged offender within the definition of a "disorderly person," constitute positive crimes, such as common gambling and the keeping of bawdy houses and render him amenable to prosecution therefor, he is to be arrested and prosecuted in the usual and ordinary mode provided by law, where a felony or misdemeanor has been committed. *People v. Fuerst* (Ct. Sess. 1895), 69 S. R. 205; 13 Misc. 304.

**Special sessions.**—The offenses, defined in this section, are not among those enumerated in sec. 56 of the Code of Criminal Procedure as being within the jurisdiction of courts of special sessions. *People v. Upson*, 61 St. Rep. 158; 79 Hu. 87; 29 Supp. 615.

Courts of special sessions have no jurisdiction over the offenses defined in this section, unless conferred by virtue of some special provision of the law. *Id.*

Chap. 204 of 1893 conferred jurisdiction upon the police justice of Rochester to hear, try and determine a complaint for keeping a disorderly house. *Id.*

See *People v. Fuerst* (Ct. Sess. 1895), 69 S. R. 205; 1304.

**action.**—This section recognizes a distinction between policies and lottery tickets, but does not state in what respects. *People v. Jones* (Sup. Ct. 2 D. 1895), 69 S. R. 273; 12. In the case above cited, there was proof given, at the trial of an indictment for selling lottery policies, that the question in question was what is commonly known as a lottery, and the court, notwithstanding such proof, submitted that question of fact to the jury, accompanied by the instruction that it was not a ticket. And it was held, that the court erred in charging the jury that the paper in question was a lottery ticket, and that as it did not appear that the charge was not prejudicial to the defendant, a new trial should be granted.

**selling.**—Pool selling in the Penal Code, is not considered in the chapter concerning "lotteries," but is in the chapter concerning "gaming," and is classified with bets and wagers. *Gray*, 60 St. Rep. 46; 77 Hun, 402; 28 Supp. 811.

**lottery.**—In this state, the import of the term "lottery" is not in doubt or dispute, for its definition is established by legislation as by the adjudication of the courts. *People v. Britton*, 58 St. Rep. 837; 8 Misc. 201; *People v. Gillson*, 94 N. Y. 137. Where a pecuniary consideration is attached to it is to be determined by lot or chance, according to the scheme held out to the public, what and how much he who purchases the money is to receive for it—that is a lottery. *Hull v. People*, 56 N. Y. 424; *Kohn v. Koehler*, 96 id. 367. In *Governor v. The American Art Union*, 7 N. Y. 228, it was adjudged that an annual distribution by lot among the members of the art union of works of art purchased by their subscription was a lottery within the meaning of the Constitution. In *Ruggles*, ante, it was so held of a scheme for selling boxes of candy, in some of which were tickets entitling to admission and in others none. In *Negley v. Devin*, 12 Abb. N. S. 100, it was so held of a ticket entitling to admission to a concert and to whatever gift might be awarded to its number. *Vilkinson v. Gill*, 74 N. Y. 63, it was held of any game of chance in the nature of a lottery, the chief judge, observing that the courts have uniformly looked beyond the mere form of the transaction and sought out and suppressed the substance itself. The cases wherein the transaction was adjudged not to be a lottery are equally illustrative of the principle. Thus, in *People v. Gillson*, 16 St. Rep. 185; 109 N. Y. 137, the scheme was held to be no lottery, because not in-

volving the slightest element of chance. Similarly, in *Kohn v. Kohler*, 96 N. Y. 332, 368, the scheme was declared not to be a lottery, because the property was not raffled for or distributed by lot or chance. From all the cases, the constituent elements of a lottery seem to be: An expedient held out to the public, which for a pecuniary consideration, offers the possibility and promise of a gain, not the product of the outlay but contingent merely upon a designated chance event. *Irvin v. Britton*, 8 Misc. 201; 58 S. R. 837.

A lottery is defined to be a scheme for the distribution of property by chance among persons who have paid or agree to pay a valuable consideration for the chance. *People ex rel. Lawrence v. Fallon* (Sup. Ct. 1 D. 1895), 4 A. D. 82; 39 S. 865; *aff'd*, 152 N. Y. 112; 46 N. E. 296. The essential quality of a lottery is that the distribution of the prizes shall depend entirely upon chance, and that so far as possible, if the lottery is honestly conducted, no other element whatever shall enter into it. *Id.*

A scheme for distributing money and cigars among purchasers who should estimate most closely the number of cigars on which the government would collect taxes during a certain month, held a lottery. *People ex rel. Ellison v. Lavin*, 179 N. Y. 164.

The conducting, by a racing association organized under chapter 570 of 1895, of horse races for premiums or stakes consisting of a definite sum payable by the association out of the entrance fees paid by the competitors, does not constitute a lottery, within the meaning of that term as defined by the Penal Code. *People ex rel. Lawrence v. Fallon*, 152 N. Y. 111; 46 N. E. 296; *aff'g*, 4 A. D. 82; 39 S. 865. This section was not intended to include within its provisions every transaction which involved any degree of chance or uncertainty, but its plain purpose was to prohibit and punish certain well-known offenses which had existed and been regarded as crimes before the enactment of the law. *Id.*

**325. Lottery.**—Where the winner of a horse race is to receive a certain stake, to be put up from the entrance fee and an additional sum to be added by the manager of the race if the entrance fees are insufficient, such a race is not a lottery. *Matter of Dwyer* (Sup. Ct. Sp. T. 1895), 70 S. R. 546; 14 Misc. 204.

The scope of the decision in *Kohn v. Koehler*, 96 N. Y. 36, has been entirely misapprehended and it was not intended to decide in that case that the sale of bonds with a lottery attachment, such as was contained in the bonds then in consideration, was not in contravention of this section of the Penal Code. *People v. Wolff*, 14 A. D. 75; 77 S. R. 421; 43 S. 421. Under the

provisions of the Penal Code, a person who deals in tickets, chances, shares or interest in or dependent upon the event of a lottery to be drawn within or without this state, is guilty of a misdemeanor, a very different case from that which was presented to the court of appeals in the Austrian bond case. *Id.*

326. See *Matter of Blum*, 62 St. Rep. 78; 9 Misc. 571; 30 Supp. 396.

**Wager.**—A deposit by two persons, who are about to engage in a boxing contest, to form a purse for the winner, is a bet or wager. *Stoddard v. McAuliff*, 63 St. Rep. 427; 81 Hun, 524; 31 Supp. 38.

An optional contract for the sale of property is a wager within the statute, and therefore void, where it is the intention not to sell or deliver the property by the one party or to purchase it by the other, but merely to settle the difference in money, according to fluctuations in market values. *People v. Wade*, 13 N. Y. Cr. 425.

327. Advertising a lottery is a misdemeanor. *People ex rel. Ellison v. Lavin*, 179 N. Y. 164.

332. See *People v. Burns*, 19 Misc. 680.

336. **Chapters 8 and 9 of title 10.**—In this state a distinction has been made by these chapters of the Penal Code between gaming and lotteries. *People v. Fuerst* (Ct. Sess. 1895), 69 S. R. 205; 13 Misc. 304. The various provisions contained in chapter 9 above mentioned, were intended to prevent gambling in the ordinary acceptance of the term, by cards, dice and other symbols of chance or hazard, in places more or less private or secluded, and which, in itself, without reference to any other element, was *malum prohibitum* and not *malum in se*. *Id.*

341. See dissenting opinion in *Gideon v. Dwyer* (Sup. Ct. 1 D. 1895), 66 S. R. 452.

342. Amended chap. 649, Laws 1904. See *People ex rel. Lewisohn*, 96 App. Div. 201.

343. See *People ex rel. Sturgis v. Fallon*, 152 N. Y. 1; 46 N. E. 302; 4 A. D. 76; 39 S. 860.

344. An indictment which charges defendant with gambling for money, to wit: for the sum of five dollars with M. at a place and date named, and in the second count charges him with having gambled for money, or other property, to wit: liquors, on the same day and at the same village, but fails to name the person with whom the game was played, is not demurrable under section 278, on the ground that it charges more than one crime. *People v. O'Malley*, 52 App. Div. 46; 15 Crim. Rep. 52; 98 St. Rep. 843. This section is constitutional. *People ex rel. Wilson v. Flynn*, 16 N. Y. Crim. Rep. 491.

344a. Added by chap. 190, Laws 1901, is constitutional. *People v. Adams*, 17 N. Y. Crim. Rep. 443; 85 App. Div. 390; *aff'd*, 176 N. Y. 351.



**344b.** Added by chap. 190, Laws 1901. Held constitutional. *People ex rel. Wilson v. Flynn*, 16 N. Y. Crim. Rep. 491; 72 App. Div. 67; *People v. Adams*, 176 N. Y. 351.

**346.** See *People v. Krivitzky*, 168 N. Y. 182; *People v. Helman*, 61 App. Div. 541.

**351.** Amended by chap. 636, Laws 1901.

**Bookmaking.**—The making or recording by a person upon a race course authorized by, and entitled to the benefits of, chapter 570 of 1895, of a bet upon a horse race taking place thereon, even though it be denominated book-making, is subject to the exclusive penalty of forfeiture of the amount of the bet, to be recovered in a civil action, prescribed by section 17 of the act, and consequently is excepted from the provisions of this section, provided such making or recording is not accomplished by any of the acts specifically excepted in said section 17. *People ex rel. Sturgis v. Fallon*, 152 N. Y. 1; 46 N. E. 302; 4 A. D. 76; 39 S. 860.

Horse racing for prizes, not depending upon entrance money, is not either pool-selling nor book-making. *People ex rel. Lawrence v. Fallon* (Sup. Ct. 1 D. 1896), 4 A. D. 82; 39 S. 865; aff'd, 152 N. Y. 12; 46 N. E. 296.

The conducting of horse races by a racing association for premiums or stakes, in the usual way and under the rules generally adopted by racing associations, does not render its officers guilty of either book-making or pool-selling. *People ex rel. Lawrence v. Fallon*, 152 N. Y. 12; 46 N. E. 296; aff'g, 4 A. D. 82; 39 S. 865. The offering or paying, by a racing association, of premiums or prizes to the successful horses, out of its general funds, to which the horse owners participating in the races have contributed by payments into the general treasury of the association, constituting a part of its general assets for the time being, subject only to the obligation of the association to pay the amount of the several prizes, does not constitute gambling, within section 9, article 1 of the Constitution. *Id.* Chapter 570 of 1895 is not violative of the provisions of the Constitution which forbid gambling, in that it authorizes associations organized under it to hold and conduct meetings for races for premiums or prizes to be awarded to the successful horses. *Id.* This statute is a special law, and the conducting of races organized under it constitutes an exception to section 352 of the Penal Code which prohibits racing for a stake, bet or award "except as allowed by special law." *Id.*

By sec. 11 of chap. 213 of 1891, the trustees are exempted from the operation of chap. 9 of title 10 of the Penal Code, relating to gambling, or of the provisions of any penal statute

not contained in said chapter if they comply with sec. 9 of the act, by posting in a conspicuous place printed notices or placards, in large and legible type, to the effect that all disorderly conduct, pool-selling, book-making, or other kind of gambling is prohibited, and also containing a copy of sec. 351 of the Penal Code, and also if they comply with sec. 10, which requires the appointment of not less than five policemen for the purpose we have heretofore noted. *Grannan v. Westchester Racing Association*, 16 A. D. 8; 78 S. R. 790; 44 S. 790. But such exemption does not obtain if such pool-selling, book-making, or other gambling shall be knowingly permitted by the trustees or directors. *Id.*

**Pool selling.**—In the Penal Code, pool selling is not considered in the chapter concerning “lotteries,” but is in the chapter concerning “gaming,” and is classified with bets and wagers. *Reilly v. Gray*, 60 St. Rep. 46; 77 Hun, 402; 28 Supp. 811.

Chap. 479 of 1887, authorizing pool selling on races conducted on the track of any incorporated association, is unconstitutional. *Id.*

Running a pool room is an offense, under this section, and punishable by imprisonment for one year or by a fine of not over \$2,000, or both. *King v. Brewer*, 60 St. Rep. 692; 8 Misc. 587; 29 Supp. 1114; 31 Abb. N. C. 325.

Chap. 479 of 1887, in so far as it purports to authorize pool selling was repugnant to the prohibition of lotteries in sec. 10, art. 1, of the State Constitution, and is void and of no effect. *Irving v. Britton*, 58 St. Rep. 840; 8 Misc. 201.

Whether this chapter was inoperative to legalize book-making was a question presented and argued by counsel but not decided by the court, in *Irving v. Britton*, 58 St. Rep. 836; 8 Misc. 201. But it was intimated that, as this act did not purport to validate book-making, but only exempted it from the operation of this and the following sections, the illegality was obvious and inevitable from the provisions of the Revised Statutes against betting and gaming. See sec. 8 of 1 Edm. St. 614.

Sections 1, 2 and 3 of chap. 479 of 1887 were amended by chap. 197 of 1894.

A method of pool selling is described in *Irving v. Britton*, ante.

By this section and sec. 352, post, pool selling and book-making on a horse race are denounced as crimes, and punished by imprisonment. *Id.*

Chap. 469 of 1893 makes pool selling at horse races a felony, while the above section of the Penal Code, describing nearly the same offense, makes it a misdemeanor. *People v. Cleary* (Ct. Sess. 1895), 70 S. R. 209; 13 Misc. 546. In 1887, the

legislature passed a law (chap. 479) by which the operation of this section was suspended, permitting recording or registering bets or wagers and selling pools upon the result of contests of skill, speed and power of endurance of horses upon the race tracks and grounds on which racing is had, owned or leased or conducted by racing associations incorporated under the laws of this state for the purpose of improving the breed of horses, but continued the inhibitions of the Penal Code under more severe penalties, if such pool selling was conducted elsewhere than on the race tracks and grounds of such racing associations. *Id.* In 1893 an amendment to the above law was passed, which, while it permitted pool selling and recording and registering bets on contests of speed and endurance of horses on race tracks and grounds owned, leased or conducted by racing associations incorporated under the laws of this state for the purpose of improving the breed of horses, declared any person who shall engage in such pool selling or bookmaking or receiving or recording bets or wagers elsewhere, to be guilty of a felony. *Id.* The Ives pool law was intended to revise the then existing statutes upon the subject of pool selling and book-making and consolidate them. *Id.* By this section of the Penal Code, it was made unlawful for any person to register or record bets or wagers or sell pools at any time or at any place, where the Ives' pool law permitted such practices on certain days and times upon race tracks or grounds on which racing is had, etc., thereby virtually re-enacting the provisions of this section, and applying its prohibitions for all places except the race tracks and grounds aforesaid, and change the character of the offense from a misdemeanor to a felony. *Id.* After April 22, 1893, the only penal statute, under which the prosecution for pool selling and book making could be had, was the amended Ives pool law. *Id.* This section of the Penal Code, which makes pool selling at horse races a misdemeanor, was impliedly repealed by chap. 479 of 1887, as amended by chap. 460 of 1893. *Id.* But the said statute, as amended, was impliedly repealed by sec. 9, art. 1 of the Revised Constitution, which without exception forbade pool selling within the state. *Id.* The subsequent amendments to this section cannot affect a person, where its provisions in so far as they relate to him, are *ex post facto*. *Id.*

Chap. 571 of 1895, which amends this section of the Code, is not in violation of sec. 17 of art. 3 of the Constitution. *People v. Weaver* (Sup. Ct. 1 D. 1896), 7 A. D. 608.

The commitment to answer complaint charge of violation of this section is void. *People ex rel. Allen v. Hagen*, 16 N. Y.

Crim. Rep. 309; 170 N. Y. 46. Keeping of premises not located upon a race track for recording and registering bets on horse races, does not fall within exception of section. *People v. Leroy*, 16 N. Y. Crim. Rep. 496; 72 App. Div. 55. A person charged with pool selling, book making, etc., is liable to be punished under this section, and his liability is not limited to a suit for a penalty in a civil action at the instance of the complainant or the maker of the bet of which he was the stakeholder. *The People ex rel. Clifton v. De Bragga*, 17 N. Y. Crim. Rep. 12; 73 App. Div. 579. An indictment which shows that the defendants, on a given day, did feloniously, outside the race course authorized by law, "engage . . . in poolselling and selling pools upon the result of a trial and contest of speed and power of endurance of" horses on the day named, is a sufficient statement. *People v. Corbales*, 17 N. Y. Crim. Rep. 469; 86 App. Div. 531. It is not necessary in order to convict of the crime of pool selling to prove that the entire contribution of the various bettors was divided among the winners. *People v. McCue*, 17 N. Y. Crim. Rep. 534; 87 App. Div. 72. Held constitutional. *People v. Stedeker*, 75 App. Div. 449; 17 N. Y. Crim. Rep. 127; *People ex rel. Clifton v. De Bragga*, 17 N. Y. Crim. Rep. 12. Commitment to await the action of the grand jury, "upon a charge of violation of section 351 of the Penal Code" defective. *People ex rel. Allen v. Hagen*, 170 N. Y. 46. See, also, *People v. Shannon*, 17 N. Y. Crim. Rep. 532; *People v. Murphy*, 93 App. Div. 379; *People v. Ebel*, 98 App. Div. 270.

**352.** See notes under preceding section.

**Racing.**—See dissenting opinion in *Gideon v. Dwyer* (Sup. Ct. 1 D. 1895), 66 S. R. 432.

This section in so many words, makes all racing or trial of speed between horses or other animals for any bet, stake or reward, a misdemeanor. *Matter of Dwyer* (Sup. Ct. Sp. T. 1895), 70 S. R. 546; 14 Misc. 204. It indisputably covers the racing of horses for contributed stakes. *Id.*

Chap. 570 of 1895-is a special law, and the conducting of races organized by it constitutes an exception to this section of the Penal Code which prohibits racing for a stake, bet or award "except as allowed by special law." *People ex rel. Lawrence v. Fallon*, 152 N. Y. 12; 46 N. E. 296; *aff'g*, 4 A. D. 82; 39 S. 865.

So much of this chapter as gives to corporations organized under sec. 3 the right to have race meetings, and to contribute nurses, prizes or premiums to be contested for at those races by the owners of horses, is constitutional. *People ex rel. Lawrence v. Fallon* (Sup. Ct. 1 D. 1896), 4 A. D. 82; 39 S. 865; *aff'd*, 152 N. Y. 12; 46 N. E. 296.

363. See *Maddock v. Steele*, 63 St. Rep. 542; 81 Hun, 509; 31 Supp. 219.

**Contract.**—A violation of this section does not render the contract void. *Baumann v. De Logerot*, 56 St. Rep. 151; 74 Hun, 640; 26 N. Y. Supp. 986.

**Firm name.**—The fact that the plaintiff is carrying on business under the name of a firm which has no interest therein, is no defense to an action brought by him for goods sold, where the defendant knew such fact. *Donlon v. English* (Sup. Ct. 2 D. 1895), 69 S. R. 260; 89 Hun, 67.

Where a firm, in which there is no partner, uses the designation “& Co.” and gives credit to one who deals with it, it is not precluded by the fact that the designation is fictitious from beginning an action to recover the amount which is due to it from the person to whom it had thus given credit. *Kennedy v. Budd* (Sup. Ct. 1 D. 1896), 5 A. D. 140; 39 S. 81.

363. Where one has no actual partner the use of the designation & Co. in violation of this section making such use a misdemeanor has no operation in case of an executed agreement. The statute is highly penal. *Sinnott v. German Am. Bk.*, 164 N. Y. 386. A contract executed by an individual under a fictitious partnership name may be enforced. *McArdle v. Thames Iron Works*, 96 App. Div. 139.

364. Amended chap. 423, Laws 1904. *People v. Aaron Hiltman*, 15 N. Y. Crim. Rep. 456; 61 App. Div. 541; see *People v. Gluckman*, 15 N. Y. Crim. Rep. 441; *People v. Kivitzky*, 168 N. Y. 182; 16 N. Y. Crim. Rep. 63.

Subd. 8. Amended by Laws 1904, chap. 423. Took effect April 27, 1904.

364a-364h. See chap. 330, Laws 1898. See chap. 288, Laws 1905.

**Indictment.** — 364a is not unconstitutional. *People v. Webster* (N. Y. Gen. Sess. 1896), 17 Misc. 410; 40 S. 1135. An indictment under this section is not defective on the ground that it fails to charge guilty knowledge or criminal intent. *Id.* It is sufficient if it follows the language of the statute defining the crime, or that words of similar import are implied. *Id.* *People v. West*, 106 N. Y. 295. But the indictment, under this section, which fails to specify that the word “sterling” indicates and denotes that the said article was then and there sterling silver, is fatally defective. *People v. Webster*, ante.

364j. Added by chap. 287, Laws 1905. See chap. 288, Laws 1904.

**366.** Printing of counterfeit labels as a misdemeanor. *People v. Kivitzky*, 168 N. Y. Crim. Rep. 182.

**367.** Amended chap. 494, Laws 1904.

**369.** Amended chap. 494, Laws 1904. *People v. Bartholf*, 49 St. Rep. 368, was reversed in 54 St. Rep. 431; 139 N. Y. 32.

*People v. Cannon*, 43 St. Rep. 427, was affirmed in 54 St. Rep. 431; 139 N. Y. 32.

*People v. Quinn*, 44 St. Rep. 920, was reversed in 54 St. Rep. 431; 139 N. Y. 32.

**Constitutional.**—Chap. 377 of 1887, as amended by chap. 181 of 1888, is constitutional. *People v. Cannon*; *People v. Quinn*; *People v. Bartholf*, 54 St. Rep. 431; 139 N. Y. 32; *aff'g*, 43 St. Rep. 427; and *rev'g*, 44 *id.* 920; and 49 *id.* 368.

**370.** Amended chap. 494, Laws 1904.

**371.** Amended chap. 494, Laws 1904.

**378.** Amended by chap. 72 of 1895, and by chap. 661, Laws 1904.

**Usury.**—This section does not attempt to define what acts constitute usury, but simply provides that a person taking usury shall be guilty of a misdemeanor. *People v. Hubbard*, 63 St. Rep. 399; 10 Misc. 104; 31 Supp. 114. In order to constitute usury, it must appear that the exaction and reception of the additional interest were in pursuance of a mutual agreement between the parties. *Id.*; *Morton v. Thurber*, 85 N. Y. 551; *People v. Wheeler*, 14 St. Rep. 422; 47 Hun, 484.

**383. Board bill.**—A guest who has been guilty of no fraud except inability to pay the amount of a board bill already incurred, if he goes away openly, and for the ostensible purpose of obtaining the money to pay the amount of the bill, is not liable to arrest and conviction. *People v. Nicholson*, 25 Misc. 266; 89 S. R. 447; 55 S. 447. The mere fact of inability to pay a hotel bill is not made a crime. *Id.*

**Theatre.**—The exclusion of a person from a theatre because of his color, is in violation of this section. *Stay v. Du Bois*, 55 St. Rep. 687; 26 N. Y. Supp. 240. By this section, the duty is imposed upon the party, conducting an opera house, to grant to a colored man the same privileges as were granted to all other citizens; and for a breach of such duty, he may be punished criminally. *Id.*

**384b. Unconstitutional.**—Chap. 698 of 1894, requiring convict made goods to be labeled as such when exposed for sale, is unconstitutional. *People v. Hawkins*, 63 St. Rep. 399; 10 Misc. 65; 31 Supp. 115.

Chap. 698 of 1894 is unconstitutional in that it violates the provision of the Federal Constitution which places the con-



trol of interstate commerce in the hands of Congress alone, in discriminating against the products or industries of other states in favor of those of this state. *People v. Hawkins*, 65 St. Rep. 679; 85 Hun, 43; 32 Supp. 519.

A state law, the effect of which, is to restrict, burden or prohibit interstate commerce, is void, though, by its terms, made applicable to the state, whose legislature enacts it. *People v. Hawkins*, 20 A. D. 494; 12 N. Y. Cr. 413; 81 S. R. 56; 47 S. 56. Chap. 931 of 1896, the effect of which is to prohibit or cast burdens upon the introduction, into this state, of a lawful article of commerce, is a violation of the interstate commerce clause of the National Constitution. *Id.* An ordinary merchantable scrub brush, manufactured by the authorities of another state, placed upon its markets, recognized as property and not claimed to be an inferior or deceptive article, is an article of commerce, though made under its authority by convict labor, and is not, therefore, within the police power of this state. *Id.*

Chap. 931 of 1896 is in conflict with the Constitution of this state, since it interferes with the right to acquire, possess, and dispose of property, and with the liberty of the individual to earn a living by dealing in the articles embraced within the scope of the law. *People v. Hawkins*, 157 N. Y. 1; 13 N. Y. Cr. 292. Sec. 29, art. 3 of Constitution, 1894, does not forbid the sale of prison-made goods to the general public. *Id.* This section is in conflict with the commerce clause of the Federal Constitution. *Id.* A citizen of this state who happens to buy goods made in a prison in Ohio has the right to put them upon the market here on their own merits, and if this right is restricted by penal law, while the same goods made in factories are untouched, such a law is a restriction upon the freedom of commerce, and the objection to it is not removed by the fact that it may have been enacted in the guise of a police regulation. *Id.*

**384h.** Sub. 1. constitutional. *People v. Oneida County Road Con. Co.*, 17 N. Y. Crim. Rep. 14, reversing 16 N. Y. Crim. Rep. 317.

**384l.** Amended, chap. 380, Laws 1903.

**384m.** A statute requiring the examination and licensing of horseshoers is unconstitutional. *People v. Beattie*, 96 App. Div. 383.

**384q.** Added chap. 657, Laws 1904.

**384r.** Added by chap. 136, Laws 1905.

**385. Gunpowder.**—Amended by chap. 367, Laws 1901. See *People v. Pelton*, 14 N. Y. Crim. Rep. 64. The keeping of gunpowder in large quantities near inhabited dwellings is a nuisance. *Booth v. R., W. & O. T. R. Co.*, 55 St. Rep. 663;

140 N. Y. 267; rev'g 44 St. Rep. 9; Myers v. Malcom, 6 Hill, 292; Heeg v. Licht, 80 N. Y. 579.

**Highway.**—Village trustees, as commissioners of highways, cannot authorize the erection of a nuisance on the highway or legalize its continuance. People v. Fowler, 43 St. Rep. 415; 17 N. Y. Supp. 744; aff'r 54 St. Rep. 931.

**Misdemeanor.**—This section very explicitly makes it a misdemeanor to create and maintain a public nuisance. Lechner v. Village of Newark, 19 Misc. 452; 78 S. R. (44S.) 556.

**Pond and dam.**—The fact that the control of a pond and dam is vested in the city authorities does not relieve the owner thereof, provided either the maintenance of the dam or the method of its use causes a public nuisance. People v. Pelton, 36 A. D. 450. No failure of duty upon the part of the city in cleaning the pond would afford a defense to the indictment, provided the maintenance of the dam contributed to the nuisance, much more if it was the cause thereof. Id.

**388.** It is a misdemeanor to maintain a place at which opium "is smoked by other persons," but not at which the maintainer alone smokes. People v. Reed, 14 N. Y. Crim. Rep. 326.

**389.** Amended by chap. 486, Laws 1901. Use of carbonic acid gas in manufacture of soda water in tenement house not a misdemeanor. People v. Lichtman, 173 N. Y. 63; 17 N. Y. 177.

**397.** Amended by chap. 443, Laws 1905. A board of health has no right to forbid the bringing into a village of fresh table and kitchen refuse from a sanatorium for consumptives as food for hogs and fowls, so long as there was no proof that this refuse was any more dangerous than the refuse from any hotel. People v. Van Fradenburgh, 81 App. Div. 259; 17 N. Y. Crim. Rep. 268.

**401.** Amended by chap. 442, Laws 1905.

**402.** Amended by chap. 442, Laws 1905.

**403.** New. Added by chap. 442, Laws 1905.

**404.** New. Added by chap. 442, Laws 1905.

**405. Pharmacy.**—The entire purpose of sec. 187, chap. 661 of 1893, will be accomplished, as well as the purpose and object of the whole statute, by construing this exemption to exclude physicians except when they are engaged in the business of pharmacy, either for themselves or another. Suffolk Co. v. Shaw, 21 A. D. 146; 81 S. R. 349; 47 S. 349. It was not intended to embrace an occasional act of filling a prescription made by another physician. Id.

**405a.** Changed to 405 by chap. 442, Laws 1905. Added by chap. 494, Laws 1903.

**405b.** Added by chap. 494, Laws 1903.

**407. Adulteration**—The adding of a foreign and artificial ingredient to a food product, even for the purpose of color merely, is in effect an adulteration, and the legislature has power to prohibit such act. *People v. Girard*, 64 St. Rep. 554; 145 N. Y. 105.

**Milk**.—Where the evidence shows that the defendant was delivering milk to regular customers, the presumption is that such delivery was under a contract of sale. *People v. Koch*, 19 Misc. 634; 78 S. R. 387; 44 S. 387. Where the defendant admits that he was in the act of delivering when he was stopped, it is not necessary to show actual delivery to a customer. *Id.* A milkman, going his daily rounds to retail customers to supply them with impure milk, will be deemed to be offering and exposing milk for sale. *Id.*

Sec. 22, chap. 338 of 1893 does not declare the mere possession of adulterated milk to be unlawful. *People v. Wright* (Sup. Ct. Ap. T. 1897), 19 Misc. 135; 77 S. R. 290; 43 S. 290. An affirmative act must be shown either as a sale or an offer to sell. *Id.* Some intent on the part of the dealer must appear, either express, as in the case of a sale, or implied, where there is an offer predicated upon an exposure for sale. *Id.* Though the statute states that, after the violation is shown, the intent become immaterial, yet there must be intent, impliedly, as a constituent of the violation. *Id.* The word "intent" as used in sec. 7 of chap. 338 of 1893, refers to the intention of the offender to sell adulterated milk, and any excuse founded upon mistake in the quality of the article is thereby made immaterial as matter of defense. *Id.* The statute makes the intent, so far, of no importance, leaving it to the distributors of milk to see that the mistake does not occur. *Id.*

The statute does not declare the mere possession of impure milk unlawful, and it only applies where there is some action taken, or intended to be taken, by the person charged, whereupon traffic in the adulterated article may be founded. *People v. Kellina*, 13 N. Y. Cr. 134. It cannot be presumed that the defendant was engaged in an unlawful act. *Id.*

**408. Butter**.—The furnishing of imitation butter is a crime against the Agricultural Law whether it is manufactured in this or in a foreign state. *People v. Fox* (Sup. Ct. 1 D. 1896), 4 A. D. 38; 38 S. 635.

**408a.** See chap. 338 of 1893, as amended by chap. 143 of 1894.

Amended by chap. 426 of 1894.

**Bar**.—A conviction and punishment by fine, under this section, for selling adulterated milk, is a bar to a prosecution for the penalty under secs. 22 and 37, chap. 338 of 1893. *People v. Piat* (Sup. Ct. Ap. T. 1897), 19 Misc. 131; 77 S. R. 231; 43 S. 231.

- 409.** Amended by chap. 92, Laws 1905.
- 410.** Amended by chap 92, Laws 1905.
- 416.** See *People v. Mago*, 53 St. Rep. 307; 69 Hun, 559; 23 N. Y. Supp. 938. Previously annotated.
- 421.** See *Laible v. N. Y. C. & H. R. R. Co.*, 13 A. D. 74; 77 S. R. 1003; 43 S. 1003.
- See *Phillips v. New York Central and Hudson River Railroad Company* (Sup. Ct. 2 D. 1895), 65 S. R. 536; 84 Hun, 412.
- 426. Commitment.**—A charge in a commitment, that defendant was “unlawfully and willfully riding on the cars of the New York Central and Hudson River Railroad without permission from the proper authorities or the person in charge of the train at Rochester, on the 9th day of June, 1893,” is sufficiently explicit to bring the offense within the first subdivision of this section. *People ex rel. Gunn v. Webster*, 58 St. Rep. 225; 75 Hun, 278; 26 N. Y. Supp. 1007.
- 429.** Amended by chap. 753 of 1894. Amended by chap. 326, Laws 1905.
- Requirement.**—This section requires the person or corporation to make and keep a sufficient fence or guard around its openings or cuttings until the ice is formed thereon at least six inches thick. *Sickles v. New Jersey Ice Co.*, 61 St. Rep. 763; 80 Hun, 213; 30 Supp. 10.
- Persons skating on the river have the right to rely upon the observance of the statute by those taking ice therefrom and to believe that, where there are no fences or guards, there are either no ice cuttings, or, if otherwise, that the ice has become six inches thick and safe. *Id.* The fact that the defendant or others had used a similar guard before, does not tend to show the sufficiency of the fence. *Id.*
- 429a.** Repealed by chap. 753 of 1894. Took effect May 22, 1894.
- 434.** See *Matter of Bryce*, 43 Misc. 297.
- 448. Conducting gas.**—The generation and conducting of a deadly gas to a room, in which there is being held a lawful meeting, for the purpose of disturbing such meeting, will constitute, it seems, a misdemeanor under this section. *People ex rel. Taylor v. Seaman*, 59 St. Rep. 463; 8 Misc. 152; 29 Supp. 329.
- 447e.** Added by chap. 528, Laws 1901.
- 447f.** Added by chap. 659, Laws 1904.
- 458. Sparring exhibition.**—Upon the trial of an indictment for manslaughter for occasioning a death at a sparring exhibition, the question whether the exhibition is within the provisions of this section is for the jury. *People v. Fitzsimmons* (Ct. Sess. 1895), 69 S. R. 191.

Proof establishing offense of "prize fight." *People v. Finican*, 80 App. Div. 407; 17 N. Y. Crim. Rep. 254.

A corporation, organized under the membership law, cannot charge an admission fee for sparring exhibitions given under its auspices. *People v. Johnson*, 83 S. R. 382; 49 S. 382.

The fact that an incorporated athletic association does not occupy an entire building devoted to athletic purposes only, is not a violation of this section. *Id.* The requirements of the statute in this respect are reasonably complied with when an incorporated association occupies for its exclusive purposes a portion of a building. *Id.*

467. See *People v. Bates*, 61 St. Rep. 584; 79 Hun, 584; 29 Supp. 894.

468e, 468c, 468d. Added by chap. 377, Laws 1902.

473. See *Banigan v. Village of Nyack*, 83 S. R. 199; 49 S. 199.

479. Evidence as to injury to canals. *People v. Manahan*, 15 N. Y. Crim. Rep. 431; 61 App. Div. 75.

486. **Evidence.**—On the trial of an indictment for arson by burning a parochial school building, which, it is alleged, was the result of a conspiracy between defendant and two servants, and committed for the purpose of realizing the insurance thereon, evidence of such servants' dealings and doings antecedent to, and subsequent to the fire, is properly received, with a view of establishing the relation between them and the defendant. *People v. Fitzgerald*, 12 N. Y. Cr. 524; 80 S. R. 1020; 46 S. 1020. So, the fact that defendant had become the owner of numerous parcels of real estate, and had taken title thereto in the names of such servants, without any consideration on their part, and in some cases without their knowledge, is competent. *Id.* Evidence of defendant's insolvency at the time of the fire, is pertinent. *Id.* The fact that the affairs of the parish school were conducted by three sisters under the supervision of the defendant, and that the relations existing between them and the defendant had become somewhat strained and disturbed, is proper evidence, to determine the probable continuance of defendant in his relation to the church property. *Id.* Where, in such cases, it is in the power of the accused to account for his whereabouts, the fact that he fails to do so, is strong presumptive evidence against him. *Id.* The testimony of an officer, who followed the servant into defendant's house, in regard to the appearance of another servant therein who interfered with him, is part of the *res gestae*. *Id.* The testimony of the servant, by whom the fire was claimed to have been set, as to his whereabouts during parts of the night of the fire, is admissible. *Id.* The admission of the testimony of insurance agents to the effect, that they had declined, under instructions, to write insurance on property in defendant's name, is not error. *Id.* A mortgagee may testify

that defendant had informed him that on the cancellation of certain policies, that he had affected insurance in the name of his servant, to whom the property has been conveyed. *Id.* So, an insurance adjuster may testify that the defendant claimed that the insurance money should be paid to him, and not to the bishop; and that he "was willing to sacrifice a little of it if they would make a settlement with him then and there." *Id.* So, the co-trustees of defendant may testify that they had no part in obtaining the insurance just prior to the fire. *Id.* So, a conversation between the bishop and defendant is competent, where it tends to show the relations existing between defendant and his church and its superior officers, and the facts that his affairs had reached a crisis. *Id.* So, a letter, written by the bishop to him just before the fire, rebuking him for "public drunkenness," and intimating that he would be removed, is admissible upon the question of motive. *Id.*

As to what deposition will confer jurisdiction upon magistrate. See *McKelsey v. Marsh*, 63 App. Div. 396.

**487. Motive.**—Where the prosecution, in rehearsing facts it expected to prove on a trial for arson, stated that it would be shown that many other buildings in which accused was interested were destroyed in a similar manner, it was held not prejudicial to the defendant, where he was charged in the same indictment with conspiracy with his father to defraud insurance companies by burning their buildings. *People v. Smith*, 37 A. D. 280; 89 S. R. 932; 55 S. 932. It would tend to show a fraudulent motive or intent on the part of the defendant, although one effect of such evidence might be to prove other crimes than the one charged in the indictment. *Id.*

**488. Arson.**—On the trial of an indictment for arson, evidence of the movements of the defendant just before the fire is admissible. *People v. Burton*, 60 St. Rep. 544; 74 Hun, 498; 28 Supp. 1081.

See *People v. Butler*, 62 App. Div. 508; 15 N. Y. Crim. Rep. 505.

**496. Presumption.**—Exclusive possession of the whole or some part of stolen property by the prisoner, shortly after the theft, is insufficient, when standing alone, to cast upon him the burden of explaining how he came by it, or of giving some explanation of that possession. *People v. Wilson* (Sup. Ct. 1 D. 1896), 7 A. D. 326; 40 S. 107; *aff'd*, 151 N. Y. 403. No presumption of guilt can be raised from the possession of stolen property, except where the possession is conscious and exclusive on the part of the defendant. *Id.* Where there are no other circumstances to connect the accused person with the crime than that of the possession of the stolen property, the exclusive possession must be established. *Id.* The phrase



“exclusive possession,” does not mean that the property must be found constantly on the person, or constantly under the immediate control of the inculpated party. *Id.* The mere fact that he shared his lodging with two women and that they might have put the diamond where it was found, does not necessarily diminish the force of the facts that the stone was found among his personal effects in his sleeping room. *Id.*

**Insufficient.**—On the trial of an indictment for burglary in the third degree and grand larceny in the second degree, evidence to the effect that on the night on which the crime was committed the accused was seen near the burglarized premises in company of a person whom he met half an hour later after the latter had come from a lot, in a cellar upon which the stolen goods were afterwards found, and that the accused had a patch of mud upon his trousers similar to that in the cellar, is insufficient to warrant a conviction. *People v. Cronk*, 40 A. D. 206; 92 S. R. (58 S.) 13. This is the case especially where a witness testifies that the mud upon the accused’s trousers was similar to that found in the streets. *Id.*

498. See dissenting opinion in *People v. Lytle* (Sup. Ct. 4 D. 1896), 7 A. D. 553, 568; 40 S. 153.

499. **Breaking.**—Rooms, in an apartment house, where entrance door opens into a general hallway in the building, constitute a dwelling within the meaning of the statute. *People v. Gartland*, 86 S. R. 352; 52 S. 352; 13 N. Y. Cr. 163. Upon trial of indictment for burglary, proof that defendant opened by any means the outer door of an apartment, establishes a breaking and entering within the meaning of the statute. *Id.* Prosecution must prove the opening, but it is not necessary that such proof should be made by any eye witness of the act. It may be done by showing a set of circumstances from which the conclusion will necessarily result that defendant could not have gained entrance otherwise than by opening the door. *Id.*

504. Amended by chap. 332, Laws 1903.

505. Where four professional thieves going in concert frequently go in and out of a bank without business and converse on an adjacent street corner. *People v. Corcoran*, 15 N. Y. Crim. Rep. 392; 334 Misc. 569.

506. **Separate counts.**—Separate counts for burglary, larceny and receiving stolen goods, respectively, may be joined in the same indictment when they are all founded upon the same transaction and the acts charged relate to the same property. *People v. Wilson*, 151 N. Y. 403; aff’g. 7 A. D. 326; 40 S. 107.

508. **Crime completed.**—The defendant should not be ac-

quitted if his intention was to commit a crime without the state. The crime is complete in this state, if carrying tools and intention formed in this state are established. *People v. Reilly*, 97 S. R. 18; 63 S. 18. See *People v. Reilly*, 49 App. Div. 218.

**Jimmy.**—The evidence was held to tend to show that a “jimmy,” which is concededly a tool or implement used for the commission of burglary, was in defendant’s possession, under circumstances evincing an intent to employ it in the commission of a crime. *People v. Thompson*, 33 A. D. 177; 87 S. R. 497; 53 S. 497; 13 N. Y. Cr. 273.

**Proof.**—Evidence tending to prove, not only that the defendant had such tools as are adapted for use and commonly used by burglars, but that he was in the company of four other men who were similarly equipped with tools and revolvers, and that their movements were on that day suspicious, and open to the inference that in concert they were preparing for an expedition or burglary intent, is sufficient to sustain a conviction for having burglars’ tools in possession. *People v. Reilly*, 97 S. R. 18; 63 S. 18.

**Reform.**—Where, on trial of indictment under this section of Penal Code, it appears that the defendant had been previously indicted and convicted of a crime, it is proper to exclude a question directed to showing defendant’s efforts to reform. *People v. Thompson*, 33 A. D. 177; 87 S. R. 497; 53 S. 497; 13 N. Y. Cr. 273.

**Shoplifter’s bag.**—A shoplifter’s bag is not an instrument designed, adapted and commonly used for the commission of larceny, within the meaning of this section. *People v. Lyons* (N. Y. Gen. Sess. 1896), 18 Misc. 339; 41 S. 646.

**509. False certificate by ex-town clerk as to the destruction of fish nets.** *People v. Filken*, 17 N. Y. Crim. Rep. 348; 83 App. Div. 589.

**510. Acknowledgment.**—The statute does not require an intent to defraud, to constitute the crime of forgery in making a false certificate with regard to an acknowledgment. *People v. Hayes*, 54 St. Rep. 184, 190; 24 N. Y. Supp. 194. Ordinarily, this intent is required to constitute forgery, but, in the case of officers authorized to take proof of acknowledgment of an instrument which by law may be recorded, all that is required is that he should willingly certify falsely. *Id.*

It is the duty of the officer making the certificate to ascertain under the responsibility of his oath of office, the truth of the matters in relation to which he certifies and the legal

presumption is that he does his duty. *Albany Co. Sav. Bank v. McCarty*, 149 N. Y. 71.

511. *People v. Underhill*, 58 St. Rep. 220; 75 Hun, 329; 26 N. Y. Supp. 1030, was reversed in 58 St. Rep. 443; 142 N. Y. 38.

**Distinct offenses.**—To forge and to utter a forgery constitute separate and distinct offenses. *People v. Adler*, 55 St. Rep. 669; 140 N. Y. 331; aff'g 53 St. Rep. 936.

**Forgery.**—Where a person in possession of a piece of paper containing the genuine signature of another fraudulently writes a promissory note over that signature, he is just as guilty of the crime of forgery as though he had unlawfully signed that person's name to the note. *People v. Drayton*, 41 A. D. 40; 92 S. R. (58 S.) 439; *People v. Graham*, 6 Park. Cr. 135; *Mann v. People*, 15 Hun, 155, 162.

**Indictment.**—An indictment, which alleges that the defendant, being an attorney of the supreme court, did wrongfully and unlawfully, with intent to deceive, "alter and falsify the order and decree of the surrogate of Erie county;" setting out in full the order of the surrogate, and containing the usual formal allegations, required in forgery indictments, is sufficient to charge a crime under this section. *People v. Oishei*, 12 N. Y. Cr. 362; 79 S. R. 49; 45 S. 49.

**Intent.**—The intent to defraud, mentioned in this section, must have some relation to the act which is claimed to constitute the forgery. *People v. Wiman*, 66 St. Rep. 442; 33 Supp. 1037. Where the alleged forgery is committed, not for the purpose of defrauding by means thereof, but for the mere purpose of concealing the misappropriation of money, it does not constitute the crime. *Id.* A definition of the word "defraud," as used in this section, is fatally defective, if it takes no cognizance whatever of the question of intent. *Id.* If it is competent upon the part of the prosecution, on the trial of an indictment under this section, to prove the indebtedness of the defendant on the question of his intent, the latter has the right to prove the means he had to meet such indebtedness, in order that he may rebut any inference that may be drawn from such indebtedness. *Id.* If the defendant was guilty of a forgery in obtaining the money, the fact that he intended, hoped or expected to return it, does not in any way qualify the nature of the act. *Id.* An intent to make reparation, and the ability to do so, do not make innocent what otherwise would be criminal. *Id.*

**Second degree.**—The Penal Code makes both the forging of an instrument and the uttering thereof, knowing it to be

**forged, forgery in the second degree.** *People v. Altman*, 70 S. R. 66; 147 N. Y. 473. It may well be that one person may forge the instrument and another utter it, and it is evident that both acts should be deemed equally criminal. *Id.*

See *Matter of Van Orden*, 32 Misc. 215; 15 N. Y. Crim. Rep. 70; *People v. Weaver*, 177 N. Y. 434.

**513. Writing.**—The word “writing,” as used in sections 514, 515 and 521, refers to an executed instrument. *People v. Underhill*, 58 St. Rep. 443; 142 N. Y. 38; rev’g 58 St. Rep. 220; 75 Hun, 329; 26 N. Y. Supp. 1030.

**514.** *People v. Underhill*, 58 St. Rep. 220; 75 Hun, 329; 26 N. Y. Supp. 1030, was reversed in 58 St. Rep. 443; 142 N. Y. 38.

**Corporation.**—By this section, an officer of a corporation who falsifies, or unlawfully or corruptly alters, erases, obliterates or destroys any accounts, books of accounts, records or other writing, belonging or appertaining to the business of the corporation, is guilty of forgery in the third degree. *People v. Underhill*, 58 St. Rep. 443; 142 N. Y. 38; reversing 58 St. Rep. 220; 75 Hun, 329; 26 N. Y. Supp. 1030.

**515.** *People v. Underhill*, 58 St. Rep. 220; 75 Hun, 329; 26 N. Y. Supp. 1030, was reversed in 58 St. Rep. 443; 142 N. Y. 38.

**When committed.**—Forgery in the third degree is committed, under this section, by any person who, with intent to defraud or to conceal any larceny or misappropriation by any person of any money or property, alters any writing belonging or appertaining to the business of a corporation. *People v. Underhill*, 58 St. Rep. 443; 142 N. Y. 38; reversing 58 St. Rep. 220; 75 Hun, 329; 26 N. Y. Supp. 1030.

**When not.**—Where the fraudulent insertion or change was made before the execution, the offense committed is not forgery. *Id.*

**517.** Amended by chap. 242, Laws 1905.

**519. Certificate of stock.**—While the signatures of persons to the certificate of transfer of stock are genuine, yet, if they were not then the officers of the corporation, which the certificate represented them to be, the act of making and uttering the certificate is a forgery. *Manhattan L. Ins. Co. v. Forty-second & G. S. St. F. R. R. Co.*, 54 St. Rep. 474; 139 N. Y. 146; aff’g 46 St. Rep. 130.

**520.** *People v. Underhill*, 58 St. Rep. 220; 75 Hun, 329; 26 N. Y. Supp. 1030, was reversed in 58 St. Rep. 443; 142 N. Y. 38.

**521. Alteration after execution.**—An instrument is falsified within the meaning of this section, only when, by some altera-

tion after actual execution, it is made to speak differently from what it did when signed, or given a different effect in some material respect, with a fraudulent or corrupt intent. *People v. Underhill*, 58 St. Rep. 444; 142 N. Y. 38; reversing 58 St. Rep. 220; 75 Hun, 329; 26 N. Y. Supp. 1030.

**Essentials.**—In order to bring a case within this section, the thing or writing must be forged, altered or counterfeited, and if it is, then uttering it or passing it off as true, is punishable as the forgery itself. *People v. Underhill*, 142 N. Y. 38; 58 S. R. 444; rev'g 75 Hun, 329; 58 S. R. 220; 26 S. 1030. It is not necessary to prove that the accused forged or altered the writing himself. *Id.* It is sufficient if it appears that he has knowingly uttered or passed it off as true, knowing it to be forged or altered. *Id.* But this section has no application to a writing, the signature to which is genuine, and no change in which is shown to have been made after execution, but executed by the party under a mistake or in ignorance of the facts, induced by fraud or deceit. *Id.*

**False paper.**—Every false paper is not necessarily a forgery. *Id.*

**Intent.**—Where the defendant was indicted for forging the name of the payee on a check with intent to defraud the maker, it is essential to show, not only that the drawing of the check was with intent to defraud the maker, but that the act of indorsing the payee's name thereon was with that intent. *People v. Wiman*, 61 St. Rep. 66; 9 Misc. 441; 29 Supp. 1034.

Where the defendant is, in fact, authorized to draw checks, an abuse of that authority, even if otherwise criminal, cannot constitute forgery. *Id.*

If the facts justify an honest belief that authority to indorse it had been given, it would not be forgery, though such authority was really wanting, because of the absence of criminal intent with regard to the signature. *Id.* The criminal intent is an essential ingredient in the indictment, is traversable, and the defendant may testify to his intent. *Id.*; *People v. Flack*, 34 St. Rep. 722; 125 N. Y. 324; *People v. Powell*, 63 *id.* 88; *Stokes v. People*, 53 *id.* 164; *Duffy v. People*, 26 *id.* 593.

522. See annotations under sec. 519 of Penal Code.

**Same name.**—That the forgery was committed by a person having the same name as the genuine payee, makes no difference. *Third Nat. Bk. v. Merchants' Nat. Bk.*, 59 St. Rep. 360; 76 Hun, 475; 27 Supp. 1070. The signature of such person is just as much a forgery, as though the names had been different. *Id.*

**523.** See *People v. Gardner*, 63 St. Rep. 21; 133 N. Y. 119; 38 N. E. Rep. 1003; modifying and affirming 57 St. Rep. 18; 73 Hun, 66; 25 Supp. 1072.

**527.** *People v. Albow*, 53 St. Rep. 869; 71 Hun, 123; 24 N. Y. Supp. 519, was reversed in 55 St. Rep. 253.

See *People v. Martin*, 61 St. Rep. 46; 79 Hun, 310; 29 Supp. 381.

**Gravamen.**—The selling, or offering to sell, counterfeit money or tokens of value, or what purports to be such, or the aiding or abetting any scheme or device having for its purpose the sale or the putting into circulation of counterfeit money or tokens, or what purports to be such, is the gravamen of the offense. *People v. Albow*, 55 St. Rep. 253; rev'g 53 St. Rep. 869. It is this offense alone, at which the section is aimed, and it has no reference to any other frauds upon the public or individuals. *Id.*

**528. Appropriation.**—Where the defendant, after executing in the name of a railroad equipment company a contract for the purchase of a street railroad with the avowed intention of converting it into an electric road, obtained possession of the cars by representing that he wished to send them to Buffalo to be altered, agreeing to return them when changed, but instead of doing so, sold and shipped them out of the state, appropriated the proceeds to his own use, and declined to give any information concerning them, the facts were held sufficient to sustain a conviction of larceny in the first degree. *People v. Lawrence*, 53 St. Rep. 536; 70 Hun, 80; 23 N. Y. Supp. 1095.

**False pretenses.**—If the prosecutor parts with his property for an unlawful purpose, no prosecution for false pretenses can be sustained. *People v. Livingstone*, 47 A. D. 283; *McCord v. People*, 46 N. Y. 470.

**Indictment.**—Where the complainant does not intend to part with his title to the property, but only with the possession, an indictment and conviction, under first clause subd. 1, are proper. *Peo. v. Evans*, 53 St. Rep. 591, 594; 69 Hun, 226; 23 N. Y. Supp. 717. But, where he does intend to part with both the title and possession, the indictment must be drawn and the conviction had under balance of subd. 1 of this section. *Id.*

An indictment, which charges the defendant with larceny under first clause subd. 1 of this section, is not sufficient to authorize the prosecution, under balance of subd. 1, to show that he acquired possession of the property by color or aid of fraudulent or false representation or pretense. *Id.* In order to sustain a conviction under this subdivision, the indictment



must charge the means by which the property was obtained. *Id.*

An indictment, which avers that the defendant took \$300 in United States treasury notes and also "divers other" bank notes of the value of \$300, plainly charges the offense of grand larceny. *Id.*

**Indictment.**—An indictment for false pretenses, under this section, should state, with reasonable certainty, the representations actually made, the falsity thereof, and the facts intended to be relied upon to establish such falsity. *People v. Winner*, 61 St. Rep. 783; 80 Hun, 130; 30 Supp. 54.

**Indictment.**—An allegation, in the complaint, of taking money out of the drawer of the complainant's store is equivalent to the charge of taking it out of the possession of complainant, who must be deemed, within the language of this section, the true owner. *People v. Smith* (Sup. Ct. 3 D. 1895), 67 S. R. 670; 86 Hun, 485.

**Insufficient proof.**—The evidence was held insufficient, in this case, to justify a conviction, and the defendant entitled to be discharged unless further incriminating facts can be proved. *People v. Gillette*, 59 St. Rep. 176; 76 Hun, 611; 28 Supp. 101. The attempt of the defendant to escape was regarded by the court, under the circumstances of the case, hardly sufficient to justify such conviction. *Id.*

**Intent—Proof.**—Where the question is as to the felonious intent of the defendant, he cannot be precluded from showing that such felonious intent did not exist, simply by the production of a paper wherein he has written or signed something inconsistent with his claim of the non-existence of the felonious intent. *People v. Barringer*, 59 St. Rep. 78; 76 Hun, 330; 27 Supp. 700. He is not estopped by any such writing. *Id.* The jury have a right to consider the writing, in determining the question as to the credibility of the witness and the weight to be given to the testimony. *Id.* But there is no ground for the application of the rule that parol evidence cannot be offered to rebut the claim of felonious intent. *Id.*

**Intent.**—A criminal intent, necessary to conviction of the crime of larceny, is entirely wanting, where the owner's clerk gives the accused permission to take the articles which he did take, and it is immaterial whether the clerk had authority to do so or not. *People ex rel. Van Bergen v. Welles* (Sup. Ct. 2 D. 1895), 69 S. R. 112; 89 Hun, 96.

**Larceny.**—If the owner of property, by trick or device, has been induced to part with the possession thereof, intending to transfer an interest therein or title thereto, a criminal appro-

priation of such property will not be a common law larceny, but the crime of obtaining goods by false pretenses. *People v. Hughes* (Sup. Ct. 1 D. 1896), 71 S. R. 523; 11 N. Y. Cr. 154. To constitute a common law larceny, it is not necessary that the property stolen should be taken from the possession of the owner by a trespass. *Id.* If a person obtains possession of the property from the owner for a special purpose, by some trick, device, artifice, fraud or false pretense, intending to appropriate it to his own use and not to the special purpose for which he received it, he is guilty of larceny. *Id.*

**Larceny.**—In larceny, an intent to deprive or defraud the true owner of his property, or of the use or benefit thereof, or to appropriate the same to the use of the taker, or of any other person, is essential to establish the crime. *People v. Gaynor*, 33 A. D. 98; 87 S. R. 86; 53 S. 86.

A person is guilty of larceny who, with intent to defraud the true owner of his property, obtains the possession thereof by color or aid of fraudulent representations or pretense. *People v. Livingstone*, 47 A. D. 283.

**Loan.**—Where the transaction is not a loan, but a mere deposit of money as security, to be returned at the termination of a contract of employment, and the defendant obtains possession of it by a trick or device, with intent to deprive complainant of it and convert it to his own use, it amounts to larceny. *People v. Evans*, 69 Hun, 226; 53 S. R. 591; 23 S. 717.

**Not larceny.**—Where boards have been placed upon premises of which the defendant is the lawful occupant, without his consent, he is plainly under no legal or moral obligation to allow them to remain where he found them. *People v. Johnson*, 83 S. R. 203; 49 S. 203. He may remove them to another part of the premises, for convenience or safe keeping, until they shall be demanded by their owner. *Id.* And larceny can not be predicated on his act in placing them in the cellar, unless it can be held that he thus secreted, withheld, or appropriated them to his own use, with the intent to deprive the true owner of his property therein. *Id.*

In such case, the fact that the removal was made publicly and without the slightest effort at concealment, negatives the inference of any criminal intent. *Id.*

**Pledge.**—The pledge of property, whose possession the pledgor obtained from the owner for the purpose of selling it to a third person, is larceny. *People v. Hazard*, 28 A. D. 304; 86 S. R. 670; 52 S. 670. Where it appears that the defendant obtained the possession of property from its true owner, under a statement that he had a customer to whom he could sell it,

and upon an agreement that if he did not sell it he would return it to the owner, and that upon the same day he received it, instead of selling it or attempting to sell it, he pawned it with a pawnbroker, and received from him the sum of \$125, this evidence is sufficient to sustain a finding of the jury that the defendant was guilty, under this section of the Penal Code, as being in possession, custody and control, as bailee of these diamond earrings belonging to another, had appropriated the same to his own use by pawning them and receiving the amount loaned upon them. *Id.* The subsequent giving of the check for the value of the jewelry by the defendant to the complainant did not at all change the nature of the relation that the defendant bore to the property, or make the pawning of the diamonds the day the defendant received them, any less a crime. *Id.*

**Presumption.**—No presumption of guilt can be raised from the possession of stolen property, except where such possession is shown to be conscious and exclusive on the part of the defendant. *People v. Wilson*, 151 N. Y. 403; *aff'g*, 7 A. D. 326; 40 S. 107. This fact may be established by circumstances from which the jury can fairly infer it. *Id.*

**Proof.**—In order to justify a conviction for the offense of larceny, the taking must amount to a trespass and be accompanied by a felonious intent conceived at the time of taking or after. *People v. Hendrickson*, 12 N. Y. Cr. 321; 80 S. R. 402; 46 S. 402. It is proper to establish the corpus of the crime by showing circumstances from which a legitimate inference of felonious taking may be inferred. *Id.* This may be accomplished by showing subsequent possession of the property, or such a relation to its disappearance as raises the presumption that the party charged appropriated it. *Id.* In such case, the proof should exclude the existence of other agencies for the removal of the property than the defendant. *Id.* Where the circumstances relied upon are made to do duty both for the establishment of the fact that a crime has been committed, and also for the establishment of the criminal agency by which it was committed, and both rest upon inference to be derived from such circumstances, the charge must fail. *Id.*

**Security.**—In *People v. Morse*, 99 N. Y. 662, the defendant gave the complainant a chattel mortgage as security for the payment of the money, with interest, yet a conviction and an indictment for larceny, drafted under subd. 1 of this section was sustained. It was held that the acceptance by the complainant of a promise that the money should be repaid was not

clusive evidence that he intended to part with his title to  
Id.

**Similar acts.**—Where a person is indicted for the commission of the specific crime of grand larceny, proofs of acts and transactions of a similar nature, not contemporaneous with the acts alleged in the indictment and not connected with them or a testimony given in support of them, is inadmissible. *People v. Hurlburt* (Sup. Ct. 4 D. 1895), 92 Hun, 46. He is entitled to a trial of the precise offense alleged in the indictment, and the indictment does not call upon him to be ready to meet accusations remote in point of time or dissimilar in character to the offenses specifically charged in the indictment. Id.

**Similar frauds.**—Proof of similar frauds, which have been perpetrated by defendant on other persons whom he has succeeded in making his victims, is competent upon the question of intent. *People v. Hughes* (Sup. Ct. 1 D. 1895), 71 S. R. 523; 11 N. Y. Cr. 154.

**Special purpose.**—If a person obtains possession of property from the owner for a special purpose by some device, trick, artifice, fraud or false pretense, intending at the time to appropriate it to his own use, and he subsequently does appropriate it to his own use and not to the special purpose for which he received it, he is guilty of larceny. *People v. Sumner*, 33 A. D. 338; 87 S. R. 817; 53 S. 817.

Where a real estate broker falsely stated to the complainant, a party intending to purchase land, that another person was ready to purchase the same at an increased price, and, at the same time, proposed to make an arrangement with the complainant by which the profits of the resale should be divided between them, and by such means obtained money from him to be used for the sole purpose of paying it over to the vendor of the land, which was to be conveyed to the complainant when satisfied as to the title and the value of the property, the case is not one in which one copartner gives money to another, to be used in the copartnership business. The money is given to be used only for a specific purpose and under special circumstances and conditions, and the copartnership contemplated between the parties constitutes them, not joint owners of the property to be purchased but simply of the product of the sale thereof. *People v. Sumner*, 33 A. D. 338; 87 S. R. 817; 53 S. 817.

**Subd. 1.**—Where the defendant obtains possession of a sum of money by fraudulent and false representations and pretenses, he is guilty of larceny under latter part of subd. 1 of

this section. *People v. Evans*, 69 Hun, 226; 53 S. R. 591; 2 S. 717.

**Subject.**—A note, given in consideration for a release of real property, is not the subject of larceny, where no written agreement to release has been given. *People v. Hall*, 56 St. Rep. 223; 74 Hun, 96; 26 N. Y. Supp. 403; *Paine v. People*, 6 John 103.

**Insufficient.**—In *People v. Gillette*, 59 St. Rep. 176; 28 N. Y. Supp. 101, it was held that the testimony was insufficient to justify a conviction of larceny, and that the defendant, unless further incriminating facts can be proved, should be discharged.

See *People v. Leland*, 56 St. Rep. 73; 73 Hun, 162; 25 N. Y. Supp. 943.

**Value.**—Upon the trial of an indictment for larceny, a finding as to the value of the goods stolen, for the purpose of fixing the degree of crime, will not be disturbed on appeal, where the evidence introduced on the part of the people was that the value of the undisputed articles exceeded \$25, and the court charged that the jury were not bound by the testimony of the people's witnesses, but could judge of the value for themselves at the same time directed their attention to the importance of such determination to the defendant. *People v. Alexander* (Sup. Ct. 1 D. 1895), 67 S. R. 475; 87 Hun, 618.

Threats made to the owner of a residence by a party who falsely represented that he owned lots in the vicinity, and that he would erect a soap factory thereon, whereby such owner was coerced into buying the lots, do not constitute a false pretense. *People v. Wheeler*, 169 N. Y. 270. In order to secure a conviction for larceny under subdivision 2, it is necessary to prove two facts, bailment and conversion. Making the contract, and taking the property under and in pursuance of it, is an act essential to the consummation of the crime alleged in the indictment. There is jurisdiction of the offense in any county in which either or both of such acts take place. *People v. Mitchell*, 49 App. Div. 531; 14 N. Y. Crim. Rep. 539; *People v. Dempsey*, 15 Crim. Rep. 90. Where a returnable indictment for larceny by false pretenses. *People v. Hartwell*, 15 N. Y. Crim. Rep. 483. Probable cause to believe treasurer of voluntary association guilty of crime of grand larceny. *People ex rel. Murphy v. Crane*, 80 App. Div. 202. Where facts alleged in information constitute petit or grand larceny trial may be for either. *People v. Stern*, 80 App. Div. 357. Failure to pay money by broker. *People v. Thomas*, 17 N. Y. Crim. Rep. 338. City physician charging f

free anti toxin. *People v. Lavin*, 17 N. Y. Crim. Rep. 378; 41 Misc. 53. See, also, *People v. Paine*, 16 N. Y. Crim. Rep. 60; 35 Misc. 763; *People v. Miller*, 169 N. Y. 339; 16 N. Y. Crim. Rep. 281; reverses 64 App. Div. 450; *People v. Dilcher*, 16 N. Y. Crim. Rep. 548; 38 Misc. 89; *People v. Putnam*, 90 App. Div. 125; *People v. Rothstein*, 42 Misc. 123; 18 N. Y. Crim. Rep. 65; *People v. Monroe*, 64 App. Div. 130.

Subd. 2. See *Moss v. Cohen* (N. Y. C. P. 1895), 71 S. R. 5.

529. Payment of hotel bill with check signed by fictitious name and endorsed by defendant, where no bank account in name of signer. *People v. Whiteman*, 16 N. Y. Crim. Rep. 461; 72 App. Div. 90.

530. **Not proven.**—A conviction of grand larceny was held, in *People v. Lesser*, 59 St. Rep. 130; 76 Hun, 371; 27 N. Y. Supp. 750, not to be sustained by the evidence, where the uncorroborative circumstantial testimony of the complainant is offset by the positive denial of the defendant, supplemented by the proof of two witnesses as to his good character and honesty.

The evidence in *People v. Rogers*, 12 N. Y. Cr. 476; 81 S. R. 393; 47 S. 893, was held insufficient to warrant a conviction under this section.

531. See *People v. Gardner*, 57 St. Rep. 18, 25; 73 Hun, 66; 25 N. Y. Supp. 1072; *People v. Frazier*, 36 Misc. 280; *People v. Mills*, 91 App. Div. 331; 18 N. Y. Crim. Rep. 125.

534. **Punishment.**—Grand larceny in the second degree is punishable, pursuant to this section, by imprisonment for a term not exceeding five years. *People v. Kerns* (Sup. Ct. 4 D. 1896), 7 A. D. 535; 40 S. 243.

535. See *People ex rel. Knatt v. Davy*, 65 St. Rep. 162; 32 Supp. 106.

544. Amended by chap. 556, Laws 1905. See *People v. Rothstein*, 42 Misc. 123; 18 N. Y. Crim. Rep. 65; 95 App. Div. 292; 180 N. Y. 148.

545. See *People v. Peckens*, 153 N. Y. 576.

549. *Parr v. Loder*, 97 App. Div. 218.

550. Amended by chap. 326, Laws 1903.

**Punishment.**—By this section of the Code, a person who buys or receives stolen property which has been wrongfully appropriated in such manner as to constitute larceny, knowing the same to have been stolen is punishable, by imprisonment in a state prison for not more than five years, or in a county jail for not more than six months, or by a fine of not more than \$50, or by both such fine and imprisonment. *People v. Kerns* (Sup. Ct. 4 D. 1896), 7 A. D. 535; 40 S. 243. The crime of receiving stolen goods may, under the Penal Code, be punishable in a different manner from that of larceny in the second degree,



and with a greater punishment. Joinder of felonies is not ground for a reversal where the sentence is single and is appropriate to either count. *Id.*

**Receiving stolen goods.**—Though larceny and the crime receiving stolen goods are separate, distinct and independent, requiring different kinds of proof, a man can be guilty of the crime of receiving stolen goods from the facts that he has in his possession the goods which he himself has stolen. *People v. Rivello*, 39 A. D. 454; 91 S. R. (57 S.) 420.

\* \* Since by the Penal Code the distinction between accessories and principals has been abolished, the rule does not obtain with respect to every person who may be convicted of the crime of larceny. *Id.*

The fact that, under the Penal Code, by aiding and abetting the crime of larceny he became a principal, in no way brings such an accessory within the principle of the rule that a person taking goods feloniously cannot receive them from himself with a felonious intent. This rule, however, in no respect applies to an individual who was not present at the commission of the crime. Although he is guilty of the principal offense, yet, in receiving the goods from the actual thief, knowing their origin, he is subject to the penalty for receiving stolen goods. See annotation of *People v. Klipfel*, 160 N. Y. 371, under § 165, ante.

**Stolen property.**—Though, upon the trial of an indictment for receiving stolen goods, knowing them to have been stolen, there is no direct evidence that the defendant received the goods from any particular person who had stolen them, and any evidence that he had positive information when he stole them that they had been stolen, yet the circumstances as to the manner of receiving them, his manner of dealing with them, his knowledge and description of the person from whom he claimed to have received them, his own acts in transferring them, the peculiarities attending such transfers and his method of payments to the alleged owner, added to the fact that the stolen goods were in his possession, may constitute potent evidence that the defendant possessed the guilty knowledge alleged in the indictment. *People v. Schooley*, 149 N. Y. 107, aff'g, 69 S. R. 841; 89 Hun, 391. See *People v. Ammon*, App. Div. 240.

**552. Fear.**—The crime of extortion is not committed, unless the person parting with his money is induced to do so by the wrongful use of force or fear, or under color of official right. *People v. Gardner*, 57 St. Rep. 18; 73 Hun, 66; 25 N. Y. S. 1072.

When fear is a necessary ingredient of a crime, it must actually exist at the time of the alleged commission of the

se. Id. If the person alleged to have been injured part with money or property without at the time being in fear, a crime is not committed. Id.

Where the complainant parts with his money for the purpose of convicting the wrongdoer of a crime, no offense is committed because there is no putting in fear. Id.

See *People v. Gardner*, 63 St. Rep. 21; 144 N. Y. 119; 38 N. Y. 1003; modifying and affirming 57 St. Rep. 18; 73 Hun, 66; 1072.

Fear, such as will constitute extortion, may be induced by a threat to do an unlawful injury to the person or property of an individual threatened. *People v. McLaughlin*, 150 N. Y.

§3. See notes under preceding section.

If the threat is made and the money paid through fear of subsequent injury, the crime of extortion is established, whether or not the threat is put into actual execution. *People v. McLaughlin* (Sup. Ct. 1 D. 1896), 2 App. Div. 419. If the threat is put into actual execution, such act will only tend to prove that the threat was seriously intended and to aggravate the threat. Id. If the defendant has threatened to do a lawful act, for example, to enforce an ordinance forbidding any obstruction of the street without permit, the receipt of money by the defendant as a consideration for not enforcing such ordinance, will not constitute extortion, but bribery. Id.

§6. **False promise.**—In *Ranney v. People*, 22 N. Y. 417, the false pretense alleged was the promise of the defendant to employ the complainant at a future time and pay him, when he did not in fact intend to employ him. *People v. Jeffery*, 82 N. Y. 409; 63 S. R. 588; 31 S. 267. It was held, in that case, that the false representation was promissory in its nature, and, for such reason, a criminal charge could not be sustained. But, in *People v. Jeffery*, ante, the defendant obtained the money from complainant by agreeing that a corporation or firm would thereafter pay him certain sums for oats, and that said corporation or firm was solvent. The false representation was as to the solvency of the firm, as to an existing fact at the time the representation was made. The false pretense counted on was not the false promise, but the statement as to the solvency of the corporation or firm. For this reason, the court, in the case, sustained the indictment.

**Proof.**—Upon the trial of an indictment for false pretenses, evidence of similar transactions to that on account of which the defendant is indicted, is proper, where it is important to

show his intention. *People v. Jeffery*, 82 Hun, 409; 63 S. R. 588; 31 S. 267.

**Value.**—It is unnecessary for the people, in cases of indictment under this section, to allege, or on the trial prove, the value of the instrument which the complainant was induced to sign by the false pretenses of the defendant. *People v. Jeffery*, 63 St. Rep. 588; 82 Hun, 409; 31 Supp. 267.

A police captain who takes possession of a cigar store and remains there with his men for eleven days, in spite of the protest of the owner, is guilty of oppression. *People v. Summers*, 17 N. Y. Crim. Rep. 321; 40 Misc. 381.

**558. Threats.**—In case a person has committed a crime which has come to the knowledge of another, and the latter, for the purpose of extorting money from the former, writes him a letter threatening to accuse him of the crime, he is guilty of a felony under this section. *People v. Eichler*, 58 St. Rep. 177; 75 Hun, 26; 26 N. Y. Supp. 998.

The fact that he believes, or even knows, that the person threatened has committed the crime of which he is threatened, does not make the act less criminal. *Id.* Such belief is no defense, and is not even a mitigating fact. *Id.*

A threat "to proceed against you criminally," is equivalent to a threat to accuse the person of a crime. *People v. Eichler*, 58 St. Rep. 177; 75 Hun, 26; 26 N. Y. Supp. 998; *People v. Gillian*, 18 St. Rep. 681; 50 Hun, 35; *aff'd* 23 St. Rep. 996; 115 N. Y. 643. In the case last cited, the point was made that the writing must contain a threat to do one of the four things named in this section, but it was held that, while a threat of the character mentioned in this section must be made in the letter or writing, it was quite competent to introduce oral evidence to explain the language used. Neither in this case, nor in *People v. Thompson*, 97 N. Y. 313, did the letters threaten to accuse a person of a particular crime, but in both it was held to be competent for the people to introduce testimony showing the existing relations between the parties explanatory of the intent of the defendants.

**560. Threat.**—Where a person has committed a crime, which has come to the knowledge of another, and the latter, for the purpose of extorting money from the former, orally threatens to accuse him of the crime, he is guilty of a misdemeanor under this section. *People v. Eichler*, 58 St. Rep. 177; 75 Hun, 26; 26 N. Y. Supp. 998.

**562.** The fact that defendant resides with plaintiff's husband, though not married to him; that she assumes his surname, and under such name has executed papers and dealt with trades-

People, as his wife, does not constitute a violation of this section. *Hodecker v. Stricker*, 20 A. D. 245; 80 S. R. 808; 46 S. 68.

**567a.** Added by chap. 366, Laws 1905.

**571.** This section relates specifically to property upon which a mortgage or instrument intended to operate as such is a lien, and, in order to bring the case within the section, that which is the subject of the lien must be something answering the description of property, and capable of being mortgaged. *People v. Durante*, 12 N. Y. Cr. 318; 79 S. R. 1073; 45 S. 1073. A liquor tax certificate is property which may be the subject of a chattel mortgage, within the meaning of this section. *Id.*

**577.** See *Burgess v. Jackson*, 80 S. R. 326 (46 S. 326).

**579. Gravamen.**—The gravamen of the charge, under this section, is that the defendant, knowing that the insurance company, against whom he presents his claim, was not indebted to him in the amount claimed, falsely and fraudulently magnified his loss and claimed such larger amount. *Id.*

**What constitutes offense.**—The presentation of a false and fraudulent claim for the payment of a loss upon a contract of insurance, constitute an offense under this section. *People v. Spiegel*, 56 St. Rep. 727; 75 Hun, 161; 26 N. Y. Supp. 1041.

**585.** See *Shaffer v. Martin*, 83 S. R. 853, 858 (49 S. 853, 858).

**592. Evidence.**—On the trial of an indictment of the president of a bank under this section of the Code, the evidence that he was in the bank when the examiner called and knew the object of the visit, is sufficient, though he did not personally show the books, to establish the facts that he exhibited the books. *People v. Helmer* (Sup. Ct. 5 D. 1895), 67 S. R. 180; 85 Hun, 560. In such case, it is incumbent upon the people to show that the defendant knew that the books contained false and fraudulent entries, and that defendant presented or exposed them to the examiner with the intent to deceive him. *Id.* In this case, the cashier of the bank, who had been misappropriating the funds, had forged, in order to cover up his defalcations, a number of promissory notes which he entered in the discount book of the bank. The president was not aware of this defalcation, and, when asked by the examiner for permission to take the suspected papers away from the bank under a promise to return them, refused to give such consent without authority from the directors of the bank. And it was held that this refusal on the part of the president was not any evidence of guilt on his part. *Id.*

**Indictment.**—This section makes it a crime to exhibit to a public officer a false book "with intent to deceive such officer or board in respect thereto." *People v. Helmer*, 13 A. D. 426;

77 S. R. 642; 43 S. 642. It is not necessary that the offense should be charged in the language of the statute, but it is sufficient if the criminal act is set forth by words which plainly describe the offense, though words other than those of the statute are used. *Id.*

**Punishment.**—This section provides, among other things, that an officer of a corporation, who knowingly exhibits a false book to any public officer authorized by law to investigate its affairs, with intent to deceive such officer in respect thereto is punishable by imprisonment not to exceed ten years. *People v. Helmer*, 154 N. Y. 596; 13 N. Y. Cr. 1.

593. Amended chap. 489, Laws 1904.

**Recognizance.**—Where the principal, after default in appearing for examination, is indicted and afterwards discharged together with his bail in the indictment, the recognizance for his original examination should not be enforced. *People v. Samuels*, 54 St. Rep. 836; 5 Misc. 585; 25 N. Y. Supp. 81.

594. Subds. 6 and 7, amended by chap. 588, Laws 1901.

597. Not controlled by the Consolidation Act, Laws 1882, chaps. 410-1482; *Matter of Sayles*, 40 Misc. 135; 17 N. Y. Crim. Rep. 234.

600. Amended by chap. 248, Laws 1905.

601. **Knowledge.**—Proof merely of the insolvency of a bank when a deposit was made does not justify an inference that the officers and directors knew of such insolvency so as to permit the depositor to recover back the deposit as for fraud of the bank. *Stapleton v. Odell*, 21 Misc. 94; 81 S. R. 13; 47 S. 13.

608. Section 608 was repealed by chap. 377 of 1884. Added by chap. 489, Laws 1904.

613. Subds. 1 and 2, amended by chap. 588, Laws 1901.

615. **Forging, etc.**—The sale of forged, altered, used or stolen tickets, is made a punishable offense under other sections of the Penal Code. *People ex rel. Tyroler v. Warden of Prison*, 157 N. Y. 116.

**Unconstitutional.**—These sections which prohibit and subject to punishment as a crime, the selling of tickets for passage on vessels or railroad trains, by any person except common carriers and their specially authorized agents, transcend the police power and violate the constitutional guarantees of civil rights and privileges and of liberty (N. Y. Const. art. 1, section 1, 6), in so far as they undertake to prohibit citizens of the state from engaging in the business of brokerage in passage tickets. *People ex rel. Tyroler v. Warden of Prison*, 157 N. Y. 116.

626. See *People v. David Cantor*, 16 N. Y. Crim. Rep. 675.

639. See *People v. Bates*, 61 St. Rep. 584; 79 Hun, 584; 20 Supp. 894.

**Information.**—In order to charge an offense under this section, the information should allege that the defendant willfully or maliciously did the act set forth. *Hewitt v. Newburger*, 57 St. Rep. 821; 141 N. Y. 538; rev'g 48 St. Rep. 811; 20 N. Y. Supp. 913.

**Knowledge.**—It is not necessary, in all cases, to constitute a crime that the defendant should know that the statute prohibits his act. *Hewitt v. Newburger*, 141 N. Y. 538; 57 S. R. 821; rev'g 48 S. R. 811; 20 S. 913; *People v. Stevens*, 14 St. Rep. 808; 109 N. Y. 159. It is sufficient if he does the act prohibited when the statute makes the mere act itself unlawful. *Hewitt v. Newburger*, ante. But, where a particular intent is an ingredient of the crime, the mere doing of the prohibited act does not constitute cases of larceny, receiving stolen goods, or passing counterfeit money, are illustrations. *Id.* The same act may, in one case, be larceny, or forgery or a guilty reception of stolen property; and, in another case be wholly innocent, depending on the intent. *Id.*

**When no crime.**—If the defendant is proceeding under a claim of title and insisting that certain walls are being erected on his land, he commits no crime in threatening to remove them. *Hewitt v. Newburger*, 141 N. Y. 538; 57 S. R. 821; rev'g 48 S. R. 811; 20 S. 913.

639a. Added by chap. 279, Laws 1905.

640. Amended by chap. 164 of 1894. See *People v. McLaughlin*, 15 N. Y. Crim. Rep. 337; 57 App. Div. 454.

Subd. 11. See *Rice v. Buffalo Steel House Co.*, 17 A. D. 462; 79 S. R. 277; 45 S. 277.

Subd. 16, amended by chap. 72, Laws 1903. Amended by chap. 80, Laws 1905, and this superseded by chap. 440, Laws 1905.

640d. Added by chap. 128, Laws 1901.

640e. Added by chap. 128, Laws 1901.

641. Amended by chap. 661, Laws 1901.

642. Amended by chap. 441, Laws 1905.

651a. Added by chap. 266, Laws 1902.

652. See *Lechner v. Village of Newark*, 19 Misc. 452.

**Bicycle.**—The act of willfully riding a bicycle, by any person, upon a sidewalk, without authority or necessity, whether in a village, city or the country, is a violation of this section of the Code. *People v. Meyer*, 26 Misc. 117; 15 N. Y. Crim. Rep. 57. The burden is on the people to prove that the defendant willfully rode a bicycle along upon a sidewalk without authority or necessity. *Id.* A conviction cannot be sustained where



**625.** Anarchy a misdemeanor. *People v. Most*, 16 N. Crim. Rep. 105; 36 Misc. 139.

there is no evidence that the road was a public highway. The word "sidewalk," used in section 652 of the Penal Code means a sidewalk along a highway. *Id.*

**652a.** Added by chap. 506, Laws 1901.

**654. Application.**—This section was intended to cover cases that had not been provided for by any other law. *People v. Knatt*, 156 N. Y. 302; 13 N. Y. Cr. 92.

**Defense.**—No offense is committed under this section, where a boat is destroyed in an effort to protect a pond against the persistent, repeated and defiant trespass upon the rights of the owner of such pond. *People v. Kane*, 59 St. Rep. 32; 142 N. Y. 366. The owner of the pond is not bound to resort to an action at law instead of himself defending his possession. *Id.*

Another remedy might be, to endure the presence of the boat upon the water, but watch for the trespasser's use of it and then employ force enough to eject it and him. *Id.*; *Filkins v. People*, 69 N. Y. 101. But the owner is not bound to wait for such act, nor pursue a mode of resistance sure to end in personal violence. *Id.*

How far one may go, what force one may use, what acts of defense are excusable, in the protection of premises or property are usually mixed questions of law and fact to be submitted to the jury under proper instructions from the court. *People v. Kane*, 59 St. Rep. 33; 142 N. Y. 366; *Filkins v. People*, ante. They always depend upon the facts and circumstances of the particular case, such as the manner and character of the trespass, the instrumentalities through which it is accomplished, and the opportunities or reasonable means of defense. *People v. Kane*, ante.

See notes under section 639, ante.

**Information.**—In order to charge an offense under this section, the information should aver that the defendant unlawfully and willfully did the act specified. *Hewitt v. Newburger*, 57 St. Rep. 821; 141 N. Y. 538; rev'g 48 St. Rep. 811; 20 N. Y. Supp. 913.

**Treble damages.**—Under subd. 3 of this section, a party who unlawfully and willfully destroys the property of another is liable, in addition to the punishment prescribed herein, to treble damages for the injury done, to be recovered in a civil action. *Prignitz v. McTiernan*, 18 Misc. 651; 77 S. R. 974; 4 S. 974.

**654.** Treble damages are recoverable in an action brought in a justice's court. A reference to the statute need not be indorsed on the summons. *Laytin v. McConnell*, 61 App. Div. 447.

**654a.** See *Lechner v. Village of Newark*, 19 Misc. 452.

**655.** See *People v. Theobald* (Sup. Ct. 4 D. 1895), 71 S. R. 527; 92 Hun, 182.

**Overdriving.**—Overdriving is made a misdemeanor by this section. *Rutherford v. Krause*, 60 St. Rep. 679; 8 Misc. 547; 29 Supp. 787; 24 C. P. 1.

This is defined by sec. 669, post, as torture or cruelty to an animal not a human being, which includes "every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted. *Id.*

The punishment therefor is provided under subd. 57, sec. 56 of the Criminal Code. *Id.*

**656. Abandonment.**—An officer of a society for the prevention of cruelty to animals is liable for an abandoned animal killed by him, unless he proves that it was past recovery for any useful purpose. *Sahr v. Scholle* (Sup. Ct. 2 D. 1895), 69 S. R. 453; 89 Hun, 42. The determination of the two reputable citizens, referred to in this section, if made without notice to the owner, is not conclusive on him. *Id.* Before there can be such conclusive determination as will result in depriving the owner of his property, he is entitled to a hearing. *Id.* In the case last cited, the evidence was held sufficient to establish that the abandoned animal was past recovery for any useful purpose.

**660. Indictment.**—Indictment, which charges defendant with willfully and maliciously mixing poison with salt and scattering the same in a pasture where the cattle of another were kept, with the intent that the poison so mixed with salt should be taken by the cattle, and that it was so taken and as a result three cows and a bull were destroyed, states a misdemeanor under sec. 660, Penal Code. *People v. Knatt*, 156 N. Y. 302; 13 N. Y. Cr. 92.

**Special sessions.**—The offense, prescribed by this section, comes within the meaning of the term "cruelty to animals," as used in sec. 56 of the Code of Criminal Procedure, so that courts of special sessions have jurisdiction over it in the first instance. *People ex rel. Knatt v. Davy*, 65 St. Rep. 162; 32 Supp. 106.

**666.** Amended by chap. 539, Laws 1904. City magistrate New York city has no jurisdiction to try charge of misdemeanor for speeding automobile. *People v. Patterson*, 16 N. Y. Crim. Rep. 508; 38 Misc. 79.

**668. Fines.**—This section is not repealed, either expressly or by implication, by the charter of the city of Gloversville. *American Society, etc., v. City of Gloversville*, 60 St. Rep. 808;

78 Hun, 40; 29 Supp. 257. Fines imposed and collected for violations of this section are payable, on demand, to the Society for the Prevention of Cruelty to Animals. *Id.* This provision relates to such prosecutions anywhere in the state. *Id.*

**Warrant.**—See *Fox v. Mohawk & H. R. Humane Soc.*, 82 S. R. 625, 628; 48 S. R. 625, 628.

Any agent or officer of any such society may arrest without warrant, and bring before the court or magistrate having jurisdiction, any person offending against any of the provisions of title 16 of the Penal Code. *Fox v. Mohawk & H. R. Humane Soc.*, 20 Misc. 461; 80 S. R. 232; 46 S. 232. Any person who shall interfere with or obstruct any such officer or agent in the discharge of his duties is guilty of a misdemeanor. *Id.*

669. See *Rutherford v. Krause*, 60 St. Rep. 680; 8 Misc. 547; 29 Supp. 787; 24 C. P. 1.

This section defines the caption of title 16 of the Penal Code. *People ex rel. Knatt v. Davy*, 65 St. Rep. 162; 32 Supp. 106.

671. **Attorneys may defend themselves.**—The last section does not affect secs. 78, 79, 80 and 81 of the Code of Civil Procedure, and does not prohibit an attorney from defending himself in person, as attorney or as counsel, when prosecuted either civilly or criminally.

672. **Fraudulent claim.**—This section, and the crime defined in it, are plainly distinguishable from section 165 referred to. *People v. Stock*, 21 Misc. 147; 12 N. Y. Cr. 420; 81 S. R. 94; 47 S. 94. The one is malfeasance in office by the official in auditing or paying a false claim, while the other is the presentation of a fraudulent claim to an auditing board for allowance or payment. *Id.* Only a public official can be guilty of the crime charged in one section, while in the other it is not the official but the person presenting the claim, who commits the felony. *Id.*

An indictment, under section 672 of the Penal Code, which alleges the presentation of the claim, alleges the presentation of the bill, the fact that it was false and fraudulent, and known to be so by the defendant when he presented it, that various of the items contained in the bill for which the defendant charged were entirely fictitious to the knowledge of the defendant, contains a full statement of all the facts necessary to constitute the offense. *People v. Coombs*, 158 N. Y. 532. In such case it is, of course, incumbent upon the prosecution to show, to the satisfaction of the jury, that the defendant knowingly presented, or caused to be presented, a false and fraudulent bill for audit to an officer authorized by law to audit and allow the same. *Id.* Where the fraudulent bill described in the indict-

ment was presented to the auditor by the defendant's clerk, and it could not be shown that he personally presented the bill, it was competent to show that he had received the proceeds. *Id.*

Presenting the claim, if fraudulent, by a supervisor to the auditor, was a crime within the provisions of this section. *People v. Klipfel*, 37 A. D. 224.

**What is not.**—Where the claim is unliquidated and not contracted for at any special price, or the subject of any statutory provision, a statement of excessive or exorbitant value, unaccompanied by any false statement of collateral circumstances, does not constitute an indictable offense. *People v. King*, 12 N. Y. Cr. 242; 78 S. R. 287; 44 S. 287.

**672.** Where the indictment describes the commission of certain acts that constitute a crime under section 672, Penal Code, it must charge that defendant committed such a crime, in order to support a conviction. *People v. Klepfel*, 160 N. Y. 371; 14 N. Y. Crim. Rep. 169.

**674a.** Amended by chap. 505 of 1894. Amended by chap. 590, Laws 1905.

**674b.** This section was added by chap. 551 of 1894, and went into effect May 8, 1894.

**674c.** This section was added by chap. 551 of 1894, and went into effect May 8, 1894.

**674d.** This section was added by chap. 551 of 1894, and went into effect May 8, 1894.

**674e.** This section was added by chap. 551 of 1894, and went into effect May 8, 1894.

**675.** Republication of article advocating murder of rulers. *People v. Most*, 16 N. Y. Crim. Rep. 55; 171 N. Y. 423; *People v. Miller*, 16 N. Y. Crim. Rep. 392; 71 App. Div. 160. Public meeting in streets. *People v. Wallace*, 17 N. Y. Crim. Rep. 432; 85 App. Div. 170. When action of licensed private detective in following a person is a misdemeanor. *People v. St. Clair*, 90 App. Div. 239; *People ex rel. Smith v. Van De Carr*, 17 N. Y. Crim. Rep. 455; 86 App. Div. 9. See, however, *People v. Weiter*, 179 N. Y. 46.

**685.** See notes under section 34, ante.

See *People v. Gardner*, 63 St. Rep. 21; 144 N. Y. 119; 38 N. E. 1003; modifying and affirming 57 St. Rep. 18; 73 Hun, 66; 25 Supp. 1072. See *People v. Reilly*, 49 App. Div. 218.

**686.** Amended by chap. 116, Laws 1902. See *People v. Mosier*, 16 N. Y. Crim. Rep. 541; 73 App. Div. 5.

687a. Added by chap. 425, Laws 1901. Amended by chap. 282, Laws 1902. See *People v. Adams*, 176 N. Y. 351.

**688. Evidence.**—Where the people wish to prove that another person, previously convicted for same offense, was one of the men connected with the burglary in question, that fact, as against the defendant, cannot be shown by the indictment, plea or judgment of conviction against such person, where the defendant was not a party to the criminal action against him. *People v. Shinburne*, 84 S. R. 51; 50 S. 51. See remarks of Gray, J., in *People v. Kief*, 126 N. Y. 661, 663, 664; 27 N. E. 556.

**Former offense.**—Though sections 707-711, only prescribe increased punishment to second offenders and say nothing about charging the fact of a conviction for a former offense in the indictment, it has always been the practice, and it is held necessary, to so charge and prove it, in order to convict, and enable the court to inflict the increased punishment. *Matter of Kenny*, 83 S. R. (49 S.) 1037. The defendant is entitled to a constitutional trial of the question of the former conviction. *Id.*; *People v. Youngs*, 1 Caines, 37; *Wood v. People*, 53 N. Y. 511; *Johnson v. People*, 55 *id.* 512.

**Indictment.**—Under this section, the indictment should charge the first conviction. *People v. Sickles*, 84 S. R. (50 S.) 377. There is no practice in this state which permits a defendant to admit part of the charges on an indictment, and restrict the trial to the other charges put in issue. *Id.*

**Indictment.**—The indictment of the person accused of being a second offender must bring the case within the statute, by setting forth the facts depended upon for the imposition of the severer punishment prescribed by the Penal Code. *People v. Sickles*, 156 N. Y. 541; 13 N. Y. Cr. 277. In the absence of some statutory provision permitting it, the defendant cannot plead in part, and thus restrict the issue and the proof to be offered under the indictment. *Id.* This section does not conflict with, and destroy, the presumption of innocence, to which he is entitled under the law, and deprive him of his liberty without that due process of law which is guaranteed by the Constitution to every citizen. *Id.* In enacting that, upon a conviction for a second offense, the punishment shall be one of greater severity, the legislature has acted in accordance with the dictates of a wise policy and has invaded no constitutional right. *Id.*

**Reform.**—Where, on trial of indictment under section 508 of Penal Code, it appears that the defendant had been previously indicted and convicted of a crime, it is proper to ex-

clude a question directed to showing defendant's efforts to reform. *People v. Thompson*, 33 A. D. 177; 87 S. R. 497; 53 S. 497; 13 N. Y. Cr. 273.

**Second offense.**—A provision of law authorizing the people, upon a plea of not guilty, to prove a former offense charged in the indictment, even though it is admitted by the defendant, is not on that ground unconstitutional. *People v. Sickles*, 84 S. R. 377; 50 S. 377. Under this section, for the second offense the defendant must be sentenced to at least the longest term provided as a punishment for the first offense, and may be sentenced for twice that time. *Id.*

**Unconstitutional.**—Sections 707-711, chap. 378 of 1896, which make the term of imprisonment of a person committed to the workhouse for public intoxication to depend upon the determination of the workhouse superintendent and commissioner of correction whether he has previously been convicted of a like offense, without giving him an opportunity to be heard thereon, deprive him of liberty without due process of law, within sec. 6, art. 1, State Constitution, and art. 14, Federal Constitution. *Matter of Kenny*, 83 S. R. 1037; 49 S. 1037.

**688. Former conviction.**—Inability to prove such former conviction, does not deprive the trial court of the right to proceed to try the question of the prisoner's guilt for the very crime for which he was indicted; nor in this is there any variance or inconsistency. *People v. Reilly*, 97 S. R. 18; 63 S. 18.

**690.** See dissenting opinion in *People v. Sickles*, 84 S. R. 377; 50 S. 377.

Chapter 357 of 1873 was in effect repealed by section 690 of the Penal Code and sections 510-514 of the Code of Criminal Procedure. *People ex rel. Sloane v. Fallon*, 27 Misc. 16; 13 N. Y. Cr. 553.

**698. Female convict.**—This section, as amended, provides that any woman over the age of sixteen years, who shall be convicted of a felony, shall, when the sentence imposed is less than one year, be committed to the county jail of the county where convicted, or to a penitentiary, or to a house of refuge for women, but when the sentence shall be for a longer term, such female must be committed to the state prison at Auburn. *People ex rel. Olcott v. House of Refuge for Women at Hudson*, 81 S. R. 767; 47 S. 767. This section was not repealed by section 146 of State Charities Law. *Id.*

**699.** Amended by chap. 726 of 1894. Amended by chap. 103, Laws 1902. Amended by chap. 655, Laws 1905.



**700.** See act to incorporate the Burnham Industrial passed May 12, 1886, as amended by chap. 414 of 1894.

**701.** Amended by chap. 103, Laws 1904. Chap. 187 of 1894, which provides for the establishment of a house of refuge for women, was amended by chap. 253 of 1895.

**Authority.**—Authority is given by this section to the court to direct a confinement, in a house of refuge, of juvenile delinquents. *People ex rel. Zeese v. Masten*, 61 St. Rep. 580; 79 Hun, 580; 29 Supp. 891. And the manner, in which such power shall be exercised, is regulated to some extent by section 702, post. *Id.*

**704. Fine.**—The court has no power to impose imprisonment in a state prison for nonpayment of a fine, as the judgment in such case must be executed by the sheriff of the county. *People ex rel. Gately v. Sage* (Westchester Co. Ct. 1896), 171 Misc. 712; 41 S. 531.

**713. Authority.**—Section 701, ante, gives authority to the courts to direct a confinement of juvenile delinquent in a house of refuge, and this section regulates to some extent the manner in which such power shall be exercised. *People ex rel. Zeese v. Masten*, 61 St. Rep. 580; 79 Hun, 580; 29 Supp. 891.

This section seems to require a child under sixteen years of age to be committed to some reformatory, charitable or other institution, authorized to receive and take charge of him, and to provide that, when he is so sentenced, the institution "until majority or for a shorter term," may subject him to such discipline and control as a parent "may lawfully exercise over a minor." *Id.* See *Gabay v. Doran*, 38 Misc. 660; 10 Y. Crim. Rep. 113.

**714.** See *Donahue v. Wippert*, 60 St. Rep. 173; 7 Misc. 28 Supp. 495.

**Witness.**—Under this section, a convict is just as competent as any other person to testify in any criminal proceeding. *People v. Sebring* (Sup. Ct. O. & T. 1895), 69 S. R. 61; 10 Misc. 31.

Where the witness has been convicted of perjury, the effect of such conviction may be, under this section of the Code, nullified by the cross examination of the witness. *People v. Wicks* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354; *aff'd*, 10 Y. 1.

At common law, persons convicted of infamous crime were excluded from being witnesses altogether, but by statute adopted in most of the United States the disqualification on account of infamy is removed, and the conviction may be proved to

credibility, and by our Penal Code, section 714, a person convicted of a crime is a competent witness in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record of a conviction or by his cross examination. *People v. Dorthy*, 13 N. Y. Cr. 137; 80 S. R. 970; 46 S. 970. The rule goes no further than to permit the witness to be asked as to specific facts or acts in his own career which tend to discredit him, or to impeach his moral character; and that only to a reasonable extent, within the discretion of the court, subject to review, however, if that discretion is abused. *Id.*; *Ryan v. Peole*, 79 N. Y. 593; *People v. Irving*, 95 *id.* 544, 546, and cases cited; *Spiegel v. Hayes*, 118 N. Y. 660; 22 N. E. 1105.

But the proceeding to disbar an attorney under sections 67, 69 of the Code of Civil Procedure is a summary one. *Id.* A witness cannot be compelled to state whether he has been indicted. *Id.* An indictment is an accusation from a body charged and sworn to investigate crime upon the oath of witness, and it acts judicially. *Id.* But *People v. Reavey*, 38 Hun, 418, is no authority for proving, under the guise of a proceeding to suspend an attorney, the charges made against him upon which that suspension was obtained. *Id.* The mere fact, only, of the suspension was shown. That is very different from a case where the prosecution seeks to prove the charges upon which the disbarment was founded, and to establish that several distinct felonies had been committed by the defendant. These different offenses the prosecution would not be permitted to show upon any criminal trial for another crime unless it was proper to establish the intent by which the defendant committed the crime for which he was being tried. *Id.*

Proceedings before the police commissioners, which result in fines or other punishment for dereliction of duty or infractions of police rules are convictions, and, therefore, proof thereof on the defendant's cross-examination is not proper, as affecting his credibility under section 832 of the Code of Civil Procedure and section 714 of the Penal Code. *People v. Sullivan*, 34 A. D. 544; 88 S. R. 538; 54 S. 538; 13 N. Y. Cr. 377. It is only such conviction as is reached after an orderly trial in a court of law before a judge or petit jury that will disqualify a person from testifving. *Id.* When testimony to that effect has no bearing on the main issue in the case, it is error to permit the prosecution to elicit it, even indirectly, from the defendant, in a criminal trial, upon his cross-examin-

**715.** *People ex rel. Frederick v. Warden*, 16 N. Y. Crim Rep. 374; 373 App. Div. 76.

**716.** When wife of defendant not prohibited from testifying as to receiving two letters from him and mailing them at his request when in jail awaiting trial. *People v. Truck*, 170 N. Y. 203; 16 N. Y. Crim. Rep. 342.

**718.** Subdivision 9 of the present section is subdivision 16 of the original section.

**725. Subd. 3.**—See *People ex rel. Shortell v. Markell*, 20 Misc. 149; 79 S. R. 904, 908; 45 S. 904, 908.

**Subd. 4.**—The village law was enacted prior to the adoption of the Code, and violations of village ordinances are “offenses” not defined and made punishable by the Code, and it was evidently the intention of the legislature that the manner of enforcing such ordinances, which were then provided for by statutes should continue in force. *People v. Van Houten* (Ct. Sess. 1895), 69 S. R. 265; 13 Misc. 603.

**726. Effect of repeal.**—The principle that the repeal of a statute, creating a crime or prescribing its punishment, prevents prosecution for offenses committed while the law was in force, is merely a rule of statutory construction. *People v. Maxwell*, 64 St. Rep. 154; 83 Hun, 157; 31 Supp. 564.

There is no question of natural right or principle of personal liberty involved. *Id.* The legislature has power to pass a statute as to criminal offenses applicable alone to the future, and such statute will not repeal the prior law on the subject, nor give immunity to past offenders. *Id.*; *Mongeon v. People*, 55 N. Y. 613.

**728.** See *People v. Cleary* (Ct. Sess. 1895), 70 S. R. 209; 13 Misc. 449.

**Implication.**—A repeal by implication of any provision of the Penal Code is expressly forbidden by this section. *American Society, etc. v. City of Gloversville*, 60 St. Rep. 808; 78 Hun, 40; 29 Supp. 257.

Repeals by implication are not favored, and a statute is not deemed repealed by implication by a subsequent statute upon the same subject, unless the two are manifestly inconsistent and repugnant to each other, or unless a clear intention is disclosed on the face of the latter statute to repeal the former one. *People v. Koenig* (Sup. Ct. 1 D. 1896), 9 A. D. 436; 41 S. 283; *Heckman v. Pinkney*, 81 N. Y. 215; *People v. Jaehne*, 103 id. 182; *McKenna v. Edmundstone*, 91 id. 231.





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**THE**  
**CODE OF CRIMINAL PROCEDURE**

**OF THE**  
**STATE OF NEW YORK**

**WITH ALL THE AMENDMENTS TO AND INCLUDING THE YEAR 1904**

**A COMPLETE INDEX, COPIOUS FORMS**

**FULL ANNOTATION OF ALL THE DECISIONS RELATING THERETO  
TO SEPTEMBER 1, 1893, WITH APPENDIX CONTAINING  
ANNOTATIONS TO MAY 1, 1904.**

**BY**  
**WILLIAM H. SILVERNAIL**

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**ALBANY, N. Y.:**  
**W. C. LITTLE & CO. LAW PUBLISHERS,**

**1904**



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# THE CODE OF CRIMINAL PROCEDURE.

OF THE

## STATE OF NEW YORK.

---

### CHAPTER 442, LAWS OF 1881.

AS AMENDED BY LAWS OF 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, and 1898.

### AN ACT

TO ESTABLISH A CODE OF CRIMINAL PROCEDURE.

PASSED JUNE 1, 1881 ; THREE-FIFTHS BEING PRESENT.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows :*

### PRELIMINARY PROVISIONS.

**SECTION 1.** Title of the Code.

2. Divisions of the Code.
3. No person punishable but on legal conviction.
4. Crimes, how prosecuted.
5. Criminal action defined.
6. Parties to a criminal action.
7. The party prosecuted known as defendant.
8. Rights of defendants in criminal actions.
9. Second prosecution for the same crime prohibited.
10. No person to be a witness against himself in a criminal action or to be unnecessarily restrained.

**SECTION 1.** Title of Code.—This act shall be known as the Code of Criminal Procedure of the State of New York.

**Object.**—This Code was intended to form a complete Code of Criminal Practice, and designed to supersede all forms of procedure which had previously existed. *People v. Clarke*, 8 N. Y. Cr. 174.

The legislature intended, by this Code, to devise and prescribe a simple and practicable mode of procedure upon the part of the prosecution, and of the defense. *People v. Clements*, 5 N. Y. Cr. 294.

The legislature, in adopting this Code, intended to establish a complete system of criminal practice. *People ex rel. Benton v. Court*, etc, 46 St. Rep. 256 ; 8 N. Y. Cr. 357.

This Code was intended to simplify pleadings. *Hewitt v. Newburger*, 48 St. Rep. 813.

The object of this Code was not to change, but to codify, the practice already existing. The legislature, in enacting it, did little more than to reduce the criminal practice, actually existing at the time of its passage, to

a compact, convenient and definite form. *People ex rel. Brown v. Supervisors, etc.*, 6 N. Y. Cr. 106. The practice was, in a few instances, simplified, and some doubtful questions were settled. *Id.*

It was the intention of the Codifiers that the criminal and Penal Code should go into effect at the same time. *Matter of McMahon*, 64 How. 294. But the legislature determined otherwise, *Id.* In each Code, a provision was inserted that, when construed in connection with other statutes, each should be deemed to have been passed on the 4th day of January, 1881. Section 963 of Code of Criminal Procedure; Section 727 of the Penal Code.

This Code was intended to free criminal practice from mere technicalities, and to bring to the trial of the indictment the very merits of the issue between the people and the defendant, and in the plainest and least formal style. *People v. Bliven*, 20 St. Rep. 486; 112 N. Y. 92.

The technical requirements of criminal procedure have been much simplified and abbreviated by the Code. *People ex rel. Baker v. Beatty*, 39 Hur. 477.

**Mode of procedure.**—This Code prescribes the method of conducting trials in criminal actions prosecuted by indictment. *People ex rel. Benton v. Court, etc.* 46 St. Rep. 256.

Prosecution relates to the warrant, the arrest, the indictment and other proceedings following the inquiry and before punishment, and the manner of so doing is regulated by the Code of Criminal Procedure. *People v. Beckwith*, 12 St. Rep. 795; 108 N. Y. 73.

The Code of Criminal Procedure prescribes the rules of procedure in criminal cases; the definition of crimes is confined to the Penal Code. *People v. Dewy*, 33 St. Rep. 427, 428.

This Code prescribes the method of conducting trials in criminal action prosecuted by indictment. *People ex rel. Benton v. Court, etc.*, 46 St. Rep. 256; 8 N. Y. Cr. 357.

**Jurisdiction.**—This Code has jurisdiction of every indictment found after it went into effect. *People v. Petrea*, 92 N. Y. 128; 1 N. Y. Cr. 283 65 How. 59.

Crimes, committed after this Code took effect, are governed by its provisions. *People v. McGloin*, 91 N. Y. 248; 1 N. Y. Cr. 154; 12 Abb. N. C. 173 16 W. Dig. 255.

Where the indictment is found after this Code was enacted and took effect the proceedings are governed by its provisions. *People v. Petrea*, 92 N. Y. 144.

**§ 2. Divisions of the Code.**—This Code is divided into six parts. The first relates to the courts having original jurisdiction in criminal actions;

The second relates to the prevention of crime;

The third relates to the judicial proceedings for the removal of public officers by impeachment or otherwise;

The fourth relates to the proceedings in criminal action prosecuted by indictment;

The fifth relates to proceedings in special sessions and police courts;

The sixth relates to special proceedings of a criminal nature.

*Matter of McMahon*, 64 How., 288.

**§ 3. No person punishable but on legal conviction.**—No person can be punished for a crime except upon legal conviction in a court having jurisdiction thereof.

See Section 1, Art. 1 of State Constitution; fifth amendment of U. Constitution.

“Due process of law” does not mean according to the course of the common law. *People ex rel. McDonald v. Keeler*, 99 N. Y. 463; 3 N. Y. Cr.

348; *Happy v. Mosher*, 48 N. Y. 317. See *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *People ex rel. Witherbee v. Board, etc.*, 70 Id. 228.

See *Cameron v. Tribune Association*, 27 St. Rep. 912; 55 Hun, 607; 7 N. Y. Supp. 742; 3 Silv. (Sup. Ct.), 581.

§ 4. **Crimes, how prosecuted.**—A crime must be prosecuted by indictment, except

1. Where proceedings are had for the removal of a civil officer of the state on impeachment by the assembly for willful or corrupt misconduct in office;

2. Where proceedings are had for the removal of justices of the peace, police justices and justices of justices' courts and their clerks;

3. A crime arising in the militia when in actual service, and in the land and naval forces in time of war, or which this state may keep with the consent of congress in time of peace;

4. Such crimes as are hereinafter or in special statutes specified as cognizable by courts of special sessions and police courts.

See Section, 6, Art. 1 of State Constitution; fifth amendment of Federal Constitution.

The proceedings, where an indictment is found after the Code of Criminal Procedure took effect, are governed by its provisions. *People v. Petrea*, 92 N. Y. 128; S. C. 65 How. 59; 1 N. Y. Cr. 233; 17 W. Dig. 121; aff'g 80 Hun, 98; 64 How. 139; 1 N. Y. Cr. 198; 16 W. Dig. 6.

An act criminal in its nature may be inquired of by various courts upon whom jurisdiction is conferred to inquire, through the intervention of a grand jury, concerning it. *People v. Beckwith*, 12 St. Rep. 795; 108 N. Y. 72.

§ 5. **Criminal action defined.**—The proceeding by which a party charged with a crime is accused and brought to trial and punishment, is known as a criminal action.

§ 6. **Parties to a criminal action.**—A criminal action is prosecuted in the name of the people of the state of New York, as plaintiffs, against the party charged with crime.

See Section 8336 of Code of Civil Procedure.

The parties to a criminal action are defined to be the people of the state as plaintiff, and the party prosecuted as defendant. *People v. Johnson*, 5 St. Rep. 606; 104 N. Y. 216; 5 N. Y. Cr. 219; aff'g 4 Id. 591.

§ 7. **The party prosecuted known as defendant.**—The party prosecuted in a criminal action is designated in this Code as the defendant.

See note under last section.

§ 8. **Rights of defendants in criminal actions.**—In a criminal action the defendant is entitled

1. To a speedy and public trial;

2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel; and,

3. To produce witnesses in his behalf, and to be confronted with the witnesses against him in the presence of the court, except that where the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presence of the defendant, who has,

either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, or, where the testimony of a witness on the part of the people, has been taken according to the provisions of section two hundred and nineteen of this Code, the deposition of the witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found in the state.

Am'd by chap. 422 of 1887.

This amendment struck out the limitation as to inability of witness to give security for appearance and omitted reference to section 220, *post*.

**Counsel.**—The prisoner is entitled to a private interview with his counsel prior to the trial. *People ex rel. Burgess v. Risley*, 66 How. 68.

A witness, summoned before a legislative committee, has no constitutional or legal right to be attended by, or to the aid of, counsel on his examination. *People ex rel. McDonald v. Keeler*, 99 N. Y. 463.

**Confronted with witnesses.**—It is sufficient under the fourteenth amendment of the Federal Constitution, if the accused is confronted with the witnesses at any stage of the same proceeding. *People v. Williams*, 3 N. Y. Cr. 63.

It is not necessary that the confronting should be at the trial of the indictment. *Id.*

The right to be confronted with the witnesses does not require that the accused should in all cases be confronted with the witnesses upon the trial of the indictment. *People v. Williams*, 35 Hun, 516; 3 N. Y. Cr., 75. It is sufficient if he has been once confronted with the witnesses against him in any stage of the process upon the same accusation, and has had an opportunity to cross-examine the witnesses, either personally or by counsel. *Id.*

It is a sufficient compliance with this section, if the accused is once confronted by the witnesses against him at any stage of the proceeding upon the same accusation, and has an opportunity of cross-examining them. *People v. Penhollow*, 3 St. Rep., 445; 5 N. Y. Cr., 41; 42 Hun, 103.

**Deposition before magistrate.**—If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity to cross-examine him, or if there was a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the opposite party. *People v. Fish*, 34 St. Rep., 840; 125 N. Y., 136.

Depositions in criminal cases may now be read if witness is absent from State. *Mutual Life Ins. Co. v. Anthony*, 19 St. Rep., 41; 4 N. Y. Supp., 503.

**Application.**—The provision of Article 6 of the Amendments to the Federal Constitution applies only to trials in the United States Courts for violations of the Federal Constitution and laws. *People v. Penhollow*, 3 St. Rep., 445; 5 N. Y. Cr., 41; 42 Hun, 103. It has no application to criminal trials in the state courts for a violation of state laws. *Id.*

Art. 6 of the Amendments to the U. S. Constitution does not apply to proceedings in the State courts, but only to such as are instituted in the Federal Courts. *People v. Williams*, 35 Hun, 516; 3 N. Y. Cr., 75.

**Death.**—Testimony given upon a former trial by a witness since deceased may be read upon a retrial of the case. *People v. Penhollow*, 3 St. Rep., 445; 5 N. Y. Cr., 41; 42 Hun, 103.

**Absence.**—Depositions in criminal cases may now, it seems, be read if witnesses are absent from state. *Mutual L. Ins. Co. v. Anthony*, 19 St. Rep., 41; 50 Hun, 104.

Where a witness has only been inquired for at a place which he named, shortly before making the deposition, to a police officer as the place where he stopped the night previous, and no inquiry has been made at the place named as his residence or at that named as the residence of his bail in the recognizance given by him on being discharged from the House of Detention, he has not been sought with such due diligence as to allow his deposition, taken before the police magistrate, to be read at the trial under this section. *Murphy v. People*, 1 N. Y. Cr., 102; 16 W. Dig., 132.

**of rights.**—Subdivision 3 of this section does nothing more than and enact the substance of the rule established by the courts in conformity with the Constitution and bill of rights. *People v. Williams*, 3 N. Y. Cr. 85 Hun, 516, 524.

This section is not invalid because it conflicts with a provision of the bill of rights. In such case, it must prevail as an amendment, modification or repeal of such provision. *People v. Williams*, 85 Hun, 516, 522; 3 N. Y. Cr. 85.

**Presence in absence of accused.**—Section 3, art. 1 of the State Constitution forbids the hearing by the jury of any evidence in the absence of the accused and his counsel, without his consent. *People v. Palmer*, 6 St. Rep. 47, 48 Hun, 401; 5 N. Y. Cr., 111.

To introduce evidence to a jury, in the absence of the prisoner and without his consent, violates the provisions of this section. *Id.*

The fact that the accused was, after he had been sentenced, subsequently brought into court, and, in the absence of his counsel, and without the consent of new counsel, re-sentenced, for the purpose of bringing the execution of his sentence within the statutory limits, was held not to be a violation of this section. *People v. Davis*, 46 St. Rep., 213; 19 N. Y. Supp., 997. *People v. Trumble*, 88 St. Rep., 997.

**Constitutional.**—Subdivision 3 of this section is constitutional and valid. *People v. Williams*, 85 Hun, 516; 3 N. Y. Cr., 75.

The provisions of subdivision 3 of this section do not violate Art. 6 of the Federal Constitution, which provides that, in all criminal prosecutions, the accused shall have the right to be confronted with the witnesses against him. *People v. Fish*, 34 St. Rep., 845; 125 N. Y., 136, 149.

**Second prosecution for the same crime prohibited.**—No person can be subjected to a second prosecution for a crime for which he has once been prosecuted, and duly convicted or acquitted.

In the case of *People v. Richards*, 7 St. Rep., 656; 44 Hun, 288; was reversed 10 St. Rep., 515; 108 N. Y., 137.

**Person in jeopardy.**—In this state, a prisoner is considered in jeopardy when he has been arraigned and pleaded to a valid indictment, a witness has been sworn and evidence given, and then, without his consent, a juror is withdrawn or the jury discharged. *King v. People*, 5 Hun, 299. Where, by reason of any defect, a motion in arrest would prevail, the prisoner has not been in peril. *Id.*

**Identity of offense.**—The identity of the offenses charged in the two indictments must exist both in law and in fact, in order to make the plea of former trial available as a bar. *People v. Burch*, 1 St. Rep., 751; 5 N. Y. Cr., 111.

A former trial is no bar unless the first indictment was such that the accused might have been convicted upon it by proof of the facts set forth in the second indictment. *Id.*

Two classes of crimes severally defined by chap. 8 of the Penal Code, section 344 of the same statute, are entirely distinct from each other. *People v. Dewey*, 83 St. Rep., 427, 428.

A conviction for one of the crimes included in the former, is no bar to a conviction for one of those included in the latter class. *Id.*

A verdict of acquittal for the trial of an indictment for robbery is no bar to a subsequent indictment and conviction for perjury, committed by the defendant as a witness on his own behalf, on the trial of the former indictment, though the testimony on the two trials is substantially the same. *People v. Sculley*, 3 N. Y. Cr., 244.

A conviction and conviction for keeping a house of ill-fame as a disorderly person is no bar to a prosecution for the same act as a criminal. *People v. ...* 3 N. Y. Cr., 481; *People ex rel. Van Houton v. Sadler*, 97 N. Y., 146; 5 N. Y. Cr., 473.

A conviction on an indictment for uttering a forged bond, is a bar to a subsequent conviction under an indictment charging the uttering, at the same time, of the mortgage, accompanying such bond and purporting to be the performance of its conditions. *People v. Peck*, 4 N. Y. Cr., 148.

**Arrest of judgment on new trial.**—The defendant is not subject to be twice put in jeopardy for the same offense ; but, if judgment is arrested on his motion, or if, for any reason, a new trial is granted on his prayer, he must submit to another trial. *People v. Guidici*, 100 N. Y., 503 ; 3 N. Y. Cr., 558.

The provisions of sections 464, 543 and 544, *post*, are not violative of section 6, art. 1 of State Constitution, against subjecting a person to be twice put in jeopardy for the same offense, as in such case the jeopardy is incurred with the consent of, and as a privilege granted to, the defendant upon his application. *People v. Palmer*, 15 St. Rep., 78 ; 109 N. Y., 417.

**Plea of guilty withdrawn.**—Under an indictment for murder in the first degree, the acceptance of a plea of guilty of murder in the second degree, which was withdrawn, is no bar to a subsequent trial for murder in the first degree on a plea of not guilty. *People v. Cignarale*, 16 St. Rep., 155 ; 110 N. Y., 29.

**Different counts.**—Where, on the trial of an indictment containing different counts, there is a specific verdict of guilty on one count and the verdict is silent as to the other counts, it is equivalent to an acquittal on those counts, and a judgment on the verdict is as to them a bar to further prosecution. *People v. Dowling*, 84 N. Y. 478. Upon a reversal of the conviction, the trial and conviction were held not to be a bar to a new trial upon the count on which the verdict of guilty was rendered. *Id.* But the reversal does not disturb the verdict of acquittal, or its effect, upon the other counts. *Id.*

§ 10. **No person to be a witness against himself in a criminal action, or to be unnecessarily restrained.**—No person can be compelled in a criminal action to be a witness against himself, nor can a person charged with crime be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

See section 393, *post* ; fifth amendment to Federal Constitution ; section 6, art. 1 of State Constitution.

Section 393, *post*, does not violate the provisions of section 6, art. 1 of State Constitution, nor is it inconsistent with this section. *People v. Courtney*, 94 N. Y., 490 ; 1 N. Y., Cr., 573 ; *aff'g* 31 Hun, 190 ; 1 N. Y., Cr., 557.

**Witness against himself.**—The provisions for the examination of persons charged with crime are framed with reference to the constitutional provision that no person shall, in any criminal case, be compelled to be a witness against himself. *People v. Mondon*, 2 St. Rep., 713 ; 4 N. Y. Cr., 559 ; 103 N. Y., 211.

Though the defendant cannot be compelled to be a witness against himself, he, by consenting to take the stand, waives the constitutional protections, and may be examined in the same manner as any other witness. *People v. Guidici*, 100 N. Y., 503 ; 3 N. Y. Cr., 558 ; *Connors v. People*, 50 N. Y., 240.

**Before coroner.**—Evidence of a person under arrest given before the coroner, except where taken as prescribed by sections 188, 196 and 198 ; *post*, cannot be used against him upon his trial for the crime. *People v. Mondon*, 2 St. Rep., 713 ; 103 N. Y., 211.

See *People v. Sharp*, 12 St. Rep., 217 ; 107 N. Y., 427.

The case of *People v. Mondon*, 38 Hun, 198 ; 4 N. Y. Cr., 128, was reversed in 2 St. Rep., 713 ; 103 N. Y., 211.



## PART I.

### OF THE COURTS HAVING ORIGINAL JURISDICTION IN CRIMINAL ACTIONS.

- TITLE**
- I. OF THE COURTS OF ORIGINAL CRIMINAL JURISDICTION IN GENERAL.**
  - II. OF THE COURT FOR THE TRIAL OF IMPEACHMENTS.**
  - III. OF THE COURTS OF OYER AND TERMINER.**
  - IV. OF THE CITY COURTS.**
  - V. OF THE COURTS OF SESSIONS.**
  - VI. OF THE COURTS OF SPECIAL SESSIONS AND POLICE COURTS.**

### TITLE I.

#### OF THE COURTS OF ORIGINAL CRIMINAL JURISDICTION IN GENERAL.

**SECTION 11.** Of the courts of original criminal jurisdiction.

§ 11. Of the courts of original criminal jurisdiction.—The following are the courts of justice in this state having original jurisdiction of criminal actions:

1. The court for the trial of impeachments;
2. The supreme court.
3. The county courts in counties other than New York.
4. The city court in Utica and Oswego.
5. The mayor's court of the city of Hudson.
6. The courts of special sessions.
7. The police courts.

The courts of special sessions and police courts are deemed inferior courts not of record, within the section of the Constitution which provides for the removal of justices of the peace and judges, or justices of inferior courts not of record, and their clerk, by such county, city or state courts as are designated by law; but for no other purpose.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

See sections 18 and 19 of art. 6 of State Constitution.

§ 11a. 1. The justices of the courts having original jurisdiction of criminal actions in the state, shall from time to time appoint a person or persons to perform the duties of probation officer or officers as hereinafter described, within the jurisdiction and under the direction of said court or justice, to hold such office during the pleasure of the court or justice making such appointment. Such probation officer or officers may be chosen



from among the officers of a society for the prevention of cruelty to children or of any charitable or benevolent institution, society or association now or hereafter duly incorporated under the laws of this state, or be reputable private citizens, male or female. Any officer or member of the police force of any city or incorporated village who may be detailed to do duty in such courts, or any constable or peace officer, may be employed as probation officer upon the order of any court or justice as herein provided. No probation officer appointed under the provisions of this section shall receive compensation for his services as such probation officer until allowed by proper municipal ordinance or resolution, as hereinafter prescribed, but this shall not be construed to deprive any officer or member of the police force, or any constable or peace officer, appointed probation officer as herein provided, from receiving the salary or compensation attached to his said official employment. The board of estimate and apportionment in the city of New York and the appropriate municipal board or body of any other city or village, may, in their discretion determine whether probation officers, not detailed from other branches of the public service, shall receive a salary, and if they shall so determine, they may fix the amount thereof and provide for its payment.

Am'd by chap. 656, Laws 1905. Takes effect Sept. 1, 1905.

2. Every probation officer or officers so appointed shall when so directed by the court, inquire into the antecedents, character, and offense of any person or persons arrested for crime within the jurisdiction of the court appointing him, and shall report the same to the court. It shall be his duty to make such reports of all cases investigated by him, of all cases placed in his care by the court, and of any other duties performed by him in the discharge of his office, as shall be prescribed by the court or justice making the appointment, or his successor, or by the court or justice assigning the case to him, or his successor, which report shall be filed with the clerk of the court, or where there is no clerk, with the justice thereof. He shall furnish to each person released on probation, committed to his care, a written statement of the terms and conditions of his probation, and shall report to the court or justice appointing him, at least monthly, any violation or breach of the terms and conditions imposed by the court, of the persons placed in his care. Such probation officer shall have, as to the persons so committed to their care, the power of a peace officer, and shall require such persons to report to them as may be directed by the court.

As amended by L. 1904, chap. 508. In effect Sept. 1, 1904.

## TITLE II.

### OF THE COURT FOR THE TRIAL OF IMPEACHMENTS

#### SECTION 12. Its jurisdiction.

#### 13. Members of the court.

#### 14. Presiding judge.

#### 15. Clerks and officers.

#### 16. Seal of the court.

#### 17. Time of holding the court.

#### 18. Oath to members of the court.

#### 19. Adjournments, etc.

#### 20. Compensation of members and officers of the court.

§ 12. Its jurisdiction.—The court for the trial of impeachments has power to try impeachments, when presented by the assembly, of all civil officers of the state, except justices of the peace, justices of justices' courts, police justices, and their clerks, for willful and corrupt misconduct in office.

See sections 1 and 18 of art. 6 of State Constitution.

**§ 13. Members of the court.**—The court is composed of the president of the senate, the senators, or a majority of them, and the judges of the court of appeals, or a majority of them, but on the trial of an impeachment against the governor or lieutenant-governor, the lieutenant-governor cannot act as a member of the court.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See section 1, art. 6 of State Constitution.

**§ 14. Presiding judge.**—The president of the senate, or in case of his impeachment, death or absence, the chief judge of the court of appeals, or in the absence of both, such other member as the court may elect, is the presiding judge of the court.

**§ 15. Clerks and officers.** The clerk and officers of the senate are the clerk and officers of the court for the trial of impeachments.

**§ 16. Seal of the court.**—The seal of the court for the trial of impeachments now deposited and recorded in the office of the secretary of state shall continue to be the seal of this court and must be kept in the custody of the clerk of the senate.

**§ 17. Time of holding the court.**—Upon the delivery of an impeachment from the assembly to the senate, the president of the senate must cause the court to be summoned to meet at the capitol in the city of Albany, on a day not less than thirty nor more than sixty days from the day of the delivery of the articles of impeachment.

**§ 18. Oath to members of the court.**—At the time and place appointed, and before the court proceeds to act upon the impeachment, the clerk must administer to the presiding judge, and the presiding judge to each of the members of the court then present, an oath or affirmation truly and impartially to try and determine the impeachment; and no member of the court can act or vote upon the impeachment, or any question arising thereon, without having taken this oath or affirmation.

**§ 19. Adjournments, etc.**—The court may adjourn from time to time and hold its sessions at such places as it may determine, but no more than two sessions of the court can be held during the recess of the legislature in any one year.

**§ 20. Compensation of members and officers of the court.**—The writ and process of the court must be signed by the clerk and tested in the name of the president of the senate. The president of the senate and each senator are entitled to receive for their services and expenses while actually attending the court, the same rate of compensation as an associate judge of the court of appeals is entitled by law to receive for his services and expenses as such judge for the same time. The other officers of the court, excepting the judges of the court of appeals, are entitled to the same compensation for their attendance thereon, and for traveling to and from the place where it is held, as is allowed them for attending a meeting of the senate, but no such compensation shall be received for attending the court during a session of the legislature.

**TITLE III.****OF THE SUPREME COURT.**

**SECTION 21.** Repealed.

**22.** Its jurisdiction.

**23.** Repealed.

**24.** Writ or process.

**25.** Repealed.

**§ 21.** Repealed by chap. 680 of 1895. In effect January 1, 1896.

**§ 22. Its jurisdiction.**—The supreme court has jurisdiction :

1. To inquire, by the intervention of a grand jury, of all crimes committed or triable in the county ; but in respect of such minor crimes as courts of special sessions or police courts have exclusive jurisdiction to hear and determine, in the first instance, the jurisdiction of the supreme court attaches only after the certificate mentioned in section fifty-seven of this Code.

2. To try and determine all such crimes and to try all persons indicted for the same.

3. To deliver the jails of the county, or city and county, according to law, of all prisoners therein.

4. To try any indictment found in the county court of the county, or the court of general sessions of the city and county of New York, which has been sent by order of the county court or general sessions to and received by the supreme court, or which has been removed from any court into the supreme court, if, in the opinion of that court, it is proper to be tried therein.

5. To exercise the same jurisdiction as a county court in a cause or proceeding transferred according to sections 40 and 41 of this Code.

6. By an order, entered in its minutes, to send any indictment found therein for a crime triable at the county court or the court of general sessions of the city and county of New York, to such court.

7. To grant new trials in all cases tried therein.

8. To let to bail any person committed, before and after indictment found upon any criminal charge whatever.

9. To exercise the powers conferred upon it by other provisions of this Code and by special statutes.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See sections 41, 343-353, and 465, *post*.

Am'd by chap. 360 of 1882.

This amendment added the second portion of subd. 1 of this section.

The organization of courts of oyer and terminer, with the exception that a justice of the supreme court must preside, is within the control of the legislature. *People v. Bork*, 96 N. Y. 198.

**Subd. 1.**—A charge of assault in the third degree is exclusively cognizable, in the first instance, by the court of special sessions, except a certificate that it should be prosecuted by indictment, is allowed by the county judge or a supreme court justice. *People v. Palmer*, 15 St. Rep. 78; 109 N. Y. 416. But where the defendant, on a trial by a court of sessions upon an indictment for assault in the first degree, is convicted of an assault in the third degree, and, upon his appeal, the judgment is reversed on questions of law only, a new trial ordered and the case remitted to the court of sessions, the jurisdiction of this court is not affected, and the case stands as though there had been no trial. *Id.*

**Subd. 2.**—Indictments for crimes punishable with death may be found in either the court of oyer and terminer or sessions, but are triable only in the oyer and terminer. *People v. Bradner*, 10 St. Rep. 667; 107 N. Y. 5.

**Subd. 4.**—The court of oyer and terminer has authority to try a prisoner, though the indictment was found in the court of sessions. *People ex rel. Sherwin v. Mead*, 93 N. Y. 415; *aff'g.* 28 Hun, 227.

**Subd. 6.**—The power of the oyer and terminer to remit indictments pending therein to the court of sessions for trial existed under the revised statutes, and is continued by subdivision 6 of this section. *People v. Bradner*, 10 St. Rep. 667; 107 N. Y. 5.

An order of the oyer and terminer, remitting the indictment to the court of sessions for trial is essential to confer jurisdiction upon the latter court to try the indictment. *Id.*

See subdivision 2 of section 89 of Code of Criminal Procedure.

But in order to the validity of the judgment rendered, the record need not show affirmatively that the sessions acquired jurisdiction by virtue of an order of the oyer and terminer remitting the indictment. *People v. Bradner, ante.* It is sufficient if, as matter of fact, the proper order was made. *Id.*

§ 23. Repealed by chap. of 1896. In effect, January 1, 1896.

§ 24. Writ or process.—A writ or process issued out of the supreme court must be tested in the name of a justice of the supreme court of the district, and may be directed by the court into any county of the state, as occasion requires.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

§ 25. Repealed by chap. 880. In effect January 1, 1896.

§§ 26, 27, 28, 29 and 30, repealed by chap. 880 of 1895. In effect, January 1, 1896.

## TITLE IV.

### CHAPTER I

#### THE CITY COURTS.

##### SECTION 31. City courts.

##### 32. By whom held.

§ 31. City courts.—The city courts, having original criminal jurisdiction, are the recorder's court of Utica, the recorder's court of Oswego, and the mayor's court of Hudson. Their jurisdiction in criminal matters is defined by special statutes, and continues as thus defined.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

See chap. 11, of 1893, amending chap. 103 of 1882, which established a local court of civil and criminal jurisdiction in the city of Utica.

**§ 82. By whom held.**—These courts for the exercise of their criminal jurisdiction must be held by the following officers:

1. The city courts of Utica and Oswego by the recorders of those cities respectively;
2. The mayor's court of Hudson, by the mayor of that city.

## CHAPTER II

### GENERAL PROVISIONS RELATING TO CITY COURTS.

**SECTION 83.** Indictment for offenses punishable with death to be sent to the supreme court.

84. Indictments for crime not punishable by death.

85. Indictments, when to be sent to city court.

86. Court continued beyond terms.

**§ 83. Indictments for offenses punishable with death.**—

When an indictment is found at a city court for a crime punishable with death, the court may send it to the next trial term of the supreme court held in the county.

**§ 84. Indictments for crimes not punishable with death.**

—A city court may also send an indictment found therein and remaining undetermined for a crime not punishable with death to the next trial term of the supreme court of the same county, to be determined according to law. But that court, if, in its opinion, the same is not proper to be tried therein, may remit it back to the court by which it was sent, which must proceed thereon as if it had remained there.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

**§ 85. Indictments, when sent to the city court.**—

When an indictment is found in the supreme court in a county embracing any of the cities in which a city court having original criminal jurisdiction is established, for an offense committed in that city, the court in which it is found may send it to the next city court in which it is triable, which must proceed to try and determine the indictment as if it had been found therein.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

**§ 36. Court continued beyond terms.**—If the trial of a cause be commenced before the expiration of the term of a city court the court may be continued beyond the term, to the completion of the trial and the rendering of judgment on the verdict.

## TITLE V.

### IN THE SUPREME COURT.

**CHAPTER I.** Repealed.

**II.** County courts.

**III.** The courts of general sessions in the city and county of New York.

§§ 37, 38, repealed by chap. 880 of 1895. In effect, January 1, 1896.

## CHAPTER II.

### COUNTY COURTS.

**SECTION 39.** Jurisdiction.

40. Indictments to be sent, *etc.*

41. Other indictments, *etc.*

42. By whom held.

43. Repealed.

44. Same.

45. When and where held; *juries*.

46. Jurors, how drawn.

47. Repealed.

48. Writ or process.

49. Repealed.

**§ 39. Jurisdiction.** — The county courts embraced in this chapter have jurisdiction:

1. To inquire by the intervention of a grand jury of all crimes committed or triable in the county; but in respect of such minor crimes, as courts of special sessions or police courts have exclusive jurisdiction to hear and determine, in the first instance, the jurisdiction of the county court attaches only after the certificate mentioned in section fifty-seven of this Code.



**2. To try and determine indictments found therein or sent thereto by the supreme court or by a city court in the county, for crimes not punishable with death.**

**3. To hear and determine appeals from orders of justices of the peace, under the provisions of law respecting the support of bastards.**

**4. To examine into the circumstances of persons committed to prison as parents of bastards, and to discharge them in the cases provided by law.**

**5. To try and determine complaints under the provisions of law respecting masters, apprentices and servants.**

**6. To review the convictions of disorderly persons actually imprisoned, and to execute the powers conferred and duties imposed by law in relation to those persons.**

**7. To continue or discharge recognizances, undertakings and bonds of persons bound to keep the peace or to be of good behavior, and to inquire into and determine the complaints on which they were founded.**

**8. To compel relatives of poor persons and committees of the estates of lunatics to support such persons and lunatics in the cases and manner prescribed by law.**

**9. To exercise the powers conferred by law in relation to the estates of persons absconding and leaving their families chargeable to the public.**

**10. To let to bail persons indicted therein for any crime triable therein, as provided by law.**

**11. To let to bail persons committed to the prison of the county before indictment for any offense triable in the court.**

**12. To discharge persons who have remained in prison without indictment or trial in the cases prescribed by law.**

**13. To revoke licenses in the cases and mode prescribed by law.**

**14. To grant new trials in all cases tried therein.**

15. To execute such other powers and duties as may be conferred by statute, or are now defined by special statute relating thereto.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Am'd by chap. 360 of 1882.

This amendment added the latter portion of subd. 1 of this section.

See notes under section 22 of the Code of Criminal Procedure.

See sections 41, 343-356, 465 and 961, *post*.

The case of *People v. Sullivan*, 17 St. Rep., 609; 49 Hun, 388, was reversed in 24 St. Rep., 579; 115 N. Y., 185.

**Transfer of indictments.**—Whether any order is necessary, in order to transfer an indictment from oyer and terminer to sessions, is questioned in *May v. People*, 12 Hun, 380; *Meyer v. People*, 8 id., 528; *Lambert v. People*, 1 Cow., 166.

An order may be made in a court of oyer and terminer sending an indictment found therein to the court of sessions for trial, without giving any notice to the accused. *Meyers v. People*, 14 Hun, 416.

**Crimes triable.**—Under the Revised Statutes, courts of general sessions had jurisdiction to try all crimes and misdemeanors not punishable with death or imprisonment in state prison for life. *Meyers v. People*, 14 Hun, 416. This jurisdiction has been enlarged by the Code. Sub. 2 of this section.

All crimes are now triable in courts of sessions except those punishable with death. *People v. Bradner*, 10 St. Rep., 667; 107 N. Y., 1, 7.

**Adjournment.**—The court has power, during a criminal trial, to withdraw, at the request of the defendant, a juror and put the case over the term. *McFall v. People*, 18 Hun, 382.

After the term of the court has been regularly opened, the non-attendance on an adjourned day does not deprive the court of jurisdiction to proceed soon as it is possible for it to attend. *People v. Sullivan*, 24 St. Rep., 579; 115 N. Y., 185. The rule is different, *it seems* where the court fails to appear on the day appointed for the commencement of a term. *Id.*

**New trial.**—Courts of sessions had power by statute, prior to the Code, to grant new trials in cases tried before them. *McFall v. People*, 18 Hun, 382. They possess this power under the Code, subd. 14 of this section.

§ 40. **Indictments to be sent, etc.**—A county court must send every indictment there found for a crime not triable there to the supreme court, or to a city court having jurisdiction to try it, and determine the same.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

The court of sessions has no power to arraign a defendant on, or to receive a plea to, an indictment for murder. *People v. McCraney*, 21 How., 149.

§ 41. **Other indictments, etc.**—A county court may send an indictment pending therein to the supreme court, to be determined according to law, and if such indictment is remitted back without trial by the supreme court, the county court may proceed thereon.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See section 344, *post*.

The power of the court of sessions to remit indictments found therein to the court of oyer and terminer for trial existed under the Revised Statutes and is continued by the provisions of this section. *People v. Bradner*, 10 St. Rep. 667; 106 N. Y. 5.

The court of sessions has power to transfer a case to the court of oyer and terminer, even if the latter court is then in session. *Dolan v. People*, 6 Hun, 493.

**§ 42. By whom held.**—A county court must be held by the county judge, except in the county of Kings, where the county court is divided into two parts, which are to be held by the two county judges elected in and for said county respectively. Am'd by chap. 880 of 1895. To take effect January 1, 1896.

§ 43. Repealed by chap. 880 of 1895. In effect January 1, 1896.

§ 44. If the county judge and special county judge, if there be one in and for that county, are both of them, for any cause incapable of action in any criminal action or proceeding pending in the county court, the court must transfer the same to the supreme court or to a city court having jurisdiction of such an action or proceeding, or may request the county judge of any other county except New York and Kings, to preside at and hold a county court in said county. But if there be a special county judge in and for that county and not incapable of acting in that criminal action or proceeding the same shall be certified to the special county judge as provided by section three hundred and forty-two of the code of civil procedure, and the special county judge shall thereupon act in such action or proceeding.

Am'd by chap. 387, Laws 1902. Took effect April 7, 1902. Previously amended by chap. 880, 1895, and chap. 339, 1886.

**§ 45. When and where held; juries.**—A county court must be held at such times as the county judge of the county, by order, designates, and at the place where the county courts are held for the trial of issues of fact by a jury. Such order must designate the terms at which a grand or petit jury, or both, or neither, is required to attend; and neither a grand jury nor a petit jury is required to be drawn; or summoned to attend a term thus designated to be held without a jury. The order must be published in a newspaper printed in the county, for four successive weeks previous to the time of holding the first term under such order.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See *People v. Rugg*, 98 N. Y. 537, 546.

Sections 45, 46, 225, 226 and 227 of the Code of Criminal Procedure form a complete system by means of which grand juries may be drawn and summoned as occasion may require. *People v. Rugg*, 98 N. Y. 537, 547; aff'g 21 W. Dig. 84.

The order is not ineffective because this section does not require that should be filed in the office of the county clerk. *Id.*

§ 46. **Jurors, how drawn.**—If a county judge fail to designate the terms at which a grand or petit jury is required to attend the grand and petit jurors must be drawn and summoned on each term mentioned in the order mentioned in the last section.

See section 226, *post*.

The omission of the county judge to designate, under chap. 444 of 1851, what terms of the sessions a grand or petit jury shall be required to attend was held in *Cyphers v. People*, 31 N. Y. 373, not to deprive the court of its authority, as such, to impanel a grand jury at any of its terms. Such omission is remedied, under the Code, by the next section.

Where the terms are named, in the order of the county judge, at which grand juries are to be drawn and summoned, the provisions of this section have no application. *People v. Rugg*, 98 N. Y. 557, 546.

§ 47. Repealed by ch. 880 of 1895. In effect January 1 1896.

§ 48. **Writ or process.**—Every writ or process issued out of a county court may be tested on any day of the term in which the court is sitting, and be made returnable on any other day of the same term, or at the next time.

§ 49. Repealed by chap. 880 of 1895. In effect January 1 1896.

## CHAPTER III.

### THE COURT OF GENERAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.

SECTION 50. These courts continued ; proceedings now pending.

51. Jurisdiction.

52. Division of court.

53. Parts, by whom held.

54. When held and its duration.

55. Accommodation for court and officers.

§ 50. **These courts continued ; proceedings now pending**—The court known as the court of general sessions in and for the city and county of New York, is continued, with the jurisdiction conferred by the next two sections and no other. But nothing contained in this section affects its jurisdiction of actions and proceedings now pending therein.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1882.

This amendment made provision for continuing courts of sessions in and for the county of Kings.

See cases under section 89, *ante*.

See section 961, *post*.

§ 51. **Jurisdiction.**—The court of general sessions of the city and county of New York has jurisdiction :

1. To try, determine and punish according to law, all crimes cognizable within said city and county, including crimes, punishable with death or imprisonment in the state prison for life.

2. To exercise, in cases arising in said city and county, the same powers as are conferred by this Code upon county courts in other counties.

3. To try and determine any indictment found in the supreme court in said city and county, which has been sent by order of that court to and received by the court of general sessions therein ; and,

4. To exercise such powers as are now prescribed by special statute relating thereto.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by 360 of 1882.

This amendment made the provisions of this section applicable to the court of sessions of Kings county.

The court of general sessions of the city and county of New York has all the jurisdiction of a court of oyer and terminer. *People v Goodwin*, 18 John. 187 ; subd. 1 of this section.

§ 52. **Division of court.**—The court of general sessions of the city and county of New York is divided into four parts.

§ 53. **Parts ; by whom held.**—Any one of the four parts of the court of general sessions of the city and county of New York may be held by the recorder of the city of New York, or the city judge or the judge of the court of general sessions. A justice of the supreme court may also hold it.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1892.

This amendment provides for the court of sessions of Kings county.

§ 54. **When held and duration.**—Each part of the court of general sessions in and for the city and county of New York,

may be held each month, commencing on the first Monday and continuing so long as, in the opinion of the judge sitting and of the district attorney, the public interest requires, but one part only is required to be held during the months of July and August, and two parts only during the rest of the year.

The general sessions of New York might, under chap. 208 of 1859, extend its terms beyond the third week of the session. *Ferris v. People*, 35 N. Y. 125; 81 How. 140; *Lowenberg v. People*, 27 N. Y. 336; 5 Park. 414, 26 How. 202. This section makes provision for extending the term.

§ 55. **Accommodation for courts and officers, etc.**—The courts have the same power to direct suitable provisions to be made for their accommodation as is now possessed by the supreme court. The recorder, city judge and judges of the court of general sessions of the city and county of New York, must appoint a clerk, and not more than eight deputy clerks, three interpreters, and four stenographers, four record clerks and four chief court attendants.

Am'd by chap. 75 of 1896. In effect March 5, 1896.

Am'd by chap. 360 of 1882.

This amendment extended the provisions of the section to the county of Kings.

Am'd by chap. 137 of 1892.

This amendment made provision for the appointment of additional clerks in Kings county, and for their compensation.

## TITLE VI.

### OF THE COURTS OF SPECIAL SESSIONS AND POLICE COURTS.

- CHAPTER I.** The special sessions except in the cities of New York and Albany.  
 II. The special sessions in the city and county of New York.  
 III. The special sessions of the city of Albany.  
 IV. The police courts.

### CHAPTER I.

#### THE SPECIAL SESSIONS EXCEPT IN THE CITIES OF NEW YORK AND ALBANY.

- SECTION** 56. Jurisdiction of courts of special sessions.  
 57. On filing certificate of county judge, of justice of the supreme court, etc., proceedings to be stayed and return made to district attorney.  
 58. Same.  
 59. Jurisdiction of special sessions.  
 60. Special sessions in Brooklyn.  
 61. Id. ; in Oswego.  
 62. By whom courts of special sessions to be held.  
 63. Recorder of a city to hold court.

§ 56. Jurisdiction of courts of special sessions.—Subject to the power of removal provided for in this chapter, courts of special sessions, except in the city and county of New York, and the city of Albany, have in the first instance exclusive jurisdiction to hear and determine charges of misdemeanors committed within their respective counties, as follows :

1. Petit larceny, charged as a first offense.
2. Assault in the third degree.
3. Racing, running or testing the speed of any animal within one mile of the place where any court is held.
4. Wrongfully severing any produce or article from the freehold, not amounting to grand larceny.
5. Selling poisonous substances not labeled as required by law.
6. Wrongfully and maliciously removing, defacing or cutting down monuments or marked trees.
7. Wrongfully destroying or removing mile-stones, mile-boards or guide-boards, or altering or defacing any inscription thereon.
8. Wrongfully destroying any public or toll-gate, or turnpike gate.
9. Intoxication of a person engaged in running any locomotive engine upon any railroad, or while acting as conductor of a car or train of cars, on any such railroad, or a misdemeanor committed by any person on a railroad car or train.



10. Setting up or drawing unauthorized lotteries, or printing and publishing an account of any such illegal lottery, game or device, or selling lottery tickets, or procuring them to be sold, or offering for sale or distributing any property depending upon any lottery, or for selling any chances in any lottery contrary to the provisions of law.

11. Unlawfully running, trotting or pacing horses or any other animals.

12. Making or selling slung-shot or any similar weapon.

13. Unlawfully disclosing the finding of an indictment.

14. Unlawfully bringing to or carrying letters from any county jail, penitentiary or state prison.

15. Unlawfully destroying or injuring any mill-dam or embankment necessary for the support of such dam.

16. Unlawfully injuring any telegraph wire, post, pier, abutment, materials or property belonging to any line of telegraph, wilfully giving a false alarm of fire, or wilfully tampering, meddling or interfering with any station or box of any fire alarm telegraph system, or injuring any box, station, wires, poles, supports and appliances connected with or forming a part of any fire alarm telegraph system.

Am'd by chap. 279, Laws 1905. Takes effect Sept. 1, 1905.

17. Unlawfully counterfeiting any representation, likeness, similitude or copy of a private stamp, wrapper or label of any mechanic or manufacturer.

18. Malicious trespass on lands, trees or timber, or injuring any fruit or ornamental or shade-trees or vines.

19. Maliciously breaking or lowering any canal walls, or wantonly opening any lock-gate, or destroying any bridge, or otherwise unlawfully injuring such canal or bridge.

20. Unlawfully counterfeiting or defacing marks on packages.

21. Unlawfully setting fire to wood or fallow land, or allowing the same to extend to lands of others, or unlawfully refusing to extinguish any fire.

22. Unlawfully or negligently cutting out, altering or defacing any mark on any logs, timber, wood or plank floating in any waters of this state, or lying on the banks or shores of any such waters, or at any saw-mills, or on any island where the same may have drifted.

23. Unlawfully frequenting or attending a steamboat landing, railroad depot, church, banking institution, broker's office, place of public amusement, auction room, store, auction sale at private residence, passenger car, hotel, restaurant or any other gathering of people.

24. Unlawfully taking and carrying away the oysters of another, lawfully planted upon the bed of a river, bay, sound or other waters within the jurisdiction of this state.

25. Removing property out of the county, with intent to prevent the same from being levied upon by execution, or secreting, assigning, conveying or otherwise disposing of property with intent to defraud any creditor, or to prevent the property being made liable for the payment of debts, or for receiving property with such intent.

26. Driving any carriage upon a turnpike, road or highway for the purpose of running horses; or wilfully and without authority riding a bicycle upon a sidewalk or footpath, constructed, maintained or allowed to remain for the exclusive use of pedestrians, in any street where a sidepath for bicycles is maintained outside of an incorporated city or village, or driving or operating any automobile or motor vehicle upon any plank road or public highway at an unlawful rate of speed.

As am'd by ch. 249, Laws 1902. To take effect September 1, 1902.

**27.** Cruelty to animals or children or offenses of children under section ~~x~~ hundred and ninety-nine of the penal code.

Am'd by chap. 656, Laws 1905.

**28.** Cheating at games.

**29.** Winning or losing at any game or play, or by any bet, as much as ~~venty~~ twenty-five dollars within twenty-four hours.

**30.** Selling liquors in a court house or jail contrary to law.

**31.** Exposure of the person contrary to law.

**32.** Crimes against the provisions of existing laws for the prevention of ~~anton~~ riot or malicious mischief.

**33.** When a complaint is made to or a warrant is issued by a committing ~~ag~~ magistrate for a violation of the laws relating to excise and the regulation ~~f~~ of taverns, inns and hotels, or for unlawfully selling or giving to any ~~adian~~ Indian, spirituous liquors or intoxicating drinks.

**34.** Frauds on hotel, inn, tavern and boarding house keepers.

**35.** For all violations of the provisions of the agricultural, poor and ~~omestic~~ domestic commerce laws.

Am'd by chap. 555 of 1896. In effect Oct. 1, 1886.

**36.** When a complaint is made to or a warrant is issued by a committing ~~magistrate~~ magistrate for a violation of the provisions of section six hundred and ~~eventy~~ seventy-five of the penal code of the state of New York.

Added by L. 1903, chap. 92. In effect Sept. 1, 1903.

**37.** Such other jurisdiction as is now provided by special statute or ~~unicipal~~ municipal ordinance authorized by statute. See chap. 92, L. 1903.

**38.** When a complaint is made to or a warrant is issued by a committing ~~magistrate~~ magistrate for any misdemeanor not included in the foregoing subdivisions ~~of~~ of this section, if the accused shall elect to be tried by a court of special ~~essions~~ sessions, as provided by section two hundred and eleven. But this sub- ~~ivision~~ division shall not apply to any misdemeanor which is or may be punish- ~~ible~~ ible by a fine exceeding fifty dollars, or by imprisonment exceeding six ~~months~~ months.

Am'd, ch. 546 of 1897. In effect Oct. 1, 1897. See chap. 92, L. 1903.

This amendment changed the wording of many of the subdivisions, ~~omitted~~ omitted subds. 3 and 14 of the original section and combined this and the ~~next~~ next section.

Am'd by chap. 379 of 1884.

This amendment omitted subds. 12 and 27 and substituted subd. 32, there- ~~for~~ for

Am'd by chap. 28 of 1883.

This amendment inserted in subd. 14 the words "county jail, penitentiary ~~or~~;" in subd. 26, a comma after the word, "turnpike;" and omitted in ~~subd.~~ subd. 27, the words "contrary to law," and added the words "or children."

Am'd by chap. 133 of 1889.

This amendment added to subd. 18 the words, "or vines"; and inserted ~~a~~ new subdivision just preceding the last one and numbered it "33."

Am'd by chap. 521 of 1890.

This amendment added to subd. 9 the words, "or a misdemeanor com- ~~mitted~~ mitted by any person on a railroad car or train."

Am'd by chap. 150 of 1893.

This amendment introduced the present 31st subdivision.

Am'd by chap. 570 of 1893.

This amendment inserted the present subdivision 35.

Subdivisions 31 and 35 go into effect Sept. 1, 1893.

See notes under sections 701, 717 and 721, *post*.

The case of *People v. Andrews*, 20 St. Rep., 407; 50 Hun, 593; 3 N. Y. ~~Supp.~~ Supp., 508, was reversed in 26 St. Rep., 442; 115 N. Y., 427; 7 N. Y. Cr., 315.

*Matter of Lord*, 10 Abb. N. C., 293; 63 How., 97, has been virtually over- ~~ruled~~ ruled by subsequent decisions.

See *People v. Palmer*, 8 St. Rep., 500.

**Act of 1879.**—The act of 1879, chap. 390, was held to be constitutional and valid. *People ex rel. Comaford v. Dutcher*, 83 N. Y., 240; rev'g 20 Hun, 241; *Devine v. People*, 20 Id., 98; *People ex rel. Stetzer v. Rawson*, 61 Barb., 619; *People ex rel. Murray v. Justices, etc.*, 74 N. Y., 496.

**Constitutional.**—This legislation has been held constitutional. *People ex rel. Comaford v. Dutcher*, 83 N. Y., 240.

**Jurisdiction.**—This section does not define any crime. It only provides that of certain crimes, enumerated in its several subdivisions, courts of special sessions have, in the first instance, exclusive jurisdiction. *People v. Dewey*, 33 St. Rep., 427, 428; 11 N. Y. Supp., 602-3.

Courts of special sessions have such jurisdiction only as is conferred upon them by this section. *People v. Bates*, 38 Hun, 181.

Sections 58 to 59 simply relate to the jurisdiction of courts of special sessions. *People ex rel. Coon v. Wood*, 35 St. Rep., 843.

The courts of special sessions are not, and never have been, courts of record. *People ex rel. McGrath v. Supervisors, etc.*, 28 St. Rep., 941; 119 N. Y., 130.

The provision of this section, in terms, apply only to misdemeanors. *People v. Dewey*, 33 St. Rep., 427; 11 N. Y. Supp., 602-3.

The jurisdiction is limited to crimes committed within the county where the magistrate is authorized to hold his court. *People v. Bates*, 38 Hun, 181.

No provision of law confers, upon a justice of the peace or upon a court of special sessions held by him, jurisdiction of a crime committed beyond the county in which he resides. *Id.*

The jurisdiction of the courts of special sessions extends throughout the county. *People ex rel. Fraser v. Board, etc.*, 17 St. Rep., 875; 2 N. Y. Supp., 611.

The provisions of sections 211 of the Code of Criminal Procedure do not apply to the cases in which courts of special sessions have exclusive jurisdiction under this section. *People v. Starks*, 17 St. Rep., 237; 1 N. Y. Supp., 722.

Where the offense charged is one of which courts of special sessions have exclusive jurisdiction, the case, unless removed in pursuance of the provisions of sections 57 and 58 of the Code of Criminal Procedure, is not one to be prosecuted by indictment. *People v. Cook*, 9 St. Rep., 412; 45 Hun, 36.

The provisions of section 188 and 189 of the Criminal Code are not applicable to such cases. *Id.*

The limitation declared in this section applies to cases, where the complaint or charge is made, in the first instance, to the court of special sessions, and where the minor offenses enumerated herein are those which are sought to be redressed. *People v. Palmer*, 6 St. Rep., 341; 43 Hun, 405.

And so, where these minor offenses are sought to be redressed by indictment in the oyer or sessions, without having been certified there under the following sections, the subject will be, by the grand jury or by the court in giving directions to this body, turned over to the court of special sessions. *Id.*

If the complaint is for a higher offense, and it is sustained by indictment, then the oyer and court of sessions, in case the indictment is found in the latter court or sent there by the oyer, will have jurisdiction. *Id.*

The word "unlawfully," in the several subdivisions of this section, is an important one in defining the offenses over which the court has jurisdiction. *People ex rel. Baker v. Beatty*, 39 Hun, 477.

The offense of keeping a disorderly house is not enumerated in, and, therefore, courts of special sessions have not exclusive jurisdiction of such offense by virtue of, this section. *People ex rel. Miller v. Cooper*, 4 St. Rep., 693; 42 Hun, 197.

The court of special sessions does not possess exclusive jurisdiction over persons accused of diluting milk in violation of chap. 183 of 1885. *People v. Austin*, 19 St. Rep., 523; 49 Hun, 398; 3 N. Y. Supp., 578.

This offense is not one of those enumerated in this section. *Id.*

The asserting, by the court of special sessions, of an exclusive jurisdiction, and the refusal of opportunity to give bail, constitute a sufficient error to require a reversal of the judgment of conviction. *Id.*

A court of special sessions is organized and exists only for the trial of each particular case, and is *functus officio* when the judgment is rendered therein. *People v. Starks*, 17 St. Rep., 234; 238; 1 N. Y. Supp., 723; *Lattimore v. People*, 10 How., 336.

**Subd. 1.**—While courts of special sessions can only try cases of petit larceny, "charged as a first offense," it is not essential to their jurisdiction, in a case of petit larceny, that the information or warrant should allege that the crime charged is a first offense. *People v. Cook*, 9 St. Rep., 412; 45 Hun, 37.

If it is a first offense in fact, the court has jurisdiction to try the case. *Id.*

It will be deemed a first offense, unless the contrary is charged. *Id.*

By this section, jurisdiction is conferred upon courts of special sessions to hear and determine certain charges, and among others petit larceny. *People v. Knowlton v. Sadler*, 2 N. Y. Cr., 439.

This section is not to be so construed as to take from a jury in the courts of the county over and terminer and of the sessions the power to find a verdict of petit larceny, on the trial before them of an indictment for grand larceny. *People v. McTameny*, 80 Hun, 505 ; 1 N. Y. Cr., 437 ; 17 W. Dig., 492 ; 13 Abb. N. C., 66 How., 70.

Where a charge of petit larceny alleged as a first offense is coupled with a count charging a crime of which the Superior Court of Buffalo has jurisdiction, and it is a degree of such crime or arose out of the same transaction, the said court has jurisdiction to try such petit larceny. *People v. Rose*, 29 St. Rep., 292.

**Subd. 2.**—In the list of misdemeanors, the Code enumerates assault in the third degree. *People v. Maschke*, 2 N. Y. Cr., 306, note.

By this section, courts of special sessions, except in New York and Albany, have exclusive jurisdiction of assault in the third degree. *Matter of Bray*, 10 St. Rep., 642 ; 12 N. Y. Supp., 367.

A charge of assault in the third degree is exclusively cognizable, in the first instance, by the court of special sessions, except a certificate that it could be prosecuted by indictment be allowed by the county judge or a supreme court justice. *People v. Palmer*, 15 St. Rep., 78 ; 109 N. Y., 415.

Courts of special sessions have exclusive jurisdiction, under this section, of assaults in the third degree. *People v. McGann*, 6 St. Rep., 541 ; 43 Hun, 56.

**Subd. 10.**—The particular description, contained in subdivision 10 of this section, clearly embraces only offenses defined by sections 323, *et seq.*, chap. 8 of the Penal Code. *People v. Dewey*, 33 St. Rep., 427 ; 11 N. Y. Supp., 602, 608.

The offense of being a common gambler, in selling lottery policies under section 344 of the Penal Code, is not included within the provisions of subdivision 10 of this section. *Id.*

**Subd. 18.**—This section confers jurisdiction upon courts of special sessions to hear and determine charges for malicious trespass upon lands, etc. *People v. Upton*, 29 St. Rep., 778 ; 9 N. Y. Supp., 685.

**Subd. 27.**—By subdivision 27 of this section, courts of special sessions have, in the first instance, exclusive jurisdiction to hear and determine charges of misdemeanors for cruelty to animals. *People v. Christy*, 47 St. Rep., 926 ; 65 Hun, 349 ; 8 N. Y. Cr., 482 ; 20 N. Y. Supp., 279. The remedy by indictment is not proper unless the case is brought before the grand jury in virtue of a certificate under the following section.

**Subd. 33.**—Under subd. 33 of this section, the magistrate may, by a substantial withdrawal and discontinuance, surrender his jurisdiction of the case, and the grand jury and court of sessions may become subsequently vested with jurisdiction. *People v. Andrews*, 20 St. Rep., 408 ; 50 Hun, 593 ; 1 N. Y. Supp., 508 ; *aff'd* on this point in 26 St. Rep., 442 ; 115 N. Y., 429.

It was held, in *People v. Burleigh*, 1 N. Y. Cr., 524, that neither this section nor any provision of the Criminal Code superseded or repealed the act of 1857, as amended by the act of 1869, in so far as they relate to the offense of public intoxication. The act of 1857 was repealed by chap. 401 of 1892.

When a complaint is made to a committing magistrate for a violation of the law relating to excise, the magistrate, subject to the power of removal provided for in the next section, obtains exclusive jurisdiction to hear and determine the charge. *People v. Andrews*, 20 St. Rep., 408 ; 50 Hun, 593 ; 3 N. Y. Supp., 508 ; *aff'd* upon this point in 26 St. Rep., 442 ; 115 N. Y., 429.

Courts of special sessions have exclusive jurisdiction of violations of the excise law under subd. 32 of this section, subject to the power of removal provided by the following section. *People v. Starks*, 17 St. Rep., 237 ; 1 N. Y. Supp., 723.

See sections 30, 31, 32, 33, 34, 35, 36, 39, 42 and 43 of chap. 401 of 1892, as amended in 1893, known as the "Excise Law."

**Subd. 37.**—Courts of special sessions have jurisdiction to try many minor offenses, described as misdemeanors, committed within the county, and such other jurisdiction as is now provided by special statute, or mu-

municipal ordinance authorized by statute. *People ex rel. McGrath v. Supervisors, etc.*, 28 St. Rep., 939; 119 N. Y., 130.

The charter of Rochester empowers the police justice of that city to hold courts of special sessions for the trial of all offenses triable in such courts. *People v. Cook*, 9 St. Rep., 412; 45 Hun, 37.

In order that a case should be brought within the exclusive jurisdiction of courts of special sessions by virtue of subd. 34 of this section, such exclusive jurisdiction must be conferred by some special statute or municipal ordinance authorized by statute. *People ex rel. Miller v. Cooper*, 4 St. Rep., 693; 42 Hun, 197.

The recorder of the city of Elmira, under its charter, has exclusive jurisdiction to try one accused of keeping a disorderly house, subject to the right of such person to apply for a certificate under sections 57 and 58 of Code of Criminal Procedure. *Id.*

See *People v. Hatter*, 22 N. Y. Supp., 890.

§ 57. On filing certificate of county judge or justice of the supreme court, etc., proceedings to be stayed and return made to district attorney.—Upon filing with the magistrate, before whom is pending a charge for any of the crimes specified in the last section, a certificate of the county judge of the county, or of any justice of the supreme court, that it is reasonable that such charge be prosecuted by indictment, and fixing the sum in which the defendant shall give bail to appear before the grand jury; and upon the defendant giving bail, as specified in the certificate, all proceedings before the magistrate shall be stayed; and he shall, within five days thereafter, make a return to the district attorney of the county of all proceedings had before him upon the charge, together with such certificate and the undertaking given by the defendant thereon; and the district attorney shall present such charge to the grand jury; provided, however, that no such certificate shall be given except upon at least three days' notice to the complainant or to the district attorney of the county of the time and place for the application therefor.

Amended by chap. 360 of 1882.

This amendment substituted an entirely new section.

Amended by chap. 393 of 1884.

This amendment added the proviso to the section.

See notes under preceding section.

*People v. Dewey*, 33 St. Rep., 427; 11 N. Y. Supp., 602; *People v. Carnrick*, 39 St. Rep., 595; 15 N. Y. Supp., 437, 438; *People v. Christy*, 47 St. Rep., 924; 20 N. Y. Supp., 279; *People v. Hulett*, 39 St. Rep., 648; 15 N. Y. Supp., 631.

This section provides a procedure for obtaining, from a county judge or justice of the supreme court, a certificate, entitling the case to go to the grand jury. *People v. Austin*, 19 St. Rep., 523; 49 Hun, 398; 3 N. Y. Supp., 579.

The general term cannot, on an appeal from the judgment of the courts of sessions, modifying the judgment of the special sessions, review the refusal of the county judge to grant the certificate authorized by this section. *People v. Wilber*, 39 St. Rep., 743; 15 N. Y. Supp., 436.

Where the defendant is informed of his rights under the preceding section, and waives them, and his intoxication, if any, is not to such degree as to incapacitate him from comprehending the statements made to him by the magistrate, the refusal to grant an adjournment on this ground is not error. *People v. Carnrick*, 39 St. Rep., 596; 15 N. Y. Supp., 438.

§ 58. Same.—When a person is brought before a magistrate—



arged with the commission of any of the crimes mentioned in section fifty-six, and asks that his case be presented to the grand jury, the proceedings shall be adjourned for not less than five nor more than ten days ; and if on or before the adjourned day a certificate mentioned in section fifty-seven is not filed with a magistrate before whom the charge is pending, and bail given by the defendant as therein prescribed, the magistrate shall proceed with the trial, and when the defendant is brought before the magistrate, it shall be the duty of the magistrate to inform him of his rights under section fifty-seven and this section.

Amended by chap, 360 of 1882.

This amendment substituted a new section.

See notes under sections 56 and 57, *post*.

See cases under section 211 and 701, *post*.

See *People v. Hulett*, 39 St. Rep., 648 ; 15 N. Y. Supp., 661 ; *People v. Ricks*, 17 St. Rep., 234 ; 1 N. Y. Supp., 723.

In the cases designated in section 56, *ante*, the person accused has the right to give bail for his appearance, in pursuance of the provisions of this section, at the next succeeding court, having authority to inquire, by the intervention of a grand jury, into the offense. *People v. Burleigh*, 1 N. Y. Supp., 524.

**Incapacity.**—One may be in such a mental condition by reason of intoxication as to be incapable of making the request provided for by this section. *People v. Carnrick*, 39 St. Rep., 596 ; 15 N. Y. Supp., 438.

The magistrate's return as to this subject will be accepted as correct by an appellate court, unless there is very strong evidence to impeach its correctness. *Id.*

**Waiver.**—By this section, the magistrate is required to inform the accused of his right, under this and the preceding section, to remove the case so that it may be tried after indictment, if the requisite certificate and bail can be obtained. *People v. McGann*, 6 St. Rep., 541 ; 43 Hun, 177.

A failure to give the notice to the prisoner, in pursuance of this section, is not a jurisdictional defect. *Id.*

The requirement is not mandatory, but only directory. *Id.*

The right of trial by indictment, of which the magistrate is required by this section to inform the defendant, is one that he can waive. *Id.*

By a demand of an immediate trial by the court, he waives all considerations of other modes of proceeding than the one demanded. *Id.*

**§ 59. Jurisdiction of special sessions.**—A court of special sessions having jurisdiction in the place where any of the crimes specified in section fifty-six is committed has jurisdiction to try and determine a complaint for such crime, and to impose the punishment, prescribed upon conviction ; unless the defendant obtains the certificate and gives the bail mentioned in section fifty-seven.

Amended by chap. 360 of 1882.

This amendment dropped out a reference to section 57 in the first part, and substituted the latter portion, of the section.

See *People v. Austin*, 19 St. Rep., 523 ; 49 Hun, 396 ; 3 N. Y. Supp., 579 ; *People v. Carnrick*, 39 St. Rep., 596.

**§ 60. Special sessions in Brooklyn.**—Subject to the power of removal provided for by sections fifty-seven and fifty-eight of this code, the courts of special sessions of the city of Brooklyn, shall, in the first instance, have jurisdiction except in case of public officers and conspiracy, to try and determine all complaints made before them, or before a police magistrate, or justice of the peace for misdemeanor committed in said city, where the term of imprisonment does not exceed one year, with or without fine, and to impose the same punishment as is authorized by statute in like cases to be inflicted by the county court of the county of Kings. Where any jury is required for the trial of any crime or misdemeanor in said courts of special sessions in the city of Brooklyn, the said courts shall have power to summons as many jurors as the court may deem necessary for the trial of such action or misdemeanor. The said court of special sessions in the city of Brooklyn shall have power to take bail in a reasonable amount for all misdemeanors, and shall have power to take undertakings in bail either with or without the defendant thereon in the discretion of said courts. All fines imposed by the said courts of special sessions in the city of Brooklyn, or by police magistrates in said city, upon defendants convicted in said courts or by such magistrates of crimes, misdemeanors or violations of any city ordinance of the city of Brooklyn, which are paid by such defendants so convicted, to the sheriff of the county of Kings or to the keeper of the penitentiary of the said city, shall be paid monthly by the said sheriff or said keeper to the respective clerks of the courts in which the said fines are imposed; provided, however, that the said sheriff or keeper of the penitentiary of Kings county may, in his discretion, pay all such fines so paid to them, or either of them, directly to the city treasurer of the city of Brooklyn. In an examination held in any criminal proceeding by a police magistrate in the city of Brooklyn, the testimony of each witness may, in the discretion of the magistrate, be taken as a deposition by the official stenographer of the court in which said magistrate holds such examination. Such minutes when so taken and when certified by the stenographer and by the magistrate who held such examination, shall both with reference to such examination, and in all procedure in connection with such examination provided for any section in this code not inconsistent herewith, be regarded as actually taken down in writing by such magistrate and subscribed by the witness at such examination.

Am'd by chap. 92 of 1896. In effect March 11, 1896.

Amended by chap. 45 of 1885.

This amendment virtually repealed the original section and added an entirely new provision upon the same subject.

Amended by chap. 364 of 1889.

This amendment added all subsequent to the first paragraph of the section.

See notes under section 701, *post*.

Courts of special sessions in the city of Brooklyn have exclusive jurisdiction to try and determine all complaints for misdemeanors where the term of imprisonment does not exceed one year, subject to the power of removal by a certificate from a county judge or supreme court justice. *People ex rel. Templeman v. Green*, 4 N. Y. Cr., 443.

**§ 61. Id.; in Oswego.**—The court of special sessions in the



f Oswego, where held by the recorder, has also jurisdiction all cases of offenses, crimes against public decency, selling noxious provisions, cheats, breaches of the peace, disobedience of commands of officers to render assistance in criminal prosecutions, obstructing officers in the discharge of their duties, adulteration of distilled spirits, not delivering marked property, demurrals or putting false marks on floating timber, all violations against the laws and ordinances of or applicable to the town when such violation is a misdemeanor, and all attempts to commit any crimes herein named or referred to when such attempt is a misdemeanor.

2. **By whom court of special sessions to be held.**—Unless provision is otherwise made by law, a court of special sessions must be held by one justice of the peace of the town or city in which the same is held, and sections two hundred and thirty-three, two hundred and ninety-four, two hundred and ninety-five, three hundred and ten, three hundred and thirty-two, three hundred and thirty-three, three hundred and thirty-four, three hundred and thirty-five, three hundred and thirty-six, three hundred and thirty-seven, three hundred and thirty-eight, three hundred and thirty-nine, three hundred and forty, three hundred and forty-one, three hundred and forty-two and three hundred and fifty-nine to four hundred and fifty, both inclusive, shall apply as far as may be to proceedings in all courts of special sessions or police courts.

Added by chap. 860 of 1882.

Amendment made certain sections, therein specified, applicable to proceedings in courts of sessions or police courts.

Part of special sessions, unless provision is otherwise made by law, is held by one justice of the peace. *Matter of Bray*, 84 St. Rep., 642 ; 12 St. Rep., 867.

In the city of Binghamton, such provision is made. *Id.*

*People v. Bates*, 38 Hun, 181 ; *People ex rel. Fellows v. Hogan*, 29 St. Rep., 12.

3. **Recorder of a city to hold court.**—A recorder of a city is authorized to hold a court of special sessions therein.

The recorder of the city of Elmira is authorized to hold courts of special sessions and exercise the powers and jurisdiction of such courts. *People ex rel. Cooper*, 4 St. Rep., 693 ; 42 Hun, 197.

## CHAPTER II.

## THE SPECIAL SESSIONS IN THE CITY OF NEW YORK.

## SECTION 64. Jurisdiction.

## 65. Seal.

**§ 64. Jurisdiction.**—The courts of special sessions in the city of New York, within their respective divisions, have jurisdiction.

1. Such is conferred on them by the Greater New York charter and other existing statutes.

2. To send process and other mandates in any matter of which they have jurisdiction into any county of the state, for service or execution, in like manner and with the same force and effect as similar process or mandates of the court of general sessions of the city and county of New York, and of county courts in counties other than New York, as provided by the code; and particularly to compel the attendance of witnesses, to order the conditional examination of witnesses, to issue commissions for the examination of witnesses without the state, to inquire into the insanity of a defendant and to dismiss the prosecution of an action in like manner as the prosecution of actions by indictment may be dismissed, conformably to the provisions of title twelve of part four of this code.

Amended by chap. 563, Laws 1904. Takes effect Sept. 1, 1904, and all acts inconsistent with this chapter are repealed.

See sections 741 to 748, *post*.

**Subd. 1.**—Misdemeanors committed in the city and county of New York must be tried and determined in the court of special sessions, unless the case is directed to be tried in the court of general sessions. *Kolzem v. Broadway & S. R. R. Co.*, 48 St. Rep., 657.

The court of special sessions of the city of New York has jurisdiction of the offense of an assault with intent to steal. *People v. Bernardo*, 1 N. Y. Cr., 245.

A warrant of commitment, issued upon a judgment of a court of special sessions, need not set forth that the prisoner was convicted of petit larceny charged as a first offense. *People ex rel. Loughlin v. Finn*, 87 N. Y., 533. It is sufficient if it appears that the conviction was for an offense of which the court had jurisdiction. *Id.*

Petit larceny is a misdemeanor within the meaning of this section. *People ex rel. Laughlin v. Finn*, 26 Hun, 58; *aff'd*, 87 N. Y., 533.

The Penal Code, which went into operation since the decision of the above cited case, has, by section 535, declared this offense to be a misdemeanor.

Under this section, the magistrate, in his discretion, may send a case for the violation of chap. 181 of 1888 to the special sessions for trial, if the defendant so elect. *People ex rel. Fellows v. Hogan*, 29 St. Rep., 112; 55 Hun, 394; 8 N. Y. Supp., 451.

The mandatory requirements of section 4, chap. 377 of 1887, as amended by chap. 181 of 1888, apply only where the magistrate takes jurisdiction under it, and do not prevent him from sending the case to the sessions for trial as a misdemeanor, as authorized by section 64 of the Code of Criminal Procedure. *People ex rel. Fellows v. Hogan*, 33 St. Rep., 48; 123 N. Y., 219.

**Subd. 4.**—The fourth subdivision of this section gives, *it seems*, to the special sessions of New York a greater limit of punishment than is conferred upon similar courts in other counties of the state. *Matter of Bray*, 34 St. Rep., 642; 12 N. Y. Supp., 367.

**Subd. 6.**—The statute is silent as to the officers by whom or the offense

hich the recognizances therein referred to, in subd. 6, may have been . Matter of McMahon, 64 How., 289.

5. **Seal.**—The seal heretofore provided for the courts of special sessions in said city on which is engraved the arms of the state and the words, "court of special sessions of the city of New York," with the number of the division of the court, shall continue to be the seal of the court, and all process issued by said court shall be sealed with the said seal and countersigned by the clerk of said court.

Added by chap. 563, Laws 1904. Takes effect Sept. 1, 1904.

6. **Term of office.**—The term of office of the clerk and deputy clerk of the court of special sessions in the city and county of New York is the same as the term of office of the justices of that city.

7. **Court, when held.**—The court of special sessions in the city and county of New York, may be held as often and at such places as the justices thereof may think expedient.

## CHAPTER III.

### THE SPECIAL SESSIONS IN THE CITY OF ALBANY.

8. **Jurisdiction.**

9. **Recognizances.**

10. **Cases, in which defendant must be held for trial before court of special sessions.**

11. **By whom court to be held.**

12. **Clerk.**

13. **Court, when and where held.**

14. **Jurisdiction.**—The court of special sessions in the city of Albany has jurisdiction:

To try and determine all cases of petit larceny charged as a misdemeanor, and all misdemeanors, not being infamous crimes, committed within the city, when a person accused of such crime or misdemeanor demands to be tried before such court of special sessions held by the recorder of said city, instead of before a police justice;

To take recognizances, to appear before the court at a subsequent term from persons charged with a crime or misdemeanor, tried therein;

To impose and enforce sentence of fine or imprisonment, or both, in the discretion of the court, in all cases within its jurisdiction, upon conviction to the same extent as the county court of Albany could do in like cases.

To punish a contempt of court in the same manner and to the same extent as the supreme court could do in like cases.

In cases where a jury trial is demanded by a defendant, draw from the jury box containing the names of jurors who reside in the city of Albany, such number of names as the recorder or county judge may direct, and to require the sheriff of the county to summon the persons so drawn to appear at the place designated for trial, to impanel a jury of twelve men, to require the attendance of additional jurors and to punish a juror

or witness neglecting to appear, in the same manner and to the same extent as the supreme court could do in like cases.

6. On motion of the district attorney, to issue a warrant for the arrest of a person who neglects to appear agreeably to the requirements of a recognizance to appear thereat, commanding the officer executing the same to bring the party forthwith before the court, if in session, otherwise to commit him to the common jail of the county, there to remain until delivered by due course of law.

Am'd by ch. 645 of 1900.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1882.

This amendment dropped out subd. 5 of the original, and inserted subd. 5 of the present, section.

See chap. 284 of 1872, as amended by chap. 364 of 1881.

Subd. 1.—The words “infamous crimes” in this section apply to such crimes as were infamous at common law. *People ex rel. Oppenheim v. Parr*, 5 St. Rep., 70 ; 42 Hun, 316.

The publication of a libel is not, in its nature, an infamous crime. *Id.*

An infamous crime is an offense implying such a dereliction of moral principle as carries with it a conviction of a total disregard of the obligation of an oath. *Id.*

Subd. 3.—The special provision of subd. 3 of this section confers upon the special sessions of the city of Albany the power of imposing sentence of fine and imprisonment to the extent possessed by the court of sessions of the county of Albany in like cases. *People v. Hollenbeck*, 1 N. Y. Cr., 439 65 How., 404.

By the third subdivision of this section, the limit of punishment, given to the special sessions of the city of Albany, is, it seems, co-extensive with ~~the~~ conferred upon the court of sessions of the county of Albany. *Matter v. Bray*, 84 St. Rep., 642 ; 12 N. Y. Supp., 367.

§ 69. **Recognizances.**—Upon charges for offenses triable in this court, the police magistrate or any other magistrate in the city hearing the same, shall, if offered, take recognizances in the cases provided by law returnable at the court of special sessions ; and all such recognizances as shall have been so taken shall be returned to and filed with the district attorney of the county of Albany. If no such recognizance be offered, the magistrate or magistrates shall commit the defendant to the common jail of the county of Albany until he shall be there delivered in due course of law, and the trial of such person shall be had before the court of special sessions, except where a police justice or other magistrate in this city has jurisdiction, the defendant may elect to be tried before such police justice or other magistrate.

Amended by chap. 360 of 1882.

This amendment substituted the present section.

§ 70. **Cases, in which defendant must be held for trial before court of special sessions.**—Whenever a person is brought before a police justice or other magistrate of the city, charged with any of the following crimes, viz. :

Petit larceny charged as a first offense, offenses against the laws relating to excise and the regulation of taverns, inns and hotels, offenses being misdemeanors against the laws relating to gaming.\*

saults upon, and interference with, a public officer in the discharge of his duty, and it shall appear to the magistrate that a crime has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must commit him to be held to answer the charge before the court of special sessions.\*

Amended by chap. 360 of 1882.

This amendment substituted the present section.

**71. By whom court to be held.**—The court of special sessions in the city of Albany must be held by the recorder of the city with or without one or more of the justices of the peace associated with him. In case of the absence or inability of the recorder to act, the county judge of the county of Albany must act in his place. If the recorder and county judge are unable, by reason of absence or other cause, to hold the court, the clerk must adjourn the court to the next following day, and continue such adjournments until the recorder or county judge attends. Not more than two officers shall be designated or appointed by the sheriff or other authority to attend the court of special sessions of the city of Albany, unless the court shall, by an order entered in its minutes, require the attendance of a greater number.

Amended by chap. 360 of 1882.

This amendment combined the original sections 69, 70 and 71, into the present section.

**72. Clerk.**—The county clerk of Albany county is clerk of the court of special sessions of the city of Albany, and must perform the same in person or by deputy.

**73. Court, when and where held.**—The court of special sessions of the city of Albany must be held at the city hall in the city of Albany, on Tuesday of each week, and may be held and continued for such length of time as it deems proper.

## CHAPTER IV.

### THE POLICE COURTS.

**SECTION 74.** Jurisdiction.

75. Repealed.

76. Repealed.

77. Repealed.

78. Compensation of justice.

**74. Jurisdiction.**—Police justices have such jurisdiction, and perform only, as is specially conferred upon them by statute. The courts held by police justices are called police courts, and courts of special sessions are also called police courts, and are so designated in different parts of the Code.

Amended by chap. 360 of 1882.

This amendment added the latter paragraph of the present section.

The last reference to this section in *Kolzem v. Broadway, etc.*, 48 St. Rep., 657, should be to section 64, *ante*.

**Jurisdiction.**—The legislature intended by this section to preserve the jurisdiction of police justices as it existed before the adoption of the Criminal and Penal Codes. *Matter of McMahon*, 64 How., 290.

Police justices possess only such powers as are specially conferred by statute. *Kolzem v. Broadway & S. R. R. Co.*, 48 St. Rep., 657; 20 N.Y. Supp., 701.

Police magistrates have the same power to commit persons convicted of disorderly conduct in default of bail as they possessed before the passage of the Code of Criminal Procedure. *Matter of McMahon*, 1 N. Y. Cr., 58; 64 How., 285.

Where authority is conferred upon a particular officer or magistrate, giving him special jurisdiction in a criminal matter, with special directions as to the mode of procedure, he must be deemed to act as an officer and not as a court of special sessions. *People v. Trumble*, 1 N. Y. Cr., 446.

§ 75. Repealed, ch. 414, 1897. To take effect July 1, 1897.

§ 76. Repealed, ch. 414, 1897. To take effect July 1, 1897.

§ 77. Repealed, ch. 414, 1897. To take effect July 1, 1897.

§ 78. **Compensation of justice.** A police justice cannot retain to his own use any costs or fees, but may receive for his services an annual salary, to be fixed in villages by the board of trustees, and in cities by the common council, except where the same is otherwise fixed by law; and such salary shall not be increased or decreased during his term of office.





## PART II.

## OF THE PREVENTION OF CRIME.

## TITLE I. OF LAWFUL RESISTANCE.

## II. OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

## TITLE I.

## OF LAWFUL RESISTANCE.

- CHAPTER I. General provisions respecting lawful resistance.  
 II. Resistance by the party about to be injured.  
 III. Resistance by other parties.

## CHAPTER I.

## GENERAL PROVISIONS RESPECTING LAWFUL RESISTANCE.

## SECTION 79. Lawful resistance; by whom made.

§ 79. Lawful resistance, etc.—Lawful resistance to the commission of a crime may be made:

1. By the party about to be injured;
2. By other parties.

See section 26 of Penal Code and note.

## CHAPTER II.

## RESISTANCE BY THE PARTY ABOUT TO BE INJURED.

## SECTION 80. In what cases; to what extent.

§ 80. In what cases; to what extent.—Resistance sufficient to prevent the crime may be made by the party about to be injured:

1. To prevent a crime against his person;
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

See section 26 of Penal Code and note.

**Self-defense.**—What it is necessary to show, to authorize a person to use a weapon in self-defense. *Evers v. People*, 3 Hun, 716; *aff'd*, 68 N. Y., 625.

As to when the right of self-defense may be rightfully exercised to the extent of taking human life, see *People v. Minisci*, 12 St. Rep., 719.

The right of attack for the purpose of defense does not arise until the accused has done everything in his power to avoid the necessity. *People v. Sullivan*, 7 N. Y., 396.

When party, who is attacked, may kill his assailant. *People v. Shorter*, 2 N. Y., 193. This principle will not justify one in returning blows with a dangerous weapon when he is struck with the naked hand, if there is no reason to apprehend a design to do him great bodily harm. *Id.* Nor will it justify homicide, when the combat can be avoided, or where, after it is

begun, the party can withdraw from it in safety before he kills his adversary. *Id.*

The prisoner, in order to justify the homicide, must establish, beyond a reasonable doubt, that he did apprehend, and had reason to apprehend, that he was in imminent danger of his life, or of the infliction of some great personal injury. *Patterson v. People*, 46 Barb., 625. This case was overruled in *People v. Schryver*, 42 N. Y., 1, 8, as to the point that the prisoner was bound to prove his justification beyond a reasonable doubt.

There must be a reasonable ground for the prisoner's belief. *People v. Lamb*, 54 Barb., 342; *aff'd*, 2 Abb. N. S., 148; 2 Keyes, 360. In such case, it is immaterial whether his impressions were, or were not, correct. *Id.*

The fact that the accused did in fact entertain an apprehension of great personal injury, is not sufficient; the jury must reach the conviction that there was reasonable ground for such apprehension. *People v. Austin*, 1 Park., 154.

See also *People v. Cole*, 4 Park., 35; *Pfomer v. People*, 4 *Id.*, 558; *Uhl v. People*, 5 *Id.*, 410.

**Defense of property.**—The owner of property, if in rightful possession, is justified in using all necessary force to defend such possession. *Corey v. People*, 45 Barb., 262; *Gyre v. Culver*, 47 *Id.*, 592.

**To prevent felony.**—For the amount of force a party may use to prevent the consummation of a felony, see *Ruloff v. People*, 45 N. Y., 218.

## CHAPTER III.

### RESISTANCE BY OTHER PARTIES.

#### SECTION 81. In what cases.

§ 81. In what cases.—Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the injury.

See section 26 of Penal Code and note.

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## TITLE II.

### OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

**CHAPTER I.** Intervention of public officers in general.

II. Security to keep the peace.

III. Police in cities and villages, and their attendance at exposed places.

IV. Prevention and suppression of riots.

## CHAPTER I.

### INTERVENTION OF PUBLIC OFFICERS IN GENERAL.

#### SECTION 82. In what case.

83. Persons acting in their aid, justified.

§ 82. In what cases.—Crimes may be prevented by the intervention of the officers of justice:

1. By requiring security to keep the peace;
2. By forming a police in cities and villages, and by requiring their attendance in exposed places;

### 3. By suppressing riots.

See sections 84-101 ; 102-117, *post*.

§ 83. **Persons acting in their aid, justified.**—When the officers of justice are authorized to act in the prevention of crime, other persons, who by their command act in their aid, are justified in so doing.

See subd. 1, section 228, of Penal Code.

## CHAPTER II.

### SECURITY TO KEEP THE PEACE.

**SECTION 84.** Information of threatened crime.

85. Examination of complainant and witnesses.

86. Warrant of arrest.

87. Proceedings, on complaint being controverted.

88. Person complained of, when to be discharged.

89. Security to keep the peace, when required.

90. Effect of giving or refusing to give security.

91. Person committed for not giving security, how discharged.

92. Undertaking to be transmitted to county court.

93. Security, when required, for assault, etc., in presence of a court or magistrate.

94. Appearance of party bound, etc.

95. Person bound, may be discharged, if complainant does not appear.

96. Proceedings in sessions, on appearance of both parties.

97. Undertaking, when broken.

98. Undertaking, when and how to be prosecuted.

99. Security for the peace not required except according to this chapter.

§ 84. **Information of threatened crime.**—An information may be laid before any magistrate that a person has threatened to commit a crime against the person or property of another.

**Complaint.**—No form is prescribed for the complaint. *Bradstreet v. Furgeson*, 17 Wend., 181.

On an application to a magistrate for sureties of the peace, there must be a formal complaint in writing and upon oath, besides the examination in writing, to justify the issuing of a warrant. *Bradstreet v. Furgeson*, 23 Wend., 638. It is not enough that the complaint is embraced in the examination. *Id.*

See *Wright v. Church*, 18 St. Rep., 868 ; 110 N. Y., 468.

The recital, in the warrant, of a verified written complaint is *prima facie* evidence of such fact, but may be rebutted by affirmative evidence. *Bradstreet v. Furgeson*, 23 Wend., 638.

§ 85. **Examination of complainant and witnesses.**—When the information is laid before a magistrate, he must examine on oath the complainant and any witnesses he may produce, and must reduce their examinations to writing, and cause them to be subscribed by the parties making them.

**Examination.**—This section does not prescribe any particular form, in which the examination shall be reduced to writing. *Bradstreet v. Furgeson*, 17 Wend., 181. If good in substance, it is sufficient. *Id.*

The written examination must or should always contain substantially the matter set forth in the complaint. *Id.*

**36. Warrant of arrest.**—If it appear from such examinations there is just reason to fear the commission of the crime threatened, by the person complained of, the magistrate must a warrant, directed generally to the sheriff of the county, y constable, marshal or policeman of the city or town, ng the substance of the information, and commanding the r forthwith to arrest the person complained of, and bring efore the magistrate.

not necessary that the warrant should contain a formal adjudication ere is reason to fear the commission of the offense threatened. *Brad- v. Furgeson*, 17 Wend., 181.

**37. Proceedings on complaint being controverted.**—When erson complained of is brought before the magistrate, if the e be controverted, the magistrate must take testimony in on thereto. The evidence must be reduced to writing, and iberated by the witnesses.

his and the next section, the law as it existed under the Revised Stat- as been changed, and the magistrate may now proceed to examine arge, and determine upon evidence whether it is, or is not, well d; and if not, may discharge the defendant. *People v. Boyle*, 2 Cr., 54.

**38. Person complained of, when to be discharged.**—If it r that there is no just reason to fear the commission of the alleged to have been threatened, the person complained ist be discharged.

**39. Security to keep the peace, when required.**—If, how- there be just reason to fear the commission of the crime, rson complained of may be required to enter into an under- g, in such sum, not exceeding one thousand dollars, as the trate may direct, with one or more sufficient sureties, to the order of the next county court of the county, held for ial of indictments, and in the meantime to keep the peace d the people of this state, and particularly toward the com- nt. In effect Sept. 1, 1897.

**Charge.**—Sections 84–99 do not confer any express authority upon the of sessions of the county of New York to discharge a prisoner, who an committed by the magistrate in default of the undertaking required section. *People v. Doyle*, 2 N. Y. Cr., 54.

re a person has given an undertaking under this section, the court of s of the city and county of New York has, *it seems*, jurisdiction to rge him under certain circumstances. *Id.*

**40. Effect of giving or refusing to give security.**—If the taking required by the last section be given, the party lained of must be discharged. If it is not given, the mag- e must commit him to prison, specifying in the warrant the of commitment, the amount of security required, and mission to give the same.

arrant of commitment, issued under this section, is valid without any fixed. *Gano v. Hall*, 42 N. Y., 67; 5 Park., 651.

*Wright v. Church*, 18 St. Rep., 868; 110 N. Y., 463.

**41. Person committed for not giving security, how dis- ed.**—If the person complained of be committed for not

giving security, he may be discharged by any two justices of the peace of the county, or police or special justices of the city, upon giving the security.

**§ 92. Undertaking, to be transmitted to county court.—**

An undertaking given as provided in section 89, must be transmitted by the magistrate to the next term of the county court of the county.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**§ 93. Security, when required, for assault, etc., in presence of court or magistrate.—**A person who, in presence of a court or magistrate, assaults or threatens to assault another, or commit a crime against his person or property, or who contends with another in angry words, may be thereupon ordered by the court or magistrate to give security as provided in section 89, or if he refuses to do so, may be committed as provided in section 90.

See section 182, *post*.

A magistrate, under this section, may commit, in default of his giving security to keep the peace, a person who, in his presence, makes any affray or threatens to kill or beat another, etc., within twenty-four hours after he has witnessed the affray, without other evidence than his own senses furnished him. *Sands v. Benedict*, 2 Hun, 479.

**§ 94. Appearance of party bound, etc.—**A person who has entered into an undertaking to keep the peace must appear on the first day of the next term of the county court of the county. If he do not, the court may forfeit his undertaking, and order it to be prosecuted, unless his default be excused.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**§ 95. Person bound may be discharged, if complainant does not appear.—**If the complainant do not appear, the person complained of may be discharged, unless good cause to the contrary be shown.

**§ 96. Proceedings, in session, on appearance of both parties.—**If both parties appear, the court may hear their proofs and allegations, and may either discharge the undertaking, or require a new one, for a time not exceeding one year.

**§ 97. Undertaking, when broken.—**An undertaking to keep the peace is broken, on the failure of the person complained of to appear at the county court, as provided in section 94, or upon his being convicted of any crimes involving a breach of the peace.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**§ 98. Undertaking, when and how prosecuted.—**Upon the district attorney producing evidence of such conviction to the county court to which the undertaking is returned, that court must order the undertaking to be prosecuted; and the district attorney must thereupon commence an action upon it in the name of the people of this state.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**§ 99. Security for the peace not required except according to this chapter.—**Security to keep the peace or be of good behavior cannot be required, except as prescribed in this chapter.

**Power of police justice.—**The language of this section, standing

is most comprehensive, and if it is to be taken literally, or if there are other provisions in either of the Codes which must be considered in interpretation, it would necessarily follow that, even though the offense of disorderly conduct still exists, the police justice, on a conviction for such offense, would have no authority to order the prisoner to give security and good behavior. *Matter of McMahon*, 64 How., 287; 1 N. Y. Cr., 60.

The section is in that part of the Code which relates to the prevention of crimes, and when it says that security to keep the peace, or to be of good conduct, cannot be required except as prescribed in this chapter, it means security to keep the peace and to be of good behavior as to the crimes prescribed in that chapter. *Matter of McMahon*, 64 How., 288; 1 N. Y. Cr., 60.

Justices of the peace and magistrates have the same power to commit persons convicted of disorderly conduct in default of bail, as they possessed before the passage of the Code of Criminal Procedure. *Matter of McMahon*, 1 N. Y. Cr., 60; 1 N. Y. Cr., 285.

*People v. Boyle*, 2 N. Y. Cr., 54.

### CHAPTER III.

#### THE POLICE IN CITIES AND VILLAGES, AND THEIR ATTENDANCE AT PUBLIC MEETINGS IN EXPOSED PLACES.

§ 100. Organization and regulation of the police.

§ 101. Force to preserve the peace, at public meetings, when and how ordered.

§ 100. **Organization and regulation of the police.**—The organization and regulation of the police in the cities and villages of this State are governed by special statutes.

§ 101. **Force to preserve the peace, at public meetings, when and how ordered.**—The mayor or other officer having the direct command of the police in a city or village, must order a force, sufficient to preserve the peace, to attend any public meeting, when he is satisfied that a breach of the peace is to be apprehended.

### CHAPTER IV.

#### PREVENTION AND SUPPRESSION OF RIOTS.

§ 102. Powers of sheriff or other officer, in overcoming resistance to process.

§ 103. His duty to certify to court the names of resisters and their abettors.

§ 104. Duty of a person commanded to aid the officer.

§ 105. When governor to order out a military force, to aid in executing process.

§ 106. Magistrates and officers to command rioters to disperse.

§ 107. To arrest rioters, if they do not disperse.

§ 108. Consequences of refusal to aid the magistrates or officers.

§ 109. Consequences of neglect or refusal of a magistrate or officer to act.

§ 110. Proceedings, if rioters do not disperse.

§ 111. Officers who may order out the military.

§ 112. Commanding officer and troops to obey the order.

§ 113. Armed force to obey orders.

§ 114. Conduct of the troops.

§ 115. Governor may, in certain cases, proclaim a county in a state of insurrection.

§ 116. May call out the militia.

§ 117. May revoke the proclamation.

**§ 102. Power of sheriff or other officer, in overcoming resistance to process.**—When a sheriff or other public officer, authorized to execute process, has reason to apprehend that resistance is about to be made to the execution of the process, he may command as many male inhabitants of his county as he thinks proper, and any military company or companies in the county armed and equipped, to assist him in overcoming the resistance and if necessary, in seizing, arresting and confining the resister and their aiders and abettors, to be punished according to law.

See Section 457 of Penal Code.

**§ 103. His duty to certify to court the names of resisters and their abettors.**—The officer must certify to the court from which the process issued, the names of the resisters and their aiders and abettors, to the end that they may be proceeded against for contempt.

**§ 104. Duty of a person commanded to aid the officer.**—Every person commanded by a public officer to assist him in the execution of process, as provided in section one hundred and two who without lawful cause, refuses or neglects to obey the command, is guilty of a misdemeanor.

See Section 456 of Penal Code.

**§ 105. When governor to order out a military force to aid in executing process.**—If it appear to the governor, that the power of the county is not sufficient to enable the sheriff to execute process delivered to him, he must, on the application of the sheriff, order such a military force from any other county or counties, as is necessary.

**§ 106. Magistrates and officers to command rioters to disperse.**—When persons to the number of five or more, armed with dangerous weapons, or to the number of ten or more, whether armed or not, are unlawfully or riotously assembled in a city, village or town, the sheriff of the county and his under-sheriff and deputies, the mayor and aldermen of the city, or the supervisors of the town, or president or chief executive officer of the village and the justices of the peace or the police justices of the city, village or town, or such of them as can forthwith be collected must go among the persons assembled, and command them, in the name of the people of the state, immediately to disperse.

**§ 107. To arrest rioters, if they do not disperse.**—If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, or cause them to be arrested, that they may be punished according to law; and for that purpose may command the aid of all persons present or within the county.

**§ 108. Consequence, of refusal to aid the magistrates or officers.**—If a person so commanded to aid the magistrates or officers



cers, neglect to do so, he is deemed one of the rioters, and is punishable accordingly.

§ 109. **Consequences of neglect or refusal of a magistrate or officer to act.**—If a magistrate or officer having notice of an unlawful or riotous assembly, mentioned in section one hundred and six, neglects to proceed to the place of the assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

§ 110. **Proceedings, if rioters do not disperse.**—If the persons assembled, and commanded to disperse, do not immediately disperse, any two of the magistrates or officers mentioned in section one hundred and six, may command the aid of a sufficient number of persons, and may proceed in such manner as in their judgment is necessary, to disperse the assembly and arrest the offenders.

§ 111. **Officers who may order out the military.**—When there is an unlawful or riotous assembly, with intent to commit a felony, or to offer violence to person or property, or to resist by force the laws of the state, and the fact is made to appear to the governor, or to a judge of the supreme court, or to a county judge, or to the sheriff of the county, or to the mayor, recorder or city judge of a city, either of those officers may issue an order directed to the commanding officer of a division, brigade, regiment, battalion or company, to order his command, or any part of it (describing the kind and number of troops), to appear at a specified time and place to aid the civil authorities in suppressing violence and enforcing the law.

§ 112. **Commanding officer and troops to obey the order.**—The commanding officer, to whom the order is given, must forthwith obey it; and the troops required must appear at the time and place appointed, armed and equipped with ammunition as for inspection, and render such aid.

§ 113. **Armed force to obey orders.**—When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, it must obey the orders in relation thereto, of either of the officers mentioned in section one hundred and eleven.

§ 114. **Conduct of the troops.**—Every endeavor must be used, both by the magistrates and civil officers, and by the officer commanding the troops, which can be made consistently with the preservation of life, to induce or force the rioters to disperse, before an attack is made upon them by which their lives may be endangered.

§ 115. **Governor may, in certain cases, proclaim a county in a state of insurrection.**—When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county, by bodies of men, or that combinations to resist

the execution of process by force exist in any county, and that the power of the county has been exerted, and has not been sufficient to enable the officer having the process to execute it, he may, on the application of the officer, or of the district attorney or county judge of the county, by proclamation to be published in the state paper, and in such papers in the county as he may direct, declare the county to be in a state of insurrection.

§ 116. **May call out the militia.**—After the proclamation mentioned in the last section, the governor may order into the service of the state such number and description of volunteer or uniform companies, or other militia of the state, as he deems necessary, to serve for such term, and under the command of such officer or officers as he may direct.

§ 117. **May revoke the proclamation.**—The governor, when he thinks proper, may revoke the proclamation authorized by section one hundred and fifteen, or declare that it shall cease, at the time and in the manner directed by him.

## PART III.

### JUDICIAL PROCEEDINGS FOR THE REMOVAL OF PUBLIC OFFICERS, BY IMPEACHMENT, OR OTHERWISE.

#### I. OF IMPEACHMENTS.

#### II. OF THE REMOVAL OF JUSTICES OF THE PEACE, POLICE JUSTICES, AND JUSTICES OF JUSTICES' COURTS AND THEIR CLERKS.

### TITLE I.

#### OF IMPEACHMENTS.

- SECTION 118.** Impeachment to be delivered to president of the senate.
- 119.** Copy of impeachment served on defendant.
- 120.** Service, how made.
- 121.** Proceedings, if defendant do not appear.
- 122.** Defendant may object to sufficiency of, or deny impeachment.
- 123.** Form of objection or denial.
- 124.** Proceedings thereon.
- 125.** Two-thirds necessary to conviction.
- 126.** Judgment on conviction, how pronounced.
- 127.** Adoption of resolution.
- 128.** Nature of the judgment.
- 129.** Officer, when impeached, disqualified to act until acquitted.
- 130.** Presiding officer, when president of the senate is impeached.
- 131.** Impeachment, not a bar to indictment.

**118. Impeachment to be delivered to president of the senate.**—When an officer of the state is impeached by the assembly, the articles of impeachment must be delivered to the president of the senate.

Section 723 of Penal Code ; Section 1, Art. 6, of State Constitution.

**119. Copy of impeachment served on defendant.**—The president of the senate must thereupon cause a copy of the articles of impeachment, with a notice to appear and answer the same, to be served on the defendant, at the time and place appointed for the meeting of the court, not less than twenty days before the day fixed for the meeting of the court.

**120. Service how made.**—The service must be upon the defendant personally, or if he cannot, upon diligent inquiry, be made in the state, the court, upon proof of that fact, may order publication to be made in such manner as it deems proper, of a notice requiring him to appear at a specified time and place, to answer the articles of impeachment.

**121. Proceedings, if defendant do not appear.**—If the defendant does not appear, the court, upon proof of service or publication as provided in the last two sections, may of its own motion, or cause shown, assign another day or place for hearing the

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impeachment; or may then, or at any other time which it may appoint, proceed in the absence of the defendant, to trial and judgment.

§ 122. **Defendant may object to sufficiency of, or deny, impeachment.**—When the defendant appears, he must answer the articles of impeachment; which he may do, either by objecting to their sufficiency, or that of any article therein, or by denying the truth of the same.

§ 123. **Form of objection or denial.**—If the defendant object to the sufficiency of the impeachment, the objection must be in writing, but need not be in any specific form; it being sufficient if it present intelligibly the grounds of the objection. If he deny the truth of the impeachment, the denial may be oral, and without oath, and must be entered upon the minutes.

§ 124. **Proceedings thereon.**—If an objection to the sufficiency of the impeachment be not sustained by a majority of the members of the court who heard the argument, the defendant must forthwith answer the articles of impeachment. If he plead guilty, or refuse to plead, the court must render judgment of conviction against him. If he deny the matters charged, the court must, at such time as it may appoint, proceed to try the impeachment, and may adjourn the trial from time to time until concluded.

See Section 6, Art. 1, of State Constitution.

§ 125. **Two-thirds necessary to conviction.**—The defendant cannot be convicted on an impeachment, without the concurrence of two-thirds of the members present during the trial; and if such two-thirds do not concur in a conviction, the defendant must be declared acquitted.

See Section 1, Art. 6, of State Constitution.

§ 126. **Judgment on conviction, how pronounced.**—After conviction, the court must immediately, or at such other time as it may appoint, pronounce judgment, in the form of a resolution, entered upon the minutes of the court. The vote upon the passage thereof must be taken by yeas and nays, and must also be entered upon the minutes.

§ 127. **Adoption of resolution.**—On the adoption of the resolution, by a majority of the members present, who voted on the question of acquittal or conviction, it becomes the judgment of the court.

§ 128. **Nature of the judgment.**—Upon conviction, the judgment must be either

1. That the defendant be removed from office; or
2. That he be removed from office and disqualified to hold and enjoy a particular office or class of offices, or any office of profit, trust or honor whatever under this state.

See Section 1, Art. 6, of State Constitution.

§ 129. Officer, when impeached, disqualified to act until acquitted.—No officer shall exercise his office, after articles of impeachment against him shall have been delivered to the senate, till he is acquitted.

See Section 1, Art. 6, of State Constitution.

§ 130. Presiding officer, when president of the senate is impeached.—If the president of the senate be impeached, notice of an impeachment must be immediately given to the senate by an assembly, that another president may be chosen.

§ 131. Impeachment not a bar to indictment.—If the offense for which the defendant is impeached be a crime, the prosecution thereof is not barred by the impeachment.

See Section 1, Art. 6, of State Constitution.

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## TITLE II.

OF THE REMOVAL OF JUSTICES OF THE PEACE, POLICE JUSTICES, AND JUSTICES OF JUSTICES' COURTS AND THEIR CLERKS.

§ 132. Justices of the peace, police justices, justices of justices' courts, and their clerks, are removable by the appellate division of the supreme court.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See Section 18, Art. 6, of State Constitution.

By Section 18, Art. 6, of the State Constitution, justices of the peace, judges and justices of inferior courts, not of record, and their clerks, may be removed, after due notice and an opportunity of being heard, by such courts as may be prescribed, for cause to be assigned in the order of removal. See *Matter of King*, 25 St. Rep., 794; 6 N. Y. Supp., 421; 2 Silv. Sup. Ct.), 357. In pursuance of this Constitutional provision, the Supreme Court, at general term, was designated by this section for this purpose. Id. like power of removal, given by the Legislature to the mayor of a city, does not oust the supreme court of the jurisdiction conferred by this section under the Constitution. Id.

For mode of procedure in such proceedings, see the above cited case.

## PART IV.

### OF THE PROCEEDINGS IN CRIMINAL ACTIONS PROSECUTED BY INDICTMENT.

- TITLE**
- I. OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.
  - II. OF THE TIME OF COMMENCING CRIMINAL ACTIONS.
  - III. OF THE INFORMATION, AND PROCEEDINGS THEREON TO THE COMMITMENT INCLUSIVE.
  - IV. OF THE PROCEEDINGS AFTER COMMITMENT, AND BEFORE INDICTMENT.
  - V. OF THE INDICTMENT.
  - VI. OF THE PROCEEDINGS ON THE INDICTMENT BEFORE TRIAL.
  - VII. OF THE TRIAL.
  - VIII. OF THE PROCEEDINGS AFTER TRIAL, AND BEFORE JUDGMENT.
  - IX. OF THE JUDGMENT AND EXECUTION.
  - X. GENERAL PROVISIONS RELATING TO PUNISHMENT OF CRIME.
  - XI. OF APPEALS.
  - XII. OF MISCELLANEOUS PROCEEDINGS.

### TITLE I.

#### OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.

- SECTION 133.** When a person leaves this state to elude its law.
- 134. When a crime is committed partly in one county and partly in another.
  - 135. When a crime is committed on the boundary of two or more counties, or within five hundred yards thereof.
  - 136. Jurisdiction of crime on board of vessel.
  - 137. Of crime committed in the state on board of any railway train, etc.
  - 138. Indictment for libel.
  - 139. Conviction or acquittal in another state, a bar, where the jurisdiction is concurrent.
  - 140. Conviction or acquittal in another county, a bar, where the jurisdiction is concurrent.

§ 133. When a person leaves this state to elude its laws.—A person who leaves this state, with intent to elude any law thereof against duelling or prize-fighting, or challenges thereto, or to do any act forbidden by such a law, or, who being a resident of this state, does an act out of it, which would be punishable as a violation of such a law, may be indicted and tried in any county of this state.

The case of *People v. Lyon*, 1 N. Y. Cr., 400, was reversed in 99 N. Y., 210.

A person, charged in an indictment with the commission of a felony, may be convicted upon proof that, although absent when the crime was committed, he advised and procured its commission. *People v. Bliven*, 20 St. Rep., 486; 112 N. Y., 79.

§ 134. When a crime is committed partly in one county and partly in another.—When a crime is committed, partly in one

y and partly in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense, in two or more counties, the jurisdiction is in either county.

case of *People v. Dimick*, 3 St. Rep., 398; 41 Hun, 634; 5 N. Y. Cr., as reversed in 11 St. Rep., 739; 107 N. Y., 13.

**jurisdiction.**—Where the crime was partly committed in the city of Buffalo and partly in the city of New York, the jurisdiction is in either city. *People v. Dimick*, 11 St. Rep., 739; 107 N. Y., 13, 83.

Whether this section affects the jurisdiction of the Superior Court of Buffalo, and whether such court has jurisdiction only of crimes wholly committed within the city of Buffalo, *quære?* *Id.*

Section 28 of Code of Criminal Procedure.

Where the substance of the charge is the wrongful appropriation of property from a bailee, the bailment made in Oswego county, and the property returned there, but the conversion occurs outside of said county, the return of the city of Oswego has jurisdiction territorially over the case under this section. *Matter of McFarland*, 36 St. Rep., 574; 59 Hun, 306; 13 Supp., 22.

A person may be convicted of burglary or larceny in any county into which he carries the stolen goods. *Haskins v. People*, 16 N. Y., 844. In the case of the larceny, it is sufficient to allege the taking to have been in the county where the indictment is found. *Id.* But an indictment for the burglary, in a county other than that in which the burglarious entry was made, must, *it seems*, set out the facts specifically, to bring it within the provisions of the act. *Id.*

Where the defendant promised at Oswego to marry a woman and on the next day went with her to Watertown in another county, and there seduced her under such promise, the grand jury of Oswego county, under this act, had jurisdiction to find an indictment for seduction. *People v. ...*, 30 St. Rep., 45; 9 N. Y. Supp., 938.

Section 50 of 2 R. S., 727, which declares that a person committing a burglary and larceny in one county and carrying the stolen property into another county, may be indicted, tried and convicted for the burglary in the latter county, as if the crime had been there committed, was held to be within the legislative power and valid. *Mack v. People*, 82 N. Y., 235. It was held that the offender might be indicted in the court of general sessions of the county where he is found with the fruits of his crime. *Id.*

*People v. Dowling*, 84 N. Y., 478, a case decided under chap. 167 of

**135. When a crime is committed on the boundary of two or more counties, or within five hundred yards thereof.**—When a crime is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

**judicial sessions.**—This section does not confer jurisdiction upon courts of criminal sessions or magistrates holding such courts. *People v. Bates*, 38 St. Rep., 182.

**indictment.**—The jurisdiction conferred over crimes committed on the territory of a county and within 500 yards thereof is limited to courts proceeding by indictment. *Id.*

The grand jury of a county have jurisdiction over an offense committed in another county, but within 500 yards of their county line. *People v. ...*, 56 N. Y., 95.

For the purposes of criminal jurisdiction, an offense is committed on the boundary between adjacent counties if perpetrated within 500 yards of the boundary line. *People v. Davis*, 36 N. Y., 77.

**136. Jurisdiction of crime on board a vessel.**—When a crime is committed in this state on board of a vessel navigating a



river, lake, or canal, or lying therein in the course of her voyage, or in respect to any portion of the cargo or lading of such boat or vessel, the jurisdiction is in any county through which, or any part of which, such river or canal passes, or in which such lake is situated, or on which it borders, or in the county where such voyage terminates, or would terminate if completed.

It is necessary, in order to give the courts of a county jurisdiction over an offense under this section, to allege in the indictment, and prove upon the trial, that the crime was committed on board of the boat or vessel, and that the boat or vessel, on that trip or voyage, had passed through some part of the county of venue. *Larkin v. People*, 61 Barb., 226.

§ 137. **Of crime committed in the state on board of any railway train, etc.**—When a crime is committed in this state, in or on board of any railway engine, train or car, making a passage or trip on or over any railway in this state, or in respect to any portion of the lading or freightage of any such railway train, or engine car, the jurisdiction is in any county through which, or any part of which, the railway train or car passes, or has passed in the course of the same passage or trip, or in any county where such passage or trip terminates, or would terminate if completed.

§ 138. **Indictment for libel.**—When a crime of libel is committed by publication in any paper in this state, against a person residing in the state, the jurisdiction is in either the county where the paper is published, or in the county where the party libeled resides. But the defendant may have the place of trial changed to the county where the libel is printed, on executing a bond to the complainant in the penal sum of not less than \$250, nor more than \$1,000, conditioned, in case the defendant is convicted, for the payment of the complainant's reasonable and necessary traveling expenses in going to and from his place of residence and the place of trial, and his necessary expenses in attendance thereon, which bond must be signed by two sufficient sureties, to be approved by the judge of a court of record exercising criminal jurisdiction.

Whenever the crime of libel is committed against a person not a resident of this state, the defendant must be indicted and the trial thereof had in the county where the libel is printed and published. But if the paper does not, upon its face, purport to be printed or published in a particular county of this state, the defendant may be indicted and the trial thereof had in any county where the paper is circulated. In no case however can the defendant be indicted for the printing or publication of one libel in more than one county of this state.

See Section 249 of Penal Code.

§ 139. **Conviction or acquittal in another state, a bar, where the jurisdiction is concurrent.**—When an act charged as a crime is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of this state, a conviction or

quittal thereof in the former, is a bar to a prosecution or indictment therefor in this state.

Section 679 of Penal Code : fifth amend. Federal Constitution.

140. Conviction or acquittal in another county, a bar, where jurisdiction is concurrent.—When a crime is within the jurisdiction of two or more counties of this state, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment thereof in another.

## TITLE II.

### OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

141. Prosecution for murder may be commenced at any time.

142. Limitation.

143. Defendant out of state.

144. Indictment deemed found, when presented in court and filed.

141. Prosecution for murder may be commenced at any time.—There is no limitation of time within which a prosecution for murder must be commenced. It may be commenced any time after the death of the person killed.

Limitation.—Upon the trial of an indictment for murder, found more than five years after the death of the party killed, the defendant can be convicted of manslaughter. *People v. Dowling*, 1 N. Y. Cr., 531.

The court, in *People v. Dowling*, *ante*, followed the case of *Clark v. State*, Georgia, 350. In the latter case, a similar statute was held to apply to an indictment on which the defendant was arraigned and tried, and not to a minor grade of offense, for which he might be found guilty on the trial of the higher grade of crime, of which the grand jury accused him.

*People v. Mather*, 4 Wend., 230, the crime of an accessory before the fact to a murder is murder, and is not barred by the statute of limitations.

142. Limitation.—An indictment for a felony, other than murder, must be found within five years after its commission, except where a less time is prescribed by statute. And an indictment for misdemeanor must be found within two years after its commission.

Amended by chap. 412 of 1887.

This amendment changed the word "crime" into "felony," and added the latter sentence of the present section.

Limitation.—While an indictment for murder may be found at any time after the death of the victim, other indictments must be found within five years. *People v. Dowling*, 1 N. Y. Cr., 531.

Here, upon the reversal of the judgment and the allowance of a demurrer to an indictment, more than two years have elapsed since the commission of the alleged misdemeanors, the defendant cannot be reindicted. *People v. Donnell*, 15 St. Rep., 141; 46 Hun, 362; 7 N. Y. Cr., 350; 10 N. Y. Supp., 100.

Exception.—The statute of limitations is not of the nature or character of an exception which forms part of the offense, and it need not be set out in the indictment. *People v. Durrin*, 2 N. Y. Cr., 328.

Commencement.—A criminal action is commenced when the indictment is filed and becomes a record of the court. *People v. Beckwith*, 2 N. Y. Cr., 29; *People v. Smith*, *id.*, 45.

Instruction.—A statute, limiting the time within which indictments

must be found, is to be construed liberally, when construction is required, in favor of the criminal. *People v. Lord*, 12 Hun, 282.

**Demurrer.**—A demurrer cannot be interposed upon the ground that it appears by the indictment that the prosecution is barred by the statute of limitations. *People v. Durrin*, 2 N. Y. Cr., 328.

**How pleaded.**—The defense of the statute of limitations, cannot be set up by special plea, under the Criminal Code, but may be proved under the general issue of not guilty. *Id.*

**Retroactive.**—A statute of limitations, increasing the length of time within which indictments may be found, is not retroactive. *People v. Lord*, 12 Hun, 282.

§ 143. **Defendant out of state.**—If, when the crime is committed, the defendant be without the state, the indictment may be found within the term herein limited after his coming within the state, and no time, during which the defendant is not an inhabitant of, or usually resident within, the state, or usually in personal attendance upon business or employment within the state, is part of the limitation. [Am'd by ch. 552 of 1895. To take effect Sept. 1, 1895.]

This amendment inserted the words "or usually in personal attendance upon business or employment within the state."

It is essential to the running of the statute of limitations that the defendant should have been within the state. *People v. Durrin*, 2 N. Y. Cr., 334.

§ 144. **Indictment deemed found, when presented in court and filed.**—An indictment is found, within the meaning of the last three sections, when it is duly presented by the grand jury in open court, and there received and filed.

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## TITLE III.

### OF THE INFORMATION AND PROCEEDINGS THEREON TO THE COMMITMENT INCLUSIVE.

#### CHAPTER I. The information.

- II. The warrant of arrest.
- III. Arrest by an officer, under a warrant.
- IV. Arrest by an officer, without a warrant.
- V. Arrest by a private person.
- VI. Retaking, after an escape or rescue.
- VII. Examination of the case, and discharge of the defendant or holding him to answer.

## CHAPTER I.

### THE INFORMATION.

- SECTION 145. Information defined.
- 146. Magistrate, defined.
- 147. Who are magistrates.

§ 145. **Information defined.**—The information is the allegation made to a magistrate, that a person has been guilty of some designated crime.

**Sufficiency.**—A plain statement of the acts of which complaint is made, without stating the evidence, is sufficient. *Hewitt v. Newberger*, 48 St. Rep., 813; 66 Hun, 232; 20 N. Y. Supp., 913.

Informations lodged before committing magistrates, and warrants issued upon them, are not expected to be drawn with the same technical accuracy that an indictment should be. *Id.*

information to the magistrate must allege that the defendant has been  
 some designated crime. *People ex rel. Baker v. Beatty*, 39 Hun,

tions are sufficient, if they specify, in plain terms, the charge  
 stated that the person proceeded against knows exactly what is  
 against him. *Hewitt v. Newberger*, *ante*.

*People v. Nowak*, 24 St. Rep., 275; 1 Silv. (Sup. Ct.), 412; 7 N. Y. Cr.,  
 189, 240; *Matter of Ramsar*, 1 N. Y. Cr., 35; 63 How., 255;  
 1 C., 444.

**Magistrate, defined.**—A magistrate is an officer, having  
 issue a warrant for the arrest of a person charged with

justice is a magistrate having power to issue a warrant for the  
 person charged with a crime. *County of Orleans v. Winchester*,  
 189, 411; 18 N. Y. Supp., 669.

*People v. Nowak*, 24 St. Rep., 275; 1 Silv. (Sup. Ct.), 412; 7 N. Y. Cr.,  
 189, 240; *Matter of Killoran v. Barton*, 26 Hun, 649; 14 W.

**Who are magistrates.**—The following persons are mag-

1 justices of the supreme court.

2 judges of any city court.

3 county judges and special county judges.

4 city judge of the city of New York, and the judges of  
 5 of general sessions in the city and county of New

6 justices of the peace.

7 police and other special justices appointed or elected  
 8 village or town.

9 mayors and recorders of cities. But in the city of  
 10 k, the only magistrates authorized to commit children  
 11 tions, are the justices of the supreme court, the  
 12 the city judge of the city of New York, and judges  
 13 d to hold the court of general sessions, and the police

14 d by chap. 279 of 1892.

15 endment changed, in first subdivision, the word "judges" into  
 16 "in fourth subdivision, the word "judge" into "judges," and  
 17 subdivision 7 the latter sentence.

18 under preceding section.

19 r is not one of the magistrates before whom proceedings under  
 20 8-290 may be instituted. *People v. McGloin*, 1 N. Y. Cr., 159; 91  
 21 ; 12 Abb. N. C., 172; 16 W. Dig., 255; *aff'g* 28 Hun, 150; 1 N. Y.  
 22 3 W. Dig., 138.

23 ror of Long Island City is, by virtue of his office, a magistrate,  
 24 d with judicial authority to conduct examinations upon criminal  
 25 *Hommert v. Gleason*, 38 St. Rep., 343; 14 N. Y. Supp., 569.

26 order of the city of Oswego is a magistrate under this section.  
 27 *McFarland*, 36 St. Rep., 574; 59 Hun, 306; 13 N. Y. Supp., 22.

28 *People v. Nowak*, 24 St. Rep., 275; 1 Sil. (Sup. Ct.), 412; 7 N. Y. Cr., 70;  
 29 pp., 240; *People v. Bates*, 38 Hun, 181; *Matter of Killoran v. Bar-*  
 30 n, 649; 14 W. Dig., 490. *County of Orleans v. Winchester*, 46 St.  
 31 18 N. Y. Supp., 669.

## CHAPTER II.

## THE WARRANT OF ARREST.

- SECTION** 148. Examination of the prosecutor, and his witnesses, upon the information.
149. Depositions, what to contain.
150. In what case warrant of arrest may be issued.
151. Form of the warrant.
152. Name or description of the defendant, in the warrant and statement of the offense.
153. Warrant to be directed to and executed by a peace officer.
154. Who are peace officers.
155. Warrant issued by certain judges.
156. Defendant, how to be disposed of.
157. Indorsement on the warrant for service in another county, how and upon what proof to be made.
158. Defendant, arrested for felony.
159. Defendant, arrested for a misdemeanor.
160. Proceedings on taking bail from the defendant, in such case.
161. Proceedings, where he is admitted to bail in such case, but bail is not given.
162. Prisoner carried from county to county.
163. Power and privilege of officer.
164. When magistrate issuing the warrant is unable to act.
165. Defendant, upon arrest, to be taken before a magistrate.
166. Defendant before another magistrate than the one who issued the warrant.

**§ 148. Examination of the prosecutor and his witnesses upon the information.**—When an information is laid before a magistrate, of the commission of a crime, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

**Sufficiency of information.**—An affidavit, which does not set forth a particular crime, but makes a general charge of guilt without stating any facts showing a criminal offense, is not a sufficient basis for the examination of the complainant and his witnesses. *People v. Nowak*, 24 St. Rep., 275; 1 *Silv.* (Sup. Ct.), 412; 7 N. Y. Cr., 70; 5 N. Y. Supp., 240.

The omission of the complainant to sign the deposition taken before a committing magistrate, as required by this section, is an irregularity which will be held to be waived, unless the defendant has interposed the objection at the first available opportunity. *People v. Winness*, 3 N. Y. Cr., 90.

A complaint in writing, charging a criminal offense, though on information and belief only as to the person suspected of having committed it, is sufficient to authorize an investigation before a magistrate by the examination of witnesses. *Blodgett v. Race*, 18 Hun, 132.

**Warrant.**—The justice acquires jurisdiction to issue the warrant for the arrest of the accused from the information laid before him. *Tracy v. Seamans*, 7 St. Rep., 145.

A warrant, which recites that it was issued upon information on oath, and has the form prescribed by section 151 of the Code of Criminal Procedure, is sufficient. *People v. Johnson*, 13 St. Rep., 48; 46 Hun, 671; 7 N. Y. Cr., 402.

See *Nowak v. Waller*, 31 St. Rep., 458; 10 N. Y. Supp., 199.

**§ 149. Depositions, what to contain.**—The depositions must

with the facts stated by the prosecutor and his witnesses, in order to establish the commission of the crime and the guilt of the defendant.

Notes under section 890, *post*.

**Depositions.**—The depositions, upon which a warrant for the arrest of an offender is issued by a magistrate, may be made on information and belief, as to the facts and circumstances, on which such information and belief are founded, are given. *People v. McIntosh*, 5 N. Y. Cr., 39.

A deposition must set forth the facts tending to establish the crime and must not rely on the conclusions of the witnesses. *Matter of Rothaker*, 11 Abb. 122.

Where the facts, stated in the depositions, do not justify the issuing of a warrant, an action for false imprisonment will lie against a person who, with bad intent, prepared and procured a warrant to be issued, and gave rewards for its service. *Loomis v. Render*, 2 St. Rep., 157 ; 41 Hun, 268.

A justice has no right to issue a warrant, where the facts, set forth in the depositions, do not justify it. *Id.*

An affidavit not prepared by the justice, and, in no sense, a statement of facts tending to show a criminal offense, does not constitute a deposition within the meaning of this section. *People v. Nowak*, 24 St. Rep., 275 ; 1 Sup. Ct.), 412 ; 7 N. Y. Cr., 70.

*Tracy v. Seamans*, 7 St. Rep., 145.

**§ 10. In what case warrant of arrest may be issued.**—If a magistrate be satisfied therefrom, that the crime complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

**Sufficient basis.**—The justice is required, by section 150 of the Code, to issue a warrant in all cases on sufficient complaint made. *People ex rel. v. Board*, etc., 17 St. Rep., 875.

Notes under section 149, *ante*.

When a question is presented to the magistrate whether or not the information embraced in the depositions, states any crime which authorizes the issuing of a warrant. *Tracy v. Seamans*, 7 St. Rep., 145.

A magistrate must have evidence of probable cause, both as to the commission of the offense and the guilt of the offender, before he can have authority to cause the arrest. *Blodgett v. Race*, 18 Hun, 132. Suspicion and mere belief as to the defendant's guilt, are insufficient. *Id.*

A deposition must tend to establish the commission of the crime, and must state the particulars of a specific offense. *People v. Nowak*, 24 St. Rep., 275 ; 1 Silv. (Sup. Ct.), 412 ; 7 N. Y. Cr., 70.

What is required to protect a magistrate in issuing a criminal warrant ; the evidence produced is colorable,—something upon which the magistrate is called upon to act in determining the question of probable cause. *Pratt v. Bogardus*, 49 Barb., 89.

In an information for larceny, the depositions must contain an accurate statement of the property claimed to have been stolen, and a statement of facts tending to establish the commission of the crime charged, in order to justify jurisdiction upon the magistrate to issue a warrant. *Tracy v. Seamans*, 7 St. Rep., 146.

*Matter of Killoran v. Barton*, 26 Hun, 649 ; 14 W. Dig., 490 ; *People v. Board*, etc., 17 St. Rep., 875 ; 2 N. Y. Supp., 611.

**§ 11. Form of warrant.**—A warrant of arrest is an order in writing in the name of the people, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form, the blanks being properly filled :

Know all men, that I, [ ],

in the name of the people of the State of New York, to any peace officer in the [ ].



"Information, upon oath, having been this day laid before me that the crime of [ ] has been committed and accusing [ ] thereof,

"You are therefore commanded forthwith to arrest the above-named [ ], and bring him before [ ], at [ ].

"Dated at [ ], this                      day of                      , 18

.....  
"Justice of the peace."  
[ ]

The warrant must direct that the defendant be brought before the magistrate issuing the warrant; or, if the offense was committed in another town, and is one of which a court of special sessions has jurisdiction to try, or which a magistrate has jurisdiction to hear and determine, he must direct that the defendant be brought before a magistrate of the town in which the offense was committed.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1882.

This amendment changed the words "To any sheriff, constable, marshal or policeman," into the words "To any peace officer."

Amended by chap. 458 of 1893.

This amendment omitted names, etc., and created blanks, and added the last provision of the present section.

It goes into effect, Sept. 1, 1893.

**Form and contents.**—This section prescribes the form of the warrant of arrest, and indicates what shall be its substance. *People ex rel. Baker v. Beatty*, 39 Hun, 477.

It is never necessary to state, in a criminal warrant, the evidence by which the charge is to be supported. *Pratt v. Bogardus*, 49 Barb., 89. **All** that is required, in that particular, is to recite the accusation. *Id.* **This** requirement is satisfied by a statement which indicates, with reasonable certainty, the crime sought to be charged. *Id.*

The warrant, by section 151 of the Code, is, in substance, required to be returnable before the justice who issued it, except in case of his absence or inability to act. *People ex rel. Fraser v. Board, etc.*, 17 St. Rep., 875.

The warrant for the offense of malicious trespass upon lands, etc., under subdivision 18 of section 56 of the Code of Criminal Procedure, was held to be sufficient in form, in *People v. Upton*, 29 St. Rep., 777; 9 N. Y. Supp., 685.

See *People v. Johnson*, 13 State Rep., 48; 46 Hun, 671; *Matter of Killoran v. Barton*, 26 Id., 649; 14 W. Dig., 490; *People v. Board, etc.*, 17 St. Rep., 875; 2 N. Y. Supp., 611.

**§ 152. Name or description of the defendant in the warrant, and statement of the offense.**—The warrant must specify the name of the defendant, or if it be unknown to the magistrate, the defendant may be designated therein by any name. It must also state an offense in respect to which the magistrate has authority to issue the warrant, and the time of issuing it, and the city, town or village, where it was issued, and be signed by the magistrate with his name of office.

**Statement of offense.**—A warrant, which states an offense in respect to which the magistrate has authority to issue a warrant and as to which he has jurisdiction, is sufficient in form. *People v. Upton*, 29 St. Rep., 778; 9 N. Y. Supp., 685. It is not necessary to set up in the warrant the circumstances of the offense. *Id.*

Where the depositions fail to show that the property has been stolen by the accused, the magistrate has no jurisdiction to issue a warrant for his



t for such offense. *Tracy v. Seamans*, 7 St. Rep., 147; 26 W. 117.

**name of defendant.**—The warrant must so describe the person in-  
ed that the officer will know whom to arrest, and the party whose  
ty is threatened may know whether he is bound to submit. *Miller v.*  
7, 28 Barb., 630.

*People ex rel. Baker v. Beatty*, 39 Hun, 477.

**153. Warrant, to be directed to and executed by a peace  
er.**—The warrant must be directed to, and executed by, a  
e officer.

**rection.**—A criminal warrant must contain a command, or a require-  
; in the nature thereof, to the person to whom it is directed, to make  
rrest. *Abbott v. Booth*, 51 Barb., 551.

e direction is an essential part of every warrant. *Id.* Unless it is  
ted to the sheriff or the constables of the county, or town, or to some  
idual officer, it is not a proper or sufficient warrant. *Id.* Authority  
ot be conferred upon a person to execute the warrant by an indorse-  
; thereon, signed by the justice. *Id.*

**154. Who are peace officers.**—A peace officer is a sheriff of  
unty, or his under-sheriff or deputy, or a constable, marshal,  
e constable or policeman of a city, town or village.

ended by chap. 860 of 1882.

is amendment added to the original section the words, "or his under-  
ff."

**155. Warrant issued by certain judges.**—If the warrant be  
d by a judge of the supreme court, recorder, city judge or  
e of a court of general sessions in the city and county of New  
x, or by a county judge, or by a recorder of a city, where  
diction is conferred by law upon such recorder, or by a judge  
e city court, it may be directed generally to any peace officer  
e state, and may be executed by any of those officers to whom  
ay be delivered.

ed by chap. 880 of 1895. In effect January 1, 1896.

ended by chap. 860 of 1882.

s amendment inserted the words "recorder, city judge or judge of a  
of general sessions," and changed the words "to any sheriff, constable,  
hal or policeman," into the words "to any peace officer."

ended by chap. 462 of 1893.

s amendment inserted the words "or by the recorder of a city, where  
fiction is conferred by law upon such recorder." It goes into effect,  
1, 1893.

County of Orleans *v. Winchester*, 45 St. Rep., 411; 18 N. Y. Supp., 689.

**156. Defendant, how to be disposed of.**—If it be issued by  
other magistrate, it may be directed generally to any peace  
er in the county in which it is issued, and may be executed  
hat county; or if the defendant be in another county, it  
be executed therein, upon the written direction of a  
istrate of such other county indorsed upon the warrant,  
ed by him, with his name of office, and dated at the city,  
r village where it is made, to the following effect: This  
ant may be executed in the county of *Monroe*, [or as the  
may be.]

ended by chap. 860 of 1882.

This amendment changed the words "to any sheriff, constable, marshal or policeman," into the words "to any peace officer."

**When arrested.**—A criminal warrant, issued by a police justice of a city or village, may be executed within the county outside of the limits of the city or village. *County of Orleans v. Winchester*, 45 St. Rep., 411; 18 N. Y. Supp., 669.

**Where admitted to bail.**—Under the provisions of section 56 of 2 R. S., 728, one, arrested upon a warrant after indictment, may be admitted to bail by a supreme court justice in the county where he is arrested, though the indictment was found in another county. *People v. Clews*, 77 N. Y., 39.

A person who, on being arrested by virtue of a criminal warrant, endorsed pursuant to statute, is discharged from arrest by a justice of the peace of the county where he is arrested, on giving a recognizance, cannot be arrested without new process. *Doyle v. Russell*, 30 Barb., 300.

The constable can, by virtue of a valid and regularly endorsed warrant, only arrest the offender and take him before a justice of the peace of the county of the endorsing justice, if the offense is bailable, or convey him to the county where the offense was committed. *Green v. Rumsey*, 2 Wend., 611. He has no authority to carry the arrested party to another county. *Id.*

One indicted in a county remote from his home, and arrested elsewhere, while the court, which alone may give him a speedy trial, or, as a court, let him to bail, is not in session, should have a ready means of giving bail in his own vicinage. *People v. Clews*, 77 N. Y., 44.

§ 157. **Indorsement on the warrant for services in another county, how and upon what proof to be made.**—The indorsement mentioned in the last section can not, however, be made, unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued. Upon this proof, the magistrate indorsing the warrant is exempted from liability to a civil or criminal action, though it afterward appear that the warrant was illegally or improperly issued.

See notes under the last section.

§ 158. **Defendant, arrested for felony.**—If the crime charged in the warrant be a felony the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate in the same county, as provided in section 164.

See notes under section 156, *ante*.

**Felony.**—A person, who is arrested by virtue of a warrant, indorsed pursuant to statute, for an offense punishable by imprisonment in the state prison, cannot be let to bail in the county where the arrest is made, but must be taken to the county in which the warrant was issued. *Clark v. Cleveland*, 6 Hill, 344.

Where the offense is punishable with death or imprisonment in a state prison, the officer, making the arrest, must convey the prisoner before some magistrate of the county where the warrant was originally issued. *People ex rel. Sichel v. Chapman*, 30 How., 202; *People v. Clews*, 77 N. Y., 39.

In cases of felony, the magistrate who issues the warrant, has exclusive jurisdiction, except in case of his absence or inability to act. *People ex rel. Navagh v. Frink*, 4 St. Rep., 162; 41 Hun, 193, 4 N. Y. Cr., 497; 26 W. Dig., 569.

The Code of Criminal Procedure has deprived the magistrate of another town of the right to send the case to a magistrate of the town where the offense was committed. *People ex rel. Fraser v. Board, etc.*, 17 St. Rep., 872, 2 N. Y. Supp., 611. He must proceed with the examination or trial. *Id.*

Sections 158, 161 and 164 require the person arrested to be taken before the justice who issued the warrant, except when the justice is absent or

le to act, or the prisoner is arrested out of the county for a crime than a felony. *Id.*

exception is made for a case when the justice issuing the warrant is out of the town where the crime was committed. *Id.*

the provisions of chap. 455 of 1847, so far as they require a warrant to be returned before some magistrate in the town where the offense was committed and give him jurisdiction to proceed with the case, are, by implication, repealed by the Code of Criminal Procedure. *Id.*

charge upon town.—But the provisions of said act, which impose an obligation to pay the expenses of the arrest, examination and trial in the town where the offense was committed, are not repealed. *Id.*

the fees for criminal proceedings before a magistrate of another town in a lawful charge against the town where the offense was committed. *Id.*

**159. Defendant, arrested for a misdemeanor.**—If the crime charged in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required to take the defendant, take him before a magistrate in that county, and must admit the defendant to bail, for his appearance before the magistrate named in the warrant, and take bail from him accordingly.

**Misdemeanor.**—If the prisoner is arrested, in another county, for a misdemeanor, it seems that it is competent for a magistrate of that county to admit him to bail. *People ex rel. Navagh v. Frink*, 4 St. Rep., 162; 41 Hun, 3 N. Y. Cr., 297.

where the offense is not punishable by death or by imprisonment in a prison, the prisoner may be let to bail by a magistrate of the county in which he was arrested. *People ex rel. Sichel v. Chapman*, 30 How., 202; *People v. Clews*, 77 N. Y., 39.

**160. Proceedings on taking bail from the defendant in a case.**—On taking bail, the magistrate must certify that he has taken the defendant on the warrant, and deliver the warrant and undertaking of the defendant to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and, without delay, deliver the warrant and undertaking to the magistrate before whom the defendant is required to appear.

**161. Proceedings where, etc., but bail is not given.**—If, on admission of the defendant to bail, as provided in section one hundred and fifty-nine, bail be not forthwith given, the officer must take the defendant before a magistrate as directed in the warrant, or some other magistrate in the same town or city, as provided in section one hundred and sixty-four.

added by chap. 458 of 1893.

the amendment substituted, after the word "Magistrate," for "who is directed," the words, "as directed by." It will go into effect, Sept. 1, 1893.

see notes under section 158, *ante*.

*People v. Board of Auditors*, 17 St. Rep., 875, 2 N. Y. Supp., 611.

**162. Prisoner carried from county to county.**—An officer who has arrested a defendant on a criminal charge, in any town or city, may carry such prisoner through such parts of any town or counties as shall be in the ordinary route of travel from the place where the prisoner shall have been arrested, to the place where he is to be conveyed and delivered under the process by which the arrest shall have been made; and such conveyance shall not be deemed an escape.

A person, arrested in one county, is not subject to arrest on any civil process in passing through another county in the ordinary route of travel from the place of arrest to the place to which he is to be conveyed according to the command of the process under which the arrest was made. *Love v. Humphrey*, 9 Wend., 204.

§ 163. **Power and privilege of officer.**—While passing through such other county or counties, the officers having the prisoner in their charge shall not be liable to arrest on civil process and they shall have the like power to require any citizen to aid in securing such prisoner, and to retake him if he escapes, as if they were in their own county; and a refusal or neglect to render such aid shall be an offense in the same manner as if they were officers of the county where such aid shall be required.

§ 164. **When magistrate issuing the warrant is unable to act.**—When, by the preceding sections of this chapter, the defendant is required to be taken before the magistrate who issued the warrant [or before a magistrate of the town in which the offense was committed], he may, if that magistrate be absent or unable to act, be taken before the nearest or most accessible magistrate in the [town in which the magistrate before whom the warrant is returnable resides, if there be such a magistrate accessible and qualified to act, and otherwise, before the nearest or most accessible magistrate in the] same county. The officer must, at the same time, deliver to the magistrate the warrant with his return indorsed and subscribed by him.

Am'd by chap. 458 of 1893.

This amendment introduced the portions included within brackets. It will go into effect, Sept. 1, 1893.

See note under section 158. *ante*.

**Absence or inability.**—This section seems to contemplate the taking of persons, arrested for a felony, before the magistrate who issued the warrant, except in case of his absence or inability to act. *People ex rel. Navagh v. Frink*, 4 St. Rep., 162; 41 Hun, 193; 4 N. Y. Cr., 297.

The warrant is not spent, if the justice, on the defendant being brought before him, declares himself, after calling the parties, unable to try the cause, and directs them to go before another justice. *Arnold v. Steeves*, 9 Wend., 515. Nor is the defendant entitled to be discharged, if the justice before whom he is taken is also unable to try the cause. *Id.*

See *People ex rel. Sichel v. Chapman*, 30 How., 202; *People v. Clews*, 1 N. Y., 39; *People ex rel. Fraser v. Board, etc.*, 17 St. Rep., 872; 2 N. Y. Supp. 611.

§ 165. **Defendant, upon arrest, to be taken before magistrate.**—The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night.

Amended by chap. 360 of 1882.

This amendment provided for giving bail, and added a provision for the cities of New York and Brooklyn.

Am'd by chap. 694 of 1887.

This amendment eliminated the provision made by the former amendment for the cities of New York and Brooklyn.

**Detention of prisoner.**—Previous to the Revised Statutes, the constable had a right to detain a defendant for a reasonable time, while making a *bona fide* effort to find a magistrate to hear the cause. *Arnold v. Steeves*

d., 515. The period was fixed by the Revised Statutes at 12 hours. Whether there is any precise limitation to the period under the Criminal Code, *quære*.

A magistrate has no authority to order a person, accused of a criminal offense, to be committed until a subsequent day, for examination, without being first brought before him. *Pratt v. Hill*, 16 Barb., 303. Upon the accused being brought before him, detain him a reasonable time for examination.

It is held, in *Hawley v. Butler*, 48 Barb., 101, that an officer, on arrest under section 6, chap. 75 of U. S. Sess. L. of 1863, was bound to take the first opportunity to bring the prisoner before a competent magistrate, where he might be tried for the offense charged.

§ 6. Defendant before another magistrate than the one who issued the warrant.—If the defendant be taken before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, if they can not be procured, the prosecutor and his witnesses must be summoned to give their testimony anew.

### CHAPTER III.

#### ARREST BY AN OFFICER, UNDER A WARRANT.

§ 167. Arrest, defined.

168. By whom an arrest may be made.

169. Every person bound to aid an officer in an arrest.

170. When the arrest may be made.

171. How an arrest is made.

172. No further restraint allowed than is necessary.

173. Officer must state his authority, and show warrant, if required.

174. If defendant flee or resist, officer may use all necessary means to effect arrest.

175, 176. When officer may break open a door or window.

§ 7. Arrest, defined.—Arrest is the taking of a person into custody so that he may be held to answer for a crime.

Author of *Killoran v. Barton*, 26 Hun, 649 ; 14 W. Dig., 490.

§ 8. Who may arrest.—An arrest may be,  
by a peace officer, under a warrant ;  
by a peace officer, without a warrant ; or  
by a private person.

to make arrest.—This section designates the persons who can lawfully make an arrest. *People v. Shanley*, 40 Hun, 478 ; 4 N. Y. Cr., 72.

An arrest for a misdemeanor, not committed in the officer's presence, is unlawful, and must be made by an officer under a warrant, in order to be justified.

A warrant, where the arrest cannot be made without it, must be, at the time of the arrest, in the actual possession of the officer. *Id.*

Author of *Killoran v. Barton*, 26 Hun, 649 ; 14 W. Dig., 490.

§ 9. Every person bound to aid an officer in an arrest.—Every person who is present when an officer is executing a warrant, must aid an officer in the execution of a warrant, if the officer requires his aid and be present and acting in its execution.

§ 10. Duty of every man in preserving the peace.—Every man is bound to aid and assist, upon order or command, in preserving the peace and apprehending offenders, and is punishable if he refuses. *Coyles v. Hurtin*, 10 John., 85.

An officer has authority to do the act, for the doing of which aid is required.

required, the bystander is bound to obey and is justified ; and, if he refuses or neglects, he is guilty of a misdemeanor and subject to fine and imprisonment. *Elder v. Morrison*, 10 Wend., 137. If the officer has no authority to do the act, the bystander is not bound to obey, and, if he yields obedience, is a trespasser. *Id.*

The sheriff may take the power of the county, if necessary, after resistance, to execute process. *Coyles v. Hurin*, 10 John., 85. The officer is to be deemed constructively present, so as to justify the aiding bystanders in arresting the offenders during his temporary absence for the purpose of procuring further assistance. *Id.*

**§ 170. When the arrest may be made.**—If the crime charged be a felony, the arrest may be made on any day, and at any time of the day or during any night. If it be a misdemeanor the arrest cannot be made on Sunday, or at night, unless by direction of the magistrate indorsed upon the warrant.

An arrest for a misdemeanor cannot be made in the night time, unless by direction of the magistrate endorsed upon the warrant. *Murphy v. Krom*, 8 St. Rep., 231 ; 20 Abb. N. C., 259.

**§ 171. How an arrest is made.**—An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer.

**Arrest, what is.**—To constitute an arrest, an actual manual touching of the body is not required. *Searls v. Viets*, 2 T. & C., 224. It is sufficient if the party is within the power of the officer and submits to the arrest. *Id.* Bare words alone will not make an arrest, if the party resists. *Id.*

No force or actual touching of the body is necessary to constitute an arrest and imprisonment, but it is sufficient if the party is within the power of the officer and submits to it. *Campbell v. Kelly*, 20 W. Dig., 160 ; *Gold v. Bissell*, 1 Wend., 210.

An actual seizing or touching of, or any interference with, the person, which would be, if not justified, a trespass, constitutes an arrest. *Schewe v. Mulvey*, 14 W. Dig., 384.

**§ 172. No further restraint allowed than is necessary.**—The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention.

**§ 173. Officer must state authority, and show warrant if required.**—The defendant must be informed by the officer that he acts under the authority of the warrant, and he must also show the warrant, if required.

**Authority to arrest, showing.**—When the defendant is informed by the officer that he acts under the authority of a warrant, he may require the officer to show it and the latter must do so. *People v. Shanley*, 40 Hun, 478 ; 4 N. Y. Cr., 476.

This section cannot be construed to mean that, after making the arrest the officer must, if required, take the defendant to some other place, and there show him the warrant. *Id.*

When the legislature speaks of arrest by a peace officer, under a warrant, it is to be understood that the warrant shall be in the possession of the officer in such manner that it may be shown to the defendant at the time of making the arrest. *Id.*

The cases of *Arnold v. Steeves*, 10 Wend., 215, and *Bellows v. Shannon*, 3 Hill, 86, were criticised in *People v. Shanley*, *ante*, as to the remark that an officer is not bound to show his warrant, and it was held that such rule was changed by this section.

**§ 174. If defendant flee or resist, officer may use all necessary means to effect arrest.**—If, after notice of intention to arrest the



ant, he either flee or forcibly resist, the officer may use necessary means to effect the arrest.

icer, in arresting the offender in case of an actual commission of a or in preventing his escape, is justified in taking his life, provided an absolute necessity for so doing. *Conraddy v. People*, 5 Park., 284. erwise in case of an arrest for a misdemeanor. *Id.* Reasonable for such belief is insufficient. *Id.*

5. When officer may break open a door or window.—The may break open an outer or inner door or window of any ig, to execute the warrant, if, after notice of his authority rpose, he be refused admittance.

ction 178, *post* ; section 223 of Penal Code.

6. *Id.*—An officer may break open an outer or inner door dow of any building, for the purpose of liberating a , who, having entered for the purpose of making an arrest, ined therein, or when necessary for his own liberation.

## CHAPTER IV.

### ARREST BY AN OFFICER, WITHOUT A WARRANT.

ON 177. In what cases allowed.

178. May break open a door or window, if admittance refused.

179. May arrest at night, on reasonable suspicion of felony.

180. Must state his authority, and cause of arrest, except where party is committing felony or is pursued after escape.

181. May take before a magistrate, a person arrested by a by-stander for breach of the peace.

182. Magistrate may commit by verbal or written order, for offenses committed in his presence.

7. In what cases allowed.—A peace officer may, without a t, arrest a person,

or a crime, committed or attempted in his presence ;

When the person arrested has committed a felony, although his presence ;

When a felony has in fact been committed, and he has able cause for believing the person to be arrested to have tted it.

out a warrant.—This section states the cases when a peace officer rest without a warrant. *People v. Shanley*, 40 Hun, 478 ; 4 N. Y.

r the Code, a peace officer may, without a warrant, arrest for either or misdemeanor committed or attempted in his presence, or where has in fact been committed, though not in his presence, where the person committed it, or the officer has reasonable cause for believ- he committed it. The second and third subdivisions of the section an actual commission of a felony, and the “reasonable cause,” men- n the last subdivision, relates, not to the offense, but to the person

ce officer may, without a warrant, arrest a person for a felony, or breach of the peace or misdemeanor, committed in his presence. . Warren, 17 How., 100 ; 1 Hilton, 590.

ection has changed the rule, prevailing at the time of the enact- the Code, that a peace officer was justified in making an arrest, a warrant, though no felony had been actually committed, if he



had reasonable ground to suspect that one had been, and acted in good faith and without evil motive.

For this former rule, see *Burns v. Erben*, 40 N. Y., 463 ; *Wilson v. King*, 89 Supr., 384 ; *Hawley v. Butler*, 54 Barb., 490. As it would mislead the practitioner to annotate the cases, decided before the Code, which relate to arrests for felonies committed not in the presence of the officer, it has been omitted.

A peace officer may arrest, without a warrant, for any misdemeanor committed in his presence. But he cannot, without a warrant, arrest for a misdemeanor, which was not committed in his presence.

The subject of reasonable cause is limited to the cases under the third subdivision. *Smith v. Botens*, 36 St. Rep., 55 ; 13 N. Y. Supp., 222.

An officer may make, or direct, the arrest of a person for a felony without a warrant. *Tupper v. Morin*, 25 Abb. N. C., 401 ; 12 N. Y. Supp., 310. But to escape liability for making an unfounded arrest, he must be able to excuse himself by proof that he had reasonable cause for believing that the person arrested had committed the crime. *Id.*

Power of magistrate to make arrests subsequently for crimes committed in his presence. *Sands v. Benedict*, 2 Hun, 479. Limitations imposed upon the power of sheriffs and constables, in similar cases. *Id.*

A police officer is not authorized, without process, to arrest a person as a common prostitute, on the ground that she is a disorderly person, unless the offense was committed in his presence. *People ex rel. Kingsley v. Pratt*, 20 Hun, 300.

A police officer may lawfully interpose to prevent a breach of the peace. *McIntyre v. Raduns*, 46 Supr., 123.

A policeman has no authority to arrest, without a warrant, even on view, a person engaged in violating a city ordinance, unless expressly authorized so to do, by the city charter, or unless such violation is accompanied by a breach of the peace. *Hennessy v. Connolly*, 13 Hun, 173. See subd. 1 of this section which empowers a peace officer to arrest, in such case, for any offense.

Where a certain intent is essential to constitute the crime, it may be doubted whether any outward acts will be an unquestionable justification for making the arrest, under sections 177 and 183 of the Code of Criminal procedure, if it is shown that no such intent existed. *Smith v. Botens*, 36 St. Rep., 55 ; 13 N. Y. Supp., 222.

**§ 178. May break a door or window, if admittance refused.—** To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if after notice of his office and purpose, he be refused admittance.

See section 173, *ante*.

**§ 179. May arrest at night, on reasonable suspicion of felony.—** He may also, at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that a felony had been committed, but that the person arrested did not commit it.

An officer, without a warrant, is justified in arresting in the night-time a person, when he has reason to believe that the latter has committed a felony. *People v. Ryan*, 28 St. Rep., 490 ; 8 N. Y. Supp., 370.

**§ 180. Must state his authority and cause of arrest, except where party is committing felony or is pursued after escape.—** When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape.

§ 181. May take before a magistrate a person arrested by a bystander for breach of the peace.—A peace officer may take before a magistrate, a person, who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

§ 182. Magistrate may commit by verbal or written order, for offenses committed in his presence.—When a crime is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

## CHAPTER V.

### ARREST BY A PRIVATE PERSON.

SECTION 183. In what cases allowed.

184. Must inform the party of the cause of arrest, except when actually committing the offense or on pursuit after escape.
185. Must immediately take prisoner before a magistrate, or deliver him to peace officer.

§ 183. In what cases allowed.—A private person may arrest another,

1. For a crime, committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence.

This section states the cases when a private person may arrest. *People v. Shanley*, 40 Hun, 478; 4 N. Y. Cr. 476.

No distinction is made between an officer and a private person in respect to arrest for a crime committed or attempted in his presence. *Smith v. Botens*, 36 St. Rep. 55; 13 N. Y. Supp. 224.

Under this section, a private person may arrest: (1) for a crime, either felony, or misdemeanor, if committed or attempted in his presence; (2) when a felony, not a misdemeanor, has been actually committed by the person arrested, though not in his presence.

Under the second subdivision, it is not sufficient that a felony has been committed by some person, and that the person making the arrest had reasonable cause to believe the party arrested to be the guilty person. The very person arrested must have committed a felony. Where a private person makes an arrest for a felony not committed in his presence, he must, in order to be justified, establish both the commission of the felony and that the party arrested is the felon.

The former rule has been modified in this respect.

A person, not an officer, is authorized by this section to arrest a party for a crime committed in his presence, upon immediate pursuit. *People v. Morehouse*, 25 St. Rep. 295; 2 Silv. (Sup. Ct.), 242; 6 N. Y. Supp. 763.

Any person may, without a warrant, arrest another who has committed a felony, either at the time of, or subsequent to, its commission. *Willis v. Warren*, 17 How. 100; 1 Hilton, 590; *Mix v. Clute*, 3 Wend. 350.

In an action for false imprisonment, if a felony has been actually committed, a private person is justified in making an arrest, if he has reasonable cause. *Burns v. Erben*, 40 N. Y. 463; *Hawley v. Butler*, 54 Barb. 490. See *Smith v. Botens*, 36 St. Rep. 55; 13 N. Y. Supp. 224.

A private citizen has no right to make an arrest for a past misdemeanor.

A private person, where no crime was committed, cannot arrest a suspected offender. *Ball v. Harrigan*, 47 St. Rep. 385; 19 N. Y. Supp. 913. See *People v. Giblin*, 24 St. Rep. 593.

**§ 184. Must inform party of the cause of arrest, except when actually committing the offense or on pursuit after escape.**—A private person before making an arrest, must inform the person to be arrested of the cause thereof, and require him to submit except when he is in the actual commission of the crime, or when he is arrested on pursuit immediately after its commission.

A private person may arrest a party for a crime committed in his presence, without informing him of the cause of arrest, if pursuit is made immediately after the commission of the crime. *People v. Morehouse*, 25 St. Rep., 295 ; 2 Silv. (Sup. Ct.), 242 ; 6 N. Y. Supp., 763, 764.

**§ 185. Must immediately take prisoner before a magistrate, or deliver him to a peace officer.**—A private person, who has arrested another for the commission of a crime, must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer.

## CHAPTER VI.

### RETAKING, AFTER AN ESCAPE OR RESCUE.

**SECTION 186.** May be at any time, or in any place in the state.

187. May break open a door or window, if admittance refused.

**§ 186. May be at any time, or in any place in the state.**—If a person arrested escape or be rescued, the person, from whose custody he escaped or was rescued, may immediately pursue and retake him, at any time, and in any place in the state.

**§ 187. May break open a door or window, if admittance refused.**—To retake the person escaping or rescued, the person pursuing may, after notice of his intention and refusal of admittance, break open an outer or inner door or window of a building.

## CHAPTER VII.

### EXAMINATION OF THE CASE, AND DISCHARGE OF THE DEFENDANT OR HOLDING HIM TO ANSWER.

**SECTION 188.** Magistrate to inform defendant of the charge, and his right to counsel.

189. Time to send, and sending for counsel.

190. Examination of.

191. When to be completed.

192. On adjournment, defendant to be committed, or discharged on deposit of money.

193. Form of commitment.

194. Depositions, to be read on examination, and witnesses examined.

195. Examination of witnesses to be in presence of defendant, and witnesses to be cross-examined in his behalf.

196. Defendant to be informed of his right to make a statement.

197. Waiver of his right, and its effect.

198, 199. Statement, how taken.

200. How reduced to writing, and authenticated.

201. After statement or waiver, defendant's witnesses to be examined.

- 202. Witnesses to be kept apart.
- 203. Who may be present at examination.
- 204. Testimony, how taken and authenticated.
- 205. Depositions and statement, how and by whom kept.
- 206. Defendant entitled to copies of depositions and statement.
- 207. Defendant, when and how to be discharged.
- 208. When and how to be committed.
- 209. Order for commitment.
- 210. Certificate of bail being taken.
- 211. Defendant to choose how he shall be tried.
- 212. Order for bail, on commitment.
- 213, 214. Form of commitment.
- 215. Undertaking of witnesses to appear, when and how taken.
- 216. Magistrate may order witness to enter into undertaking for appearance.
- 217. Commitment of witnesses under sixteen.
- 218. Witness to be committed, on refusal to give security for appearance.
- 219. Witnesses for people, conditional examination of.
- 221. Magistrate to return depositions, statement and undertakings of witnesses to the court.

18. **Magistrate to inform defendant of the charge, and his counsel.**—When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of committing a crime, the magistrate must immediately inform him of the charge against him, and of his right to the counsel in every stage of the proceedings, and before any proceedings are had.

Section 8, *ante*; section 6, art. 1 of State Constitution.

*People v. Mondon*, 38 Hun, 191; 1 N. Y. Cr., 88; 63 How., 255, reversed in 2 St. Rep., 713; 103 N. Y., 221; 4 N. Y. Cr., 561.

**Examination.**—The proceedings to be taken after a person has been arrested on an information are contained in sections 188 to 221 inclusive. See *People v. Ramsar*, 1 N. Y. Cr., 36; 63 How., 255; 10 Abb. N. C., 444.

Section 188 retains the provisions of the Revised Statutes applicable to the examination of persons charged with crime. *People v. Mondon*, 2 St. Rep., 713; 103 N. Y., 221; 4 N. Y. Cr., 559.

Section 189, *post*, is not intended to change the statutory rules relating to the examination of persons charged with crime. *Id.*

Sections 188, 189, and the following, section 190, are applicable to cases arising only by indictment, and not to those of which exclusive jurisdiction is vested in the courts of special sessions under section 56 of the Code of Criminal Procedure. *People v. Cook*, 9 St. Rep., 412; 45 Hun, 36.

Sections 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, of the Code of Criminal Procedure, regulating the mode of examining and authenticating the statements of prisoners accused of crime, and in sections 188 to 200 inclusive, refer in terms only to the judicial examinations therein provided for, regularly instituted before one of the magistrates described in section 147, *ante*, for the examination of criminals.

*People v. McGloin*, 91 N. Y., 241; 1 N. Y. Cr., 154; 12 Abb. N. C., 172; 16 W. Dig., 255; *aff'd* 28 Hun, 150; 1 N. Y. Cr., 105; 16 W. Dig., 138.

Section 196, in connection with sections 196, 198, *post*, prohibits the examination of a prisoner upon oath before a magistrate, upon the subject of the charge made against him. *People v. Mondon*, 2 St. Rep., 713; 103 N. Y., 221; 4 N. Y. Cr., 561.

**Preliminary examination**, which takes place before the committing magistrate, the coroner's inquest, and the grand jury, are in the main for the purpose, and a person who is charged with the commission of a crime which is under investigation before either of them, should be treated in all respects as is required by this section and the following sections 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, of the Criminal Code. *People v. Haines*, 6 N. Y. Cr., 103; 1 N. Y. Cr., 56.

See *People ex rel. Baker v. Beatty*, 39 Hun, 477 ; 4 N. Y. Cr., 288 ; *People ex rel. Navagh v. Frink*, 4 St. Rep., 162 ; 41 Hun, 188 ; 4 N. Y. Cr., 299 ; *Hommel v. Gleason*, 38 St. Rep., 843 ; 14 N. Y. Supp., 569.

§ 189. **Time to send, and sending for counsel.**—He must also allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose ; and must, upon the request of the defendant, require a peace officer to take a message to such counsel in the town or city, as the defendant may name. The officer must, without delay and without fee, perform that duty.

See notes under preceding section and section 256, *post*.

The case of *People v. Mondon*, 38 Hun, 191 ; 1 N. Y. Cr., 83 ; 63 How., 255, was reversed in 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 561.

See *People ex rel. Navagh v. Frink*, 4 St. Rep., 162 ; 41 Hun, 188 ; 4 N. Y. Cr., 299 ; *People v. McGloin*, 91 N. Y., 248 ; 1 N. Y. Cr., 154 ; 12 Abb. N. C., 172 ; 16 W. Dig., 255 ; *aff'g* 28 Hun, 150 ; 1 N. Y. Cr., 105 ; 16 W. Dig., 138 ; *People v. Haines*, 6 N. Y. Cr., 103 ; 1 N. Y. Supp., 56 ; *People v. Cook*, 9 St. Rep., 412.

§ 190. **Examination of.**—The magistrate, immediately after the appearance of counsel, or if none appear and the defendant require the aid of counsel, must, after waiting a reasonable time therefor, proceed to examine the case, unless the defendant waives examination and elects to give bail, in which case the magistrate must admit the defendant to bail if the crime is bailable, as provided in section two hundred and ten ; and in that case witnesses in attendance or shown to be material for the people may be required to appear and testify, or to be examined conditionally as prescribed in sections two hundred and fifteen, two hundred and sixteen, two hundred and seventeen, two hundred and eighteen, two hundred and nineteen and two hundred and twenty.

Amended by chap. 360 of 1882.

This amendment added the latter part of the section making provision for attendance or examination of witnesses.

The case of *People v. Mondon*, 38 Hun, 191 ; 1 N. Y. Cr., 83 ; 63 How., 255, was reversed in 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 561.

The inquiry, authorized by this section, relates to a proceeding before an indictment found or trial had. *People v. Beckwith*, 12 St. Rep., 795 ; 108 N. Y., 73.

An inquiry as to an act criminal in its nature may be made in certain cases through an examination before a magistrate. *Id.*

See *People v. McGloin*, 91 N. Y., 248 ; 1 N. Y. Cr., 158 ; 12 Abb. C., 172 ; 16 W. Dig., 255, *aff'g* 28 Hun, 150 ; 1 N. Y. Cr., 105 ; 16 W. Dig., 138 ; *People ex rel. Navagh v. Frink*, 4 St. Rep. 162 ; 41 188 ; 4 N. Y. Cr. 299.

§ 191. **When to be completed.**—The examination must be completed at one session, unless the magistrate, for good cause shown, adjourn it. The adjournment can not be for more than two days at each time, unless, by consent or on motion of the defendant.

Amended by chap. 360 of 1882.

This amendment omitted from the original section the words " nor more than six days in all."

The case of *People v. Mondon*, 38 Hun, 191 ; 1 N. Y. Cr., 83 ; 63 How., 255, was reversed in 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 561.

**Object of examination.**—An examination before the arresting, or ~~the~~

ther. magistrate is not a necessary preliminary to an indictment. *People ex rel. Phelps v. Westbrook*, 12 Hun, 646.

The object of an examination, in case of a felony, is solely to inquire whether there exist sufficient reasons to justify the holding of the accused, until the charge against him shall have been presented to, and passed upon by, a grand jury of the county. *People ex rel. Phelps v. Westbrook*, 12 Hun, 47.

The magistrate, it seems, should not continue the examination after its main object and purposes are rendered nugatory by the presentment of an indictment by a grand jury against the accused for the same offense. *People ex rel. Phelps v. Westbrook*, 12 Hun, 651.

See *People v. McGloin*, 91 N. Y., 248 ; 1 N. Y. Cr., 158 ; 12 Abb. N. C., 172 ; 6 W. Dig., 255, aff'g 28 Hun, 150 ; 1 N. Y. Cr., 105 ; 16 W. Dig., 138.

§ 192. On adjournment, defendant to be committed or discharged on deposit of money.—If an adjournment be had for any cause, the magistrate must commit the defendant for examination, or discharge him from custody, upon his giving bail to appear during the examination, or upon the deposit of money as provided in this Code, to make sure of his appearance at the time to which the examination is adjourned.

The case of *People v. Mondon*, 38 Hun, 191 ; 1 N. Y. Cr., 33 ; 63 How., 255 ; was reversed in 2 St. Rep. 713 ; 103 N. Y., 221 ; 4 N. Y. Cr. 561.

See *People v. McGloin*, 91 N. Y. 248 ; 1 N. Y. Cr., 158 ; 12 Abb. N. C., 172 ; 6 W. Dig., 255, aff'g 28 Hun, 150 ; 1 N. Y. Cr. 105 ; 16 W. Dig. 138.

§ 193. Form of commitment for examination.—The commitment for examination must be to the following effect :

'State of New York, }  
County of               , } ss. :

"In the name of the people of the state of New York. To the sheriff of the county of               " (or in the city and county of New York "to the keeper of the city prison of the city and county of New York.") "A. B. having been brought before me under a warrant of arrest upon the charge of (stating briefly the nature of the crime) is committed for examination to the sheriff of the county of               ," or in the city and county of New York "to the keeper of the city prison of the city of New York."

Dated at the city of                (or as the case may be,) this                day of                'C. D.'

'Justice of the peace'  
(or as the case may be).

Amended by chap. 608 of 1899. In effect Sept. 1, 1899.

The case of *People v. Mondon*, 38 Hun, 191 ; 1 N. Y. Cr., 33 ; 63 How., 255, was reversed in 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 561.

See *People v. McGloin*, 91 N. Y., 241 ; 1 N. Y. Cr., 158 ; 12 Abb. N. C., 172 ; 6 W. Dig., 255 ; aff'g 28 Hun, 150 ; 1 N. Y. Cr., 105 ; 16 W. Dig., 138.

§ 194. Depositions to be read on examination and witnesses examined.—At the examination, the magistrate must, in the first place, read to the defendant the depositions of the witnesses examined on the taking of the information, and if the defendant request it, or elects to have the examination, must summon for cross-examination the witnesses so examined, if they be in the county. He must also issue subpoenas for additional witnesses required by the prosecutor or the defendant.

The case of *People v. Mondon*, 38 Hun, 191 ; 1 N. Y. Cr., 33 ; 63 How., 255 was reversed in 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 561.

See *People v. McGloin*, 91 N. Y., 241 ; 1 N. Y. Cr., 158 ; 12 Abb. N. C., 172 ; 6 W. Dig., 255 ; aff'g 28 Hun, 150 ; 1 N. Y. Cr., 105 ; 16 W. Dig., 138 ; *Matter of Paul*, 94 N. Y., 502 ; 2 N. Y. Cr., 6.

§ 195. Examination of witnesses to be in presence of defendant, and witnesses to be cross-examined in his behalf.—The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf.

The case of *People v. Mondon*, 38 Hun, 191 ; 1 N. Y. Cr., 33 ; 63 How., 255, was reversed in 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 561.



See *People v. McGloin*, 91 N. Y., 241 ; 1 N. Y. Cr., 158 ; 12 Abb. N. C., 172 ; 16 W. Dig., 255 ; aff'g 28 Hun, 150 ; 1 N. Y. Cr., 105 ; 16 W. Dig., 188 ; *Matter of Paul*, 94 N. Y., 502 ; 2 N. Y. Cr., 6 ; *People v. Williams*, 35 Hun, 516.

§ 196. **Defendant to be informed of his right to make a statement.**—When the examination of the witnesses on the part of the people is closed, the magistrate must inform the defendant, that it is his right to make a statement in relation to the charge against him (stating to him the nature thereof) ; that the statement is designed to enable him, if he see fit, to answer the charge and to explain the facts alleged against him ; that he is at liberty to waive making a statement ; and that his waiver cannot be used against him on the trial.

See notes under section 188, *ante*, sections 198 and 256, *post*.

The case of *People v. Mondon*, 38 Hun, 191 ; 1 N. Y. Cr., 33 ; 63 How., 255, was reversed in 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 561.

Where it does not affirmatively appear that defendant had been cautioned by the magistrate before making a statement, as required by the Code, but it does not appear that he had not been so cautioned, it will not be presumed that the magistrate failed in his duty and omitted to caution the defendant. *People v. Stott*, 5 N. Y. Cr., 61.

See *People v. McGloin*, 91 N. Y., 241 ; 1 N. Y. Cr., 158 ; 12 Abb. N. C., 172 ; 16 W. Dig. 255 ; aff'g 28 Hun, 150 ; 1 N. Y. Cr., 105 ; 16 W. Dig., 188 ; *People v. Chapleau*, 30 St. Rep., 989 ; 121 N. Y., 272 ; *People v. Hames*, 6 N. Y. Cr., 103 ; 1 N. Y. Supp., 56.

§ 197. **Waiver of his right and its effect.**—If the defendant waive his right to make a statement, the magistrate must make a note thereof, immediately following the depositions of the witnesses against the defendant.

The case of *People v. Mondon*, 38 Hun, 191 ; N. Y. Cr., 33 ; 63 How., 255, was reversed in 2 St. Rep., 613 ; 103 N. Y., 221 ; 4 N. Y. Cr., 561.

See *People v. McGloin*, 91 N. Y., 241 ; 1 N. Y. Cr., 158 ; 12 Abb. N. C., 172 ; 16 W. Dig., 255 ; aff'g 28 Hun, 150 ; 1 N. Y. Cr., 105 ; 16 W. Dig., 188.

§ 198. **Statement, how taken.**—If the defendant choose to make a statement, the magistrate must proceed to take it in writing, without oath, and must put to the defendant the following questions only :

What is your name and age ?

Where were you born ?

Where do you reside, and how long have you resided there ?

What is your business or profession ?

Give any explanation you may think proper, of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation.

See notes under preceding section.

See notes under section 188, *ante*, and section 256, *post*.

The case of *People v. Mondon*, 38 Hun, 191 ; 1 N. Y. Cr., 33 ; 63 How., 255, was reversed in 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 561.

The statement, contemplated by the statute, is regulated by the provisions of this and the following two sections. *People v. McGloin*, 28 Hun, 150 ; 1 N. Y. Cr., 110 ; 16 W. Dig., 138 ; aff'd, 91 N. Y., 248 ; 1 N. Y. Cr., 158 ; 12 Abb. N. C., 172 ; 16 W. Dig., 255.

These provisions apply to an examination before a magistrate for the purpose of ascertaining whether a crime has, or has not, been committed, and not to any proceeding before a coroner. *Id*.

The examination of a prisoner on oath before a magistrate, on the subject



urged against him, is condemned by the provisions of this People v. Mondon, 2 St. Rep., 713; 103 N. Y., 221; 4 N. Y. Cr.,

ple v. McGloin, 91 N. Y., 248; 1 N. Y. Cr., 158; 12 Abb. N. C., 7. Dig., 255; aff'g, 28 Hun, 150; 1 N. Y. Cr., 105; 16 W. Dig., 188. ple v. Haines, 6 N. Y. Cr., 103; 1 N. Y. Supp., 56.

**Id.**—The answer of the defendant to each of the questions must be distinctly read to him as it is taken down. He may upon correct or add to his answer, and it must be correct until it is made conformable to what he declares to be the truth.

as under preceding section.

People v. Mondon, 38 Hun, 191; 1 N. Y. Cr., 33; 63 How., 561. reversed in 2 St. Rep., 713; 103 N. Y., 221; 4 N. Y. Cr., 561.

ple v. McGloin, 91 N. Y., 241; 1 N. Y. Cr., 158; 12 Abb. N. C., 7. Dig., 255, aff'g 28 Hun, 150; 1 N. Y. Cr., 105; 16 W. Dig., 188.

**How reduced to writing and authenticated.**—The statement must be reduced to writing by the magistrate, or under his direction, and authenticated in the following manner:

The authentication must set forth in detail, that the defendant was informed of his rights as provided in section 196, and after being so informed, he made the statement;

The statement must contain the questions put to him, and his answers as provided in sections 198 and 199;

The statement may be signed by the defendant, or he may refuse to sign, but if he refuse to sign, his reason therefor must be stated, and he gives it;

The statement must be signed and certified by the magistrate.

as under section 198, *ante*.

People v. Mondon, 38 Hun, 191; 1 N. Y. Cr., 33; 63 How., 561. reversed in 2 St. Rep., 713; 103 N. Y., 221; 4 N. Y. Cr., 561.

ple v. McGloin, 91 N. Y., 241; 1 N. Y. Cr., 158; 12 Abb. N. C., 7. Dig., 255, aff'g 28 Hun, 150; 1 N. Y. Cr., 105; 16 W. Dig., 188. ple v. Chapleau, 30 St. Rep., 992; 121 N. Y., 272.

**After statement or waiver, defendant's witnesses to be examined.**—After the waiver of the defendant to make a statement, or after he has made it, his witnesses, if he produce any, must be sworn and examined.

**Witnesses to be kept apart.**—The witnesses produced by either of the people or of the defendant cannot be present during the examination of the defendant; and while a witness is being examined, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other, until they are all examined.

**Who may be present at examinations.**—The magistrate may exclude from the examination every person except the magistrate, the prosecutor and his counsel, the district attorney general, the district attorney of the county, the defendant, his counsel and the officer having the defendant in custody.

Amended by chap. 220 of 1888.

This amendment changed "must" into "may," and eliminated the words upon the request of the defendant," from the original section.

**Appearance.**—The complainant may be represented by counsel on the preliminary hearing, and such counsel cannot be excluded from the examination under this section. *People ex rel. Howes v. Grady*, 50 St. Rep., 129; 86 Hun, 446, 7; 21 N. Y. Supp., 381.

By the words "prosecutor and his counsel," the district attorney is not meant. *Id.*

The district attorney may appear upon the preliminary hearing, but is not required, nor has he the exclusive right, to do so. *Id.*

**§ 204. Testimony, how taken and authenticated.**—The testimony given by each witness must be reduced to writing, as a deposition, by the magistrate or under his direction, and authenticated in the following manner:

1. The authentication must state the name and age of the witness, his place of residence and his business or profession.

2. It must, unless deposition by question and answer be waived by the defendant and the witness, contain the questions put to the witness, and his answers thereto; each answer being distinctly read to him as it is taken down and being corrected or added to, until it is made conformable to what he declares to be the truth.

3. If a question put be objected to on either side, and overruled, or the witness decline answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated.

4. The deposition must be signed by the witness, or if he refuse to sign it, his reason for refusing must be stated in writing as he gives it.

5. It must be signed and certified by the magistrate.

6. The foregoing provisions shall apply to preliminary examinations in the city and county of New York only when either the defendant or the district attorney, or the representative of the district attorney shall so elect.

Subd. 6 added by chap. 818 of 1896. In effect May 21, 1896.

Amended by chap. 360 of 1882.

This amendment introduced in subd. 2 of the original section the words "unless deposition by question and answer be waived by the defendant and the witness."

The magistrate is required by this and the following section to certify the testimony and return the depositions, taken upon the information, to the court. *People v. Johnson*, 13 St. Rep., 48; 46 Hun, 671; 7 N. Y. Cr., 402.

See *People v. Winness*, 3 N. Y. Cr., 89.

**§ 205. Depositions, etc., at examinations, how and by whom kept.**—The magistrate or his clerk must keep the depositions taken on the information or on the examination, and the statement of the defendant, if any, until they are returned to the proper court; and must not permit them to be inspected by any person, except a judge of a court having jurisdiction of the offense, the attorney-general, the district attorney of the county, the defendant and his counsel and the complainant and his counsel.

Amended by chap. 220 of 1888.

This amendment added to the original section the words "and the complainant and his counsel."

There is no necessity for producing the depositions upon the trial in support of the warrant or commitment. *People v. Johnson*, 13 St. Rep., 48; 46 Hun, 671; 7 N. Y. Cr., 402.

§ 206. Defendant entitled to copies of depositions and statement.—If the defendant be held to answer the charge, the magistrate or his clerk having the custody of the depositions taken the information or examination, and of the statement of the defendant, must, on payment of his fees at the rate of five cents for every hundred words, and within two days after demand, furnish to the defendant, or his counsel, a copy of the depositions and statement, or permit either of them to take a copy.

§ 207. Defendant, when and how to be discharged.—After hearing the proofs, and the statement of the defendant, if he have made one, if it appear, either that a crime has not been committed, or that there is no sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged, by an indorsement on the depositions and statement, signed by him, to the following effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order him to be discharged."

Upon this preliminary hearing, the magistrate determines simply whether there is probable cause for holding the defendant for trial. *People ex rel. Jones v. Grady*, 50 St. Rep., 129.

After an arrested person enters into a recognizance to appear at the court general sessions, the magistrate cannot proceed in the case and discharge him. *Sandrock v. Knop*, 34 How., 191.

See *Matter of Ramscar*, 1 N. Y. Cr., 35; 63 How., 255; 10 Abb. N. C., 14.

§ 208. When and how to be committed.—If, however, it appears from the examination that a crime has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must, in like manner, indorse on the depositions and statement an order, signed by him, to the following effect: "It appearing to me by the within depositions (and statement, if any) that the crime therein mentioned or any other crime according to the fact, stating generally the nature thereof has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same."

**Commitment.**—The magistrate apparently has authority to issue process of commitment for a crime developed on the examination, though not charged in the original warrant. *Matter of Paul*, 94 N. Y., 502; 2 N. Y., 6.

Where the commitment recites that an order has been made by the magistrate, it is unnecessary to go back of it and prove that an order was indorsed by him upon the depositions and statement, in order to establish that the defendant is rightfully in custody and confinement under such commitment. *People v. Johnson*, 13 St. Rep., 48; 46 Hun, 671; 7 N. Y. Cr., 402. See *Matter of Ramscar*, 1 N. Y. Cr., 35; 63 How., 255; 10 Abb. N. C., 14.

§ 209. Order of commitment.—If the crime be not bailable, the following words, or words to the same effect, must be added to the indorsement: "and that he be committed to the sheriff of the county of \_\_\_\_\_," or in the city and county of New York, "to the keeper of the city prison of the city of New York."

§ 210. **Certificate of bail being taken.**—If the crime be bailable, and bail be taken by the magistrate, the following words or words to the same effect, must be added to the indorsement mentioned in section 208: “and I have admitted him to bail to answer, by the undertaking hereunto annexed.”

See *People ex rel. Navagh v. Frink*, 4 St. Rep. 162; 41 Hun, 188; 4 N. Y. Cr., 299.

§ 211. **Defendant to choose how he shall be tried.**—If the crime with which the defendant is charged be one triable, as provided in subdivision thirty-seven of section fifty-six, by a court of special sessions of the county in which the same was committed, the magistrate, before holding the defendant to answer, must inform him of his right to be tried by a court of special sessions, and must ask him how he will be tried. If the defendant shall not require to be tried by a court of special sessions, he can only be held to answer to a court having authority to inquire by the intervention of a grand jury in offenses triable in the county.

Am'd, ch. 611 of 1897. In effect October 1, 1897.

See notes under sections 56, 57, 58, 69 and 70, *ante*.

**Election.**—Where a court of special sessions has exclusive jurisdiction of an offense, the justice must try the person accused thereof, notwithstanding his demand to be held to bail to the next grand jury. *Austin v. Vrooman*, 40 St. Rep., 339; 128 N. Y., 234.

Where exclusive jurisdiction is not conferred upon courts of special sessions, the justice is bound, by the provisions of this section, where the defendant has elected to give bail, to accept it if sufficient. *Id.*

But, in the absence of a proper demand and the giving of sufficient bail, it is the duty of the justice, and his jurisdiction continues, to try the accused. *Id.*

It is a sufficient request to be tried by a jury after indictment, if the defendant pleads not guilty, waives the preliminary examination and offers to give bail for his appearance at the next grand jury. *Id.*

An election to be tried by a court of special sessions was held in *Gill v. People*, 3 Hun, 188; *aff'd*, 60 N. Y., 643, to waive all objections to the jurisdiction of the court.

This section seems to have been adopted for the purpose of preserving a practice, which prevailed prior to the enactment of the Code of Criminal Procedure. *People v. Austin*, 19 St. Rep., 523; 49 Hun, 396; 3 N. Y. Supp. 578; See *People v. Putman*, 3 Park., 386; *Hill v. People*, 20 N. Y., 363.

The requirements of this section aim at cases in which the defendant has an absolute right to be tried by jury after indictment. *People v. McGarran*, 6 St. Rep., 541; 43 Hun., 57.

The provision of this section, as to trial by jury after indictment, necessarily relates to crimes triable only by jury after indictment, and can have no application to cases in which courts of special sessions have exclusive jurisdiction. *People v. Starks*, 17 St. Rep., 237; 1 N. Y. Supp., 723.

Where the defendant pleads not guilty, and, on being asked by the magistrate if he is ready for trial, replies that he is, it is equivalent to a request to be tried by a court of special sessions. *People v. Cook*, 9 St. Rep., 412; 45 Hun, 36.

§ 212. **Order for bail, on commitment.**—If the crime be bailable and the defendant be admitted to bail, but bail have not been taken, the following words, or words to the same effect, must be added to the indorsement mentioned in section 208, “and that he be admitted to bail in the sum of                      dollars, and be committed to the sheriff of the county of                      ,”

the city and county of New York, "to the keeper of the prison of the city of New York," until he gave such bail.

**213. Form of commitment.**—If the magistrate order the defendant to be committed as provided in sections 209 and 212, must make out a commitment, signed by him, with his name vice, and deliver it, with the defendant, to the officer to whom he is committed, or if that officer be not present, to a peace officer, who must immediately deliver the defendant into the officer's custody, together with the commitment.

**Commitment.**—A commitment is intended merely as a protection to the officer executing it, and as showing the authority upon which he restrains the accused person of his liberty. *People v. Johnson*, 16 St. Rep., 846 ; 110 N. Y., 142.

Commitments need not state the facts constituting the offenses, but must express, in some degree, the nature of the crimes. *People v. Johnson*, 16 St. Rep., 48 ; 46 Hun, 471.

A recital, in the commitment, of the crimes with which the defendant is charged as grand larceny in the first degree, and burglary in the third degree, is a sufficient statement of the nature of the crimes, for the purpose of showing that he was in custody or confinement upon the charge of felony.

**214. Id.**—The commitment must be to the following effect:

"County of Albany [or as the case may be.]

of the name of the people of the State of New York:

To the sheriff of the county of Albany," or in the city and county of New York, "to the keeper of the city prison of the city of New York:"

An order having been this day made by me, that A. B. be committed to answer to the court of \_\_\_\_\_ upon a charge of [stating briefly the nature of the crime,] you are commanded to receive him into your custody and detain him, until he be legally discharged.

Witness my hand at the city of Albany [or as the case may be], this \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_.

C. D., Justice of the Peace,  
[or as the case may be.]

**Form and contents of commitment.**—The warrant of commitment is required to state briefly the nature of the crime. *Matter of Paul*, 94 N. Y., 2 N. Y. Cr., 6.

There is nothing in the office which a commitment is designed to perform, requiring a detailed statement of the circumstances attending the commission of the crime. *People v. Johnson*, 16 St. Rep., 846 ; 110 N. Y., 142.

A statement in a commitment that the defendant is held to answer upon a charge of burglary in the first degree, or that he is held upon a charge of larceny in the first degree, is a sufficient compliance with the provision of section 212, requiring the nature of the crime to be briefly stated therein.

Where the jurisdiction of the magistrate over the subject matter of the commitment is established, and the person of the defendant is established, he has authority to make out a commitment. *Id.*

In such case, the recitals in the commitment are presumptive evidence of the facts therein stated. *Id.*; *Scott v. Ely*, 4., Wend., 555.

Where the prisoner is arrested for one, and committed for another, crime, the warrant of commitment should briefly state what the new and distinct crime is, viz: the nature of the crime. *Matter of Paul*, 94 N. Y., 502 ; 2 N. Y. Cr., 6.

Where there are names given by law to offenses, they express in some degree the nature of the crime, and their recital in the commitment is a substantial conformance in terms to the requirements of this section. *People v. Johnson*, 13 St. Rep. 48; 46 Hun, 667; 7 N. Y. Cr. 492.

§ 215. **Undertaking of witnesses to appear, when and how taken.**—On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the people, a written undertaking, to the effect that he will appear and testify at the court to which the depositions and statements are to be sent, or that he will forfeit the sum of one hundred dollars.

§ 216. **Magistrate may order witness to enter into undertaking for appearance.**—When the magistrate is satisfied, by proof on oath, that there is reason to believe that any such witness is an accomplice in the commission of the crime charged, he may order the witness to enter into a written undertaking, with such sureties, and in such sum as he may deem proper, for his appearance as specified in the last section.

Amended by chap. 416 of 1883.

This amendment dropped from the original section the words "will not appear and testify, unless security is required," and substituted the words "is an accomplice in the commission of the crime charged."

§ 217. **Commitment of witnesses under sixteen.**—Children under the age of sixteen years, when witnesses, may be committed as provided by section two hundred and ninety-one of the Penal Code, subject to the order of the trial court.

Original section repealed by chap. 416 of 1883. New section added by chap. 220 of 1888.

Amended by chap. 279 of 1892.

This amendment omitted the word "such" before the word "witnesses," from the new section, and added the words "subject to the order of the trial court."

§ 218. **Witness to be committed on refusal to give security for appearance.**—If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the magistrate must commit him to prison until he comply or be legally discharged.

§ 219. **Witnesses for people, conditional examination of.**—A witness may be conditionally examined on behalf of the people in the manner and with the effect provided by title twelve, chapter three of this Code, for taking examination of witnesses conditionally on behalf of the defendant. A copy of the order and affidavit upon which the application is made, together with notice of the time and place where the examination is to be taken, shall be served on the defendant, and his counsel, if he have any, at least two days before the time fixed for such examination, and the defendant may be present personally upon such examination to confront the witness produced against him; if the defendant have no counsel the order shall contain a provision assigning counsel to him for the purpose of such examination—upon whom a copy of said order, affidavit and notice shall be served.

Amended by chap. 461 of 1883.

This amendment removed the condition as to inability to procure sureties.

Amended by chap. 422 of 1887.

This amendment added to the section, as amended in 1883, all after the words "with the effect provided" and omitted the words "in this code."

See sections 620-635, *post*.

The question whether there is, or is not, sufficient preliminary proof that a witness, whose testimony has been taken upon the examination before the magistrate, cannot be found within the state, to permit the prosecution to read upon the trial such testimony, is addressed to the discretion of the trial court. *People v. Fish*, 34 St. Rep. 840; 125 N. Y. 149; 8 N. Y. Cr. 139. His decision, if based upon evidence legitimately tending to establish the facts required by this and the following section, should not be lightly disturbed. *Id.* An objection to this effect is not available for the first time on appeal. *Id.*



**20. Justices' criminal docket.**—Every justice of the peace and every other special justice appointed or elected in a city, village or town than in the city and county of New York, shall forthwith enter correct at the time thereof, full minutes of all business done before him as justice and as a Court of Special Sessions in criminal actions and in civil proceedings and including cases of felony, in a book to be furnished him by the clerk of the city, village or town where he shall reside, and it shall be designated "justices' criminal docket," and shall be at all times open for inspection to the public. Such docket shall be and remain the property of the city, village or town of the residence of such justice, and at expiration of the term of office of such justice, if in a city shall remain in the police office of such justice, or in the office of the police clerk, if in a village or town shall be forthwith filed by him in the office of the clerk of such village or town. The minutes in every such docket shall state the names of the witnesses sworn and their places of residence, and if in a city the street and house number; and every proceeding had before him. Every justice of the peace or police or other special justice who shall wilfully neglect to make and enter in such docket forthwith, the entries by this section required to be made or to exhibit the docket when reasonably required shall be guilty of a misdemeanor and shall, upon conviction, in addition to the punishment provided by law for a misdemeanor, forfeit his office.

Amended by L. 1898, chap. 111. In effect March 23, 1898.

**221. Magistrate to return depositions, statement and undertaking of witnesses to court and district attorney.**—Whenever a magistrate has discharged a defendant, or has held him to answer, as provided in sections two hundred and seven and two hundred and eight, he shall, within five days thereafter, return to the clerk of the supreme court or county court or other court having power to inquire into the offenses by the intervention of a grand jury, the warrant, if any, the depositions, the statement of the defendant, if he have made one, and all undertakings of the defendant or for the appearance of witnesses, taken by him. In the city of New York such returns shall be made, in the case of all misdemeanors, except charges of libel to the district attorney of the county wherein the offence was committed. Except in a county containing or wholly contained within the city of the first class, any such magistrate, within five days after so arguing or holding a defendant, must also return to the district attorney of the county a statement of the name and address of the defendant, the charges, the name and address of the informant, and the names and addresses of all of the witnesses subpoenaed or sworn upon the examination, or who have made depositions in support of the information.

Am'd by ch. 267, Laws 1905. Takes effect Sept. 1, 1905.

## TITLE IV.

### PROCEEDINGS AFTER COMMITMENT, AND BEFORE INDICTMENT.

#### CHAPTER I. Preliminary provisions.

#### II. Formation of grand jury; its powers and duties.

### CHAPTER I.

#### PRELIMINARY PROVISIONS.

#### SECTION 222. Crimes; how prosecuted.

**222. Crimes; how prosecuted.**—All crimes prosecuted in a supreme court or in a county court, or in a city court, must be prosecuted by indictment.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Section 6, art. 1 of State Constitution; art. 5 of Federal Constitution.

Inquiry as to an act criminal in its nature, through the intervention of a grand jury, relates to a proceeding before indictment found or trial had.

See *People v. Beckwith*, 12 St. Rep. 795; 108 N. Y. 73.

Neither inquiry, nor prosecution, relates to or includes, within its com-



mon meaning, the evidence which may be given, or the degree of proof required, upon the inquiry, or during the prosecution to secure a conviction and punishment. *Id.*

## CHAPTER II.

### FORMATION OF THE GRAND JURY, ITS POWERS AND DUTIES.

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 265. Secrets of the grand jury to be kept.  
 266. Grand jury, when bound to disclose the testimony of a witness.  
 267. Grand juror not to be questioned for his conduct as such.

§ 223. Grand jury defined.—A grand jury is a body of men, returned at stated periods from the citizens of the county, before a court of competent jurisdiction, and chosen by lot and sworn to inquire of crimes committed or triable in the county.

**Grand jury.**—A grand jury is defined in this section. *People v. Petrea*, 80 Hun, 102.

The grand jury, all through this chapter, is recognized as a body separate and distinct from the court before which it is returned. *People ex rel. Pickard v. Sheriff*, etc., 11 Civ. Pro., 184.

The grand jury is merely an appendage or adjunct of the court. *Matter*

le, 8 N. Y. Cr., 7; 24 Abb. N. C., 430; 18 Civ. Pro., 180; People v. on, 7 Abb. N. S., 421; People v. Kelley, 24 N. Y., 74; People v., 4 T. & C., 476; People *ex rel.* Hackley v. Kelly, 21 How., 54.  
 Grand jury is the grand inquest between the government and the People v. Briggs, 60 How., 42.

**4. Grand jury defined.**—The grand jury must consist of less than sixteen and not more than twenty-three persons, the presence of at least sixteen is necessary for the transaction of any business.

If more than twenty-three persons are sworn and sit upon a grand jury and an indictment is found by them, to which the defendant pleads, tried and found guilty, the court will not, upon motion, quash the indictment. Conkey v. People, 5 Park., 38; 1 Abb. App. Dec., 418.

The defendant, in an indictment found by them, may, if that fact appears on the caption of the indictment, bring error in law. *Id.* People v. 2 Caines, 98. If it does not so appear, then he may bring error in fact.

**5. For what courts to be drawn, etc.**—A grand jury shall be drawn for every term of the following courts:

1. The supreme court, except in the city and county of New York and the county of Kings, and except for extraordinary or adjourned terms. But whenever in any other county than New York and Kings, more than four terms of the supreme court shall be appointed to be held in any year, the justices of the supreme court or a majority of them, of the district in which said county is situated may designate four terms of the supreme court in said district for which a grand jury shall be drawn, and a grand jury shall attend at such terms only; and

2. The court of general sessions of the city and county of New York and the court of sessions of the county of Kings.

Added by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1882.

A amendment added to the first subdivision the words "and the county of Kings, and except for extraordinary or adjourned terms;" and to the second subdivision the words and "the court of sessions of the county of Kings."

A provision is made in this section for the drawing of grand juries for the sessions in any county except for New York and Kings. People v. 3 N. Y., 537, 547; 3 N. Y. Cr., 176, *aff'g* 21 W. Dig., 85.

**3. Idem.**—A grand jury may also be drawn:

1. For every other county court, when specially ordered by the court or by the board of supervisors.

2. For the supreme court in the city and county of New York, upon the order of a justice of the supreme court elected in the judicial district.

3. For the supreme court, of the county of Kings, upon the order of a justice of the supreme court elected in the second judicial district.

4. For an extraordinary term of the supreme court upon the order of the justice named to hold or preside at the same.

Added by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1882.

A amendment added subdivision 3 of the present section.

**Section 4. for drawing jury.**—An order of the court or of the board of su-

pervisors is not essential to legalize the summoning and drawing of a grand jury at a term of the court, designated by the county judge under section 45 of the Criminal Code. *People v. Rugg*, 96 N. Y., 537, 3 N. Y. Cr., 176; aff'g 21 W. Dig., 84.

This section was intended to provide for the drawing of a grand jury when no designation had been made by the county judge in pursuance of the provisions of section 45, or when special circumstances existed which required that a grand jury be drawn and summoned independent of those which were provided for in the above section. *Id.*

§ 227. **For what courts to be drawn; the order.**—If made by the court or a judge thereof, the order for a grand jury must be entered upon its minutes, and a copy thereof filed with the county clerk, at least twenty days before the term for which the jury is ordered. If made by the board of supervisors a copy thereof, certified by the clerk of the board, must be filed with the county clerk, at least twenty days before the term; and when so filed, is conclusive evidence of the authority for drawing the jury.

§ 228. **Misdescription in order.**—A misdescription of the title of the court in an order for a grand jury does not affect the validity of the order, if it can be plainly understood therefrom what court is intended.

§ 229. **Mode of selecting grand jurors.**—The mode of selecting grand jurors is prescribed by special statutes.

See sections 1041, 2293–2301, 3314, 3351 of Code of Civil Procedure; § R. S., 1015–1019.

See notes under section 223, *ante*.

The cases of *People v. Duff* and *People v. Fitzgerald*, 1 N. Y. Cr., 307, were reversed or overruled by 1 N. Y. Cr., 425.

§ 230. **If sixteen jurors do not appear, etc.**—If at any term of the supreme court or county court, except in the counties of Genesee, Orleans and St. Lawrence, there shall not appear at least sixteen persons, duly qualified to serve as grand jurors, who have been summoned, or if the number of grand jurors attending shall be reduced below sixteen, such court must, by order to be entered in its minutes, require the clerk of the county to draw, and the sheriff to summon, such additional number of grand jurors as shall be necessary, and must specify the number required in the order.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

§ 231. **Manner of designating the additional grand jurors.**—The clerk of the county must forthwith bring into court the box containing the names of the grand jurors, from which grand jurors in the county are required to be drawn; and he must, in the presence of the court, proceed publicly to draw the number of grand jurors specified in the order; and when such drawing is completed, he must make two lists of the persons so drawn, each of which must be certified by him to be a correct list of the names of the persons so drawn by him, one of which he must file in his office, and the other he must deliver to the sheriff.

§ 232. **Manner of designating the additional grand jurors.**—The sheriff must accordingly, in the manner required in respect to the grand jurors originally drawn, forthwith summon the persons whose names are drawn or designated in the list, provided

in section 231, to appear in the court requiring their attendance at the time designated, and they must attend and serve as if they had been originally summoned as grand jurors, and subject to the same penalties, unless excused or discharged by the court.

§ 233. **In counties named.**—In the counties of Genesee, Orleans and St. Lawrence, the names of the persons required to complete the grand jury may, in the discretion of the court, be drawn as provided in the last section, or may be publicly designated by the court, from the by-standers or the body of the county.

Amended by chap. 360 of 1882.

This amendment dropped from the original section the words "In any other county," and substituted the words "In the counties of Genesee, Orleans and St. Lawrence."

§ 234. **Summoning the additional grand jurors and compelling their attendance.**—The sheriff must accordingly, in the manner required in respect to the grand jurors originally drawn, forthwith summon the persons whose names are drawn or designated, as provided in the last two sections, who must attend and serve as if they had been originally summoned as grand jurors, and are subject to the same penalties, unless excused or discharged by the court.

§ 235. **When new grand jury may be summoned for the same court.**—If a crime be committed during the sitting of the court, after the discharge of the grand jury, the court may, in its discretion, direct an order to be entered, that the sheriff summon another grand jury; and the same shall be summoned, in the manner prescribed for grand juries in general.

§ 236. **Grand jury, how drawn when more than a sufficient number attends.**—When more than twenty-three persons summoned as grand jurors attend for service, the clerk must prepare separate ballots containing their names, folded as nearly alike as possible, and so that the names can not be seen, and must deposit them in a box. He must then openly draw out of the box twenty-three ballots; and the persons whose names are drawn constitute the grand jury. The names remaining in the box, as well as those drawn, must be returned to the box of drawn grand jurors.

See notes under section 224, *ante*.

It is error to swear twenty-four grand-jurors. *People v. King*, 2 Caines, 298.

A grand jury ought not to consist of more than twenty-three persons. *Conkey v. People*, 1 Abb. App. Dec., 423; 5 Park., 31.

§ 237. **Individual grand juror, who may challenge.**—The district attorney in behalf of the people, and also a person held to answer a charge for crime, may challenge an individual grand juror.

Amended by chap. 279 of 1892.

This amendment prefixed to the original section the words "The district attorney in behalf of the people, and also."

§ 238. **Causes of discharge of the panel.**—There is no challenge allowed to the panel or to the array of the grand jury, but the

court may, in its discretion, at any time discharge the panel and order another to be summoned, for one or more of the following causes :

1. That the requisite number of ballots was not drawn from the grand jury box of the county ;
2. That notice of the drawing of the grand jury was not given ;
3. That the drawing was not had, in the presence of the officers designated by law ; and
4. That the drawing was not had, at least fourteen days before the court.

See notes under section, 361, *post*.

The cases of *People v. Duff*, and *People v. Fitzgerald*, 1 N. Y. Cr., 307, were reversed or overruled by 1 N. Y. Cr., 425.

**Intent.**—The power, conferred by this section, is in the general interest of public justice. *People v. Hooghkerk*, 96 N. Y., 159.

This section is intended to confer upon the court a discretionary power to discharge the panel, to be exercised upon its own volition, and in view of all the circumstances. *Id.*

This section leaves it to the discretion of the court to discharge the panel. *People v. Petrea*, 30 Hun, 103.

**No challenge to array.**—No challenge to the array of a grand jury was allowed under the Revised Statutes. (2 R. S., 724, sections 27, 28.) *Carpenter v. People*, 64 N. Y., 483.

No challenge to the array of grand jurors is allowed. *People v. Petrea*, 30 Hun, 102.

This section prohibits any challenge to the panel or array of grand jurors, but the court is authorized, in its discretion, for certain causes stated, to discharge the panel and order another to be summoned. *People v. Petrea*, 92 N. Y., 144 ; 1 N. Y. Cr., 244.

Challenges or objections to the panel or array of the grand jury can no longer be taken. *People v. Fitzpatrick*, 66 How., 23 ; 30 Hun, 493 ; 1 N. Y. Cr., 425.

The right of a defendant to challenge the body of the grand jury, because irregularly or defectively constituted, no longer exists. *People v. Hooghkerk*, 96 N. Y., 159.

**Before indictment.**—This and the following section relate to proceedings to be taken before indictment. *People v. Petrea*, 92 N. Y., 144.

This section has application to proceedings to be taken before indictment found. *People v. Petrea*, 30 Hun, 112. The proceedings permissible to the accused after indictment are provided in subsequent sections. *Id.*

A challenge to the panel or array of the grand jury is an objection made to the swearing in and impaneling of the grand jury, not an objection made after it is sworn in and impaneled. *People v. Fitzpatrick*, 66 How., 23 ; 30 Hun, 493 ; 1 N. Y. Cr., 425.

**When not taken.**—A challenge to the panel of grand jury, on the ground that the act, under which the commissioners were appointed, was unconstitutional, cannot be sustained. *Thompson v. People*, 6 Hun, 135.

Under the Code of Criminal Procedure, a defendant, held to answer a criminal charge, may not, on the return of the grand jury list and before indictment, take the objection that the law, under which the grand jury was selected, is unconstitutional. *People v. Hooghkerk*, 96 N. Y., 158.

**No partial discharge.**—A grand jury cannot be discharged as to some, and remain as to others, of the persons indicted. *People v. Fitzpatrick*, 66 How., 21 ; 30 Hun, 493 ; 1 N. Y. Cr., 425.

**Another to be summoned.**—This section requires, on discharging a grand jury, the summoning of another. *People v. Fitzpatrick*, 30 Hun, 496 ; 1 N. Y. Cr., 425 ; 66 How., 23.

§ 239. **Causes for challenge.**—A challenge to an individual grand juror may be interposed, for one or more of the following causes, and for these only :

at he is a minor.

at he is an alien.

at he is insane.

at he is the prosecutor upon a charge against the de-

at he is a witness for either party, if the court is satisfied by the exercise of a sound discretion that he cannot act impartially and without prejudice to the substantial rights of the party challenging.

at a state of mind exists on his part, in reference to the party, either party, which satisfies the court, in the exercise of a sound discretion that he cannot act impartially and without prejudice to the substantial rights of the party challenging.

added by chap. 279 of 1892.

amendment substituted subdivision 5 of the present section for same of the original section.

added under preceding section.

—By this section a grand juror may be challenged as a minor, an alien, or as prejudiced and not impartial toward the party challenged. *People ex rel. Munsell v. Court, etc.*, 101 N. Y., 251.

This provision was intended to secure to an accused person the right to challenge a panel of one or more particular grand jurors who may be objected to on account of bias, or other specified causes. *People v. Hooghkerk*, 96 N. Y.,

the right conferred by this section, is in the particular and special case of the person accused. *Id.*

**Challenges to individual jurors.**—This section provides for challenges to individual jurors. *People v. Petrea*, 92 N. Y., 145 ; 1 N. Y. Cr., 244.

Under no provision of law, which permits a defendant to raise any objection to the grand jury, except an objection to individual jurors under this section. *People v. Hooghkerk*, 96 N. Y., 159.

When a peremptory challenge is found, there can be no challenge to the grand jury indictment. *People v. Petrea*, 30 Hun, 102 ; see section 242, *post*.

**Manner of taking and trying the challenges.**—Challenges to individual grand jurors may be oral, and must be entered in the minutes and tried by the court in the same manner as challenges in the case of a trial jury.

Section 1180 of Code of Civil Procedure.

Section 1180 of 1873, which provided that all challenges of jurors, both in civil and criminal cases, shall be tried and determined by the court alone, was sustained in *People v. Twiss*, 6 Hun, 140, to be constitutional and valid. See *People v. Tweed*, 11 Id., 197.

**Decision upon the challenge.**—The court must allow or overrule the challenge, and the clerk must enter its decision in the minutes.

**Effect of allowing same.**—If a challenge to an individual grand juror be allowed for any of the causes mentioned in subdivisions one, two or three of section 239, he must be discharged from the grand jury. If such challenge be allowed for any of the causes mentioned in subdivisions four, five or six of section 239, the juror challenged cannot be present or take any part in the consideration of the charge against the defendant mentioned in or who interposed the challenge, or in the deliberations or vote of the grand jury thereon.



Amended by chap. 279 of 1892.

This amendment inserted in the original section after the word "deliberation" the words "or vote."

The case of *People v. Bork*, 31 Hun, 374 ; 2 N. Y. Cr., 78, was reversed in 96 N. Y., 188 ; 2 N. Y. Cr., 177.

A violation of this section cannot subject the misconduct of a juror to punishment, under subd. 3, section 8 of the Code of Civil Procedure. *People ex rel. Munsell v. Court, etc.*, 36 Hun, 282.

§ 243. **Violation of last section.**—The grand jury must inform the court of a violation of the last section, and the same is punishable by the court as a contempt.

The case of *People v. Bork*, 31 Hun, 374 ; 2 N. Y. Cr., 78, was reversed in 96 N. Y., 188 ; 2 N. Y. Cr., 177.

**Contempt.**—The provisions of this section include no other proceedings or cases than may be made out for the punishment of a grand juror for misconduct. *People ex rel. Munsell v. Court, etc.*, 36 Hun, 280 ; 3 N. Y. Cr., 216.

A grand juror, who serves in violation of the last section, is guilty of a contempt of court. *People ex rel. Munsell v. Court, etc.*, 101 N. Y., 251 ; 4 N. Y. Cr., 75 ; 3 How. N. S., 418, aff'g 36 Hun, 280 ; 3 N. Y. Cr., 216.

A violation of this section is not called or made a criminal or public contempt, but it belongs to the class of private contempts occurring in a criminal action. *Id.*

§ 244. **Appointment of foreman.**—From the persons summoned to serve as grand jurors, and appearing, the court must appoint a foreman. The court must also appoint a foreman when a person already appointed is discharged or excused before the grand jury are dismissed.

§ 245. **Oath of the foreman and the other grand jurors.**—The following oath must be administered to the foreman of the grand jury: "You, as foreman of this grand jury, shall diligently inquire and true presentment make, of all such matters and things as shall be given you in charge ; the counsel of the people of this state, your fellows' and your own you shall keep secret ; you shall present no person from envy, hatred or malice ; nor shall you leave any one unrepresented through fear, favor, affection or reward, or hope thereof ; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God !"

As to presumption that grand jury was sworn, see *People v. Rose*, 23 St. Rep., 390 ; 52 Hun, 33.

§ 246. **Oath of the foreman and the other grand jurors.**—The following oath must be immediately thereupon administered to the other grand jurors present: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part. So help you God !"

§ 247. **Oath of the foreman and the other grand jurors.**—If, after the foreman and the grand jurors then present are sworn, any other grand juror appear, and be admitted as such, the oath, as prescribed in section 245, must be administered to him, commencing, "You, as one of this grand jury," and so on, to the end.



The reference to this section in *People v. Crotty*, 9 N. Y. Supp., 989, should be to section 547, *post*.

§ 248. **Charge of court to grand jury.**—The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court must read to them the provisions of this Code, from section 252 to section 267, both inclusive, or give them a copy thereof, and must give them such information as it may seem proper as to the nature of their duties, and any charges and crimes returned to the court, or likely to come before the grand jury. The court need not, however, charge them, respecting violations of a particular statute, excepting when so requested by the district-attorney.

Amended by chap. 279 of 1892.

This amendment added to the original section the words “excepting when so requested by the district attorney.”

The reference to this section in *People v. Crotty*, 9 N. Y. Supp., 989, should be to section 548, *post*.

§ 249. **Retirement of the grand jury.**—The grand jury must when retire to a private room and inquire into the offenses cognizable by them.

The grand jury is required, after the court has advised it as to its duties, to retire to a private room, and it may there remain until it is through with its inquiries, or until the final adjournment of the court. *People ex rel. Pickard v. Sheriff, etc.*, 11 Civ. Pro., 184.

§ 250. **Appointment of a clerk, and his duties.**—The grand jury must appoint one of their number as clerk, who is to preserve minutes of their proceedings (except of the votes of the individual members on a presentment or indictment), and of the evidence given before them.

§ 251. **Discharge of the grand jury.**—The grand jury, on the completion of the business before them, must be discharged by the court; but whether the business be completed or not, they are discharged by the final adjournment of the court.

**Adjournment.**—The grand jury is not adjourned by a temporary adjournment or recess of the court. *People ex rel. Pickard v. Sheriff, etc.*, 11 Civ. Pro., 184.

When a body of men have been sworn and impaneled as a grand jury and as such have found indictments, it is manifest that they may be discharged as having finished their labors. *People v. Fitzpatrick*, 80 Hun, 16; 66 How., 21. But they cannot be discharged retroactively, as of a date prior to their action as a grand jury. *Id.*

§ 252. **Power of grand jury to inquire into crimes, etc.**—The grand jury has power, and it is their duty, to inquire into all crimes committed or triable in the county, and to present them to the court.

The grand jury is clothed with power to determine the facts and the law; and there is no way to review its determination, unless it is by motion to quash the indictment or in arrest of judgment. *People v. Dimick*, 11 St. Rep., 739; 107 N. Y., 13, 34; *People v. Brickner*, 8 N. Y. Cr., 219, 15 N. Y. Supp., 580.

**Corporations.**—The power conferred by this section, exists, as well in the case of a corporation, as of an individual charged with a criminal offense, and is not in any way affected by the provisions of sections 675 to 682 inclu-

sive of the Code of Criminal Procedure. *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 191 ; 5 N. Y. Supp., 20.

**Pending examination.**—An indictment will not be quashed on the ground that it was found and presented by the grand jury pending an examination of the same charge before a magistrate. *People v. Heffernan*, 5 Park., 393 ; *People v. Horton*, 4 id., 222 ; *People v. Hyler*, 2 id., 566 ; *French v. People*, 3 id., 114 ; *People v. Page*, id., 600.

§ 253. **Foreman may administer oaths.**—The foreman may administer an oath, to any witness appearing before the grand jury.

§ 254. **Definition of an indictment.**—An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a crime.

See section 275, *post*.

See *People v. Dunn*, 25 St. Rep., 460 ; 53 Hun, 384 ; 7 N. Y. Cr., 184 ; 6 N. Y. Supp., 807 ; *People v. Stark*, 35 St. Rep., 155 ; 59 Hun, 58 ; 12 N. Y. Supp., 692 ; *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 509 ; 8 N. Y. Cr., 269 ; *People v. Jeffery*, 38 St. Rep., 315 ; 14 N. Y. Supp., 839.

§ 255. **Evidence receivable before the grand jury.**—In the investigation of a charge, for the purpose of indictment, the grand jury can receive no other evidence than,

1. Such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence ; or
2. The deposition of a witness, in the cases mentioned in the third subdivision of section 8.

See notes under next section.

The legislature has, by this section, limited the way in which legal evidence may be given. *People v. Brickner*, 8 N. Y. Cr., 221 ; 15 N. Y. Supp., 530.

See *People v. Price*, 6 N. Y. Cr., 144 ; 2 N. Y. Supp., 416.

§ 256. **Evidence receivable before the grand jury.**—The grand jury can receive none but legal evidence.

**Legal evidence.**—By this section, the legislature has required the grand jury to receive none but legal evidence. *People v. Brickner*, 8 N. Y. Cr., 221 ; 15 N. Y. Supp., 530, 531.

The district attorney should take care that no evidence is received by the grand jury which will not be admissible on the trial. *People v. Sellick*, 4 N. Y. Cr., 334.

An indictment found in a case which the grand jury had been requested to investigate, and after various unofficial volunteer statements had been made to the jurors regarding the facts, should be set aside. *Id.*

An indictment, found upon the testimony of a physician as to privileged communications between himself and his patient, will be set aside. *Id.*

An indictment was quashed, in *People v. Briggs*, 60 How., 17, for the reason that the wife of the defendant was permitted to testify against him, before the grand jury, contrary to law.

The placing of the depositions, taken before the magistrate in an examination before him, and of the examination of the defendant, taken in accordance with the statute, in the hands of the grand jury, will not vitiate the indictment. *Hope v. People*, 83 N. Y., 423.

The situation of a person charged with committing a crime, which is under investigation before the grand jury, is similar to that he would occupy, if under investigation before a committing magistrate. *People v. Haines*, 6 N. Y. Cr., 103. He should be informed of the charge against him, and of his right to the aid of counsel, and, if he has no counsel, must have reasonable time to send and obtain one. *Id.* He must be advised of his right to make a statement in relation to the charge against him, or that he may waive making one, and that his waiver cannot be used against him or

**Id.** If he volunteers to make a statement, and not otherwise, the coroner or grand jury is limited to asking certain specified questions; his statement must be taken without oath. *Id.*  
*People v. Price*, 6 N. Y. Cr., 144 ; 2 N. Y. Supp., 416.

**Grand jury not bound to hear evidence for the defendant may order explanatory evidence to be produced.**—Grand jury is not bound to hear evidence for the defendant; it is their duty to weigh all the evidence submitted to them; when they have reason to believe that other evidence, within their reach, will explain away the charge, they should order such evidence to be produced; and for that purpose, require the district attorney to issue process for the witness.

Power of the grand jury to cause explanatory evidence to be produced is exercised with the limitation that the accused person should not be required to attend as a witness before them. *People v. Singer*, 5 N. Y.

**Degree of evidence, to warrant an indictment.**—The grand jury ought to find an indictment, when all the evidence taken together, is such as in their judgment would, if true and uncontradicted, warrant a conviction by the jury.

**Quantity of evidence.**—The grand jury have no power to find an indictment without evidence. *People v. Clark*, 8 N. Y. Cr., 178.

The legislature has forbidden the grand jury to indict without evidence which makes the crime so that a trial jury would convict. *People v. Brickman*, Cr., 221 ; 15 N. Y. Supp., 530, 531. This is evidence that proves beyond a reasonable doubt. *Id.*

Testimony given before a grand jury should be sufficient in degree to show the defendant guilty, if unexplained; and upon less testimony the grand jury should never find a bill. *People v. Baker*, 10 How., 567.

Grand jury ought not to find an indictment unless the testimony of the accused, *ex parte* and unexplained, is sufficient to convict. *People v. Price*, 6 N. Y. Cr., 143 ; 2 N. Y. Supp., 416 ; *People v. Hyler*, 2

**Grand jurors must declare their knowledge as to commission of a crime.**—If a member of the grand jury know, or has reason to believe, that a crime has been committed, which is committed in the county, he must declare the same to his fellow jurors; and they must thereupon investigate the same.

**Grand jury must inquire as to persons imprisoned without criminal charges and not indicted; the condition of public prisons; and the misconduct of public officers.**—The grand jury must inquire,

1. the case of every person imprisoned in the jail of the county on a criminal charge, and not indicted;

2. the condition and management of the public prisons in the county; and

3. the willful and corrupt misconduct in office, of public officers of every description, in the county.

**Grand jury entitled to access to public prisons, and to examine public records.**—They are also entitled to free ac-

cess, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records in the county.

§ 262. When and from whom they may ask advice, and who may be present during their sessions.—The grand jury may in any case ask the advice of any judge of the court, or of the district attorney of the county.

§ 263. When and from whom they may ask advice, and who may be present during their sessions.—Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter, and of issuing subpoenas or other process for witnesses.

§ 264. When and from whom they may ask advice, and who may be present during their sessions.—The district attorney of the county, an assistant district attorney, or in counties having no assistant district attorney an attorney appointed by a justice of the supreme court upon the nomination of the district attorney to attend upon the grand jury, must be allowed, at all times, to appear before the grand jury, at his request, for the purpose of giving information relative to any matter before them, but no district attorney, officer or other person, shall be present with the grand jury during the expression of their opinions, or the giving of their votes upon any matter.

Am'd ch. 286, Laws 1905. Takes effect Sept. 1, 1905.

§ 265. Secrets of the grand jury to be kept.—Every member of the grand jury must keep secret whatever he himself, or any other grand juror may have said, or in what manner he, or any other grand juror, may have voted, on a matter before them.

§ 266. Grand jury, when bound to disclose the testimony of a witness.—A member of the grand jury may, however, be required by any court, to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person upon a charge against him for perjury in giving his testimony, or upon his trial therefor.

§ 267. Grand juror not to be questioned for his conduct as such.—A grand juror cannot be questioned for anything he may say, or any vote he may give, in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors.

## TITLE V.

### OF THE INDICTMENT.

- CHAPTER**
- I. Finding and presentation of the indictment.
  - II. Form of the indictment.
  - III. Amendment of the indictment.
  - IV. Arraignment of the defendant.
  - V. Setting aside the indictment.
  - VI. Demurrer.
  - VII. Plea.
  - VIII. Removal of the action before trial.

## CHAPTER I.

### FINDING AND PRESENTATION OF THE INDICTMENT.

- SECTION 268.** Indictment must be found by twelve grand jurors, and indorsed by foreman.
269. If not so found, depositions, etc., must be returned to the court, with dismissal indorsed.
270. Effect of dismissal.
271. Names of witnesses must be indorsed upon indictment.
272. Indictment.

§ 268. Indictment must be found by twelve jurors, and indorsed by foreman.—An indictment can not be found without the concurrence of at least twelve grand jurors. When so found, it must be indorsed, “A true bill,” and the indorsement must be signed by the foreman of the grand jury.

See *People v. Petrea*, 30 Hun, 101.

See *People v. Clements*, 5 N. Y. Cr., 292.

**Practice.**—The practice is for the district attorney to inform the jury of the charge to be investigated, and, if a bill is found, to prepare an indictment such as the jury conclude to present. *People ex rel. Pickard v. Sheriff, etc.*, 11 Civ. Pro., 185.

**Indorsement.**—The certificate of the foreman of a grand jury that it is a true bill, indorsed upon an indictment, is no part of such indictment, but simply the statutory mode of authenticating it. *Brotherton v. People*, 75 N. Y., 159.

Sufficient indorsement of indictment. *People v. Peck*, 2 N. Y. Cr., 315 ; 18 W. Dig., 527.

**Before grand jury.**—A person, who is charged with the commission of a crime which is under investigation before a grand jury, should be treated in all respects as is required by sections 188, 189, 196 and 198 of the Code of Criminal Procedure. *People v. Haines*, 6 N. Y. Cr., 103.

**When found.**—An indictment for a felony may be found, while an examination of the prisoner is pending before a magistrate. *People ex rel. Phelps v. Westbrook*, 12 Hun, 646 ; *People v. Horton*, 4 Park., 222 ; *People v. Heffernan*, 5 id., 893. See *People v. Hyler*, 2 id., 566 ; *French v. People*, 3 id., 114 ; *People v. Paige*, id., 600.

A discharge by the examining magistrate on the ground that, in his opinion, there was not sufficient reason to believe him guilty, will in no degree affect the jurisdiction and right of the grand jury to investigate the charge and pass upon it by finding an indictment for the alleged offense. *People ex rel. Phelps v. Westbrook, ante.*

An indictment found during a recess of the court is not void by reason of that fact. *People ex rel. Pickard v. Sheriff, etc.*, 11 Civ. Pro., 178, 185.

**Reconsideration.**—The grand jury may, during the same session, reconsider its own action. *Id.*

Where it passes upon a charge and votes no bill, and subsequently, without leaving the court, reconsiders the same charge and finds an indictment, the indictment is not void. *Id.*

§ 269. If not so found, deposition, etc., must be returned to the court, with dismissal indorsed.—If twelve grand jurors do not concur in finding an indictment, the depositions (and statement, if any), transmitted to them, must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed.

The grand jurors may be examined, in support of a motion to quash an indictment, to prove that twelve of them did not concur in finding the indictment. *People v. Shattuck*, 6 Abb. N. C., 38.

§ 270. Effect of dismissal.—The dismissal of the charge does not, however, prevent its being again submitted to a grand jury, as often as the court may so direct. But without such direction, it can not be again submitted.

**Resubmission.**—A criminal charge may, under the provisions of this section, be resubmitted to the grand jury as often as the court may so direct. *People v. Lynch*, 20 W. Dig., 9.

In case the grand jury dismiss a charge, the same cannot be presented again to the grand jury, without the direction of the court. *People v. Clements*, 5 N. Y. Cr., 297.

The legislature left it to the court to say whether a criminal charge, which had not been sustained before a grand jury, or before the court, should or should not be any further prosecuted. *Id.*

The grand jury, after the failure of a previous jury to find an indictment for an assault, may, after the death of the injured party and without leave of the court first obtained, find an indictment for manslaughter in the second degree, arising out of the same acts. *People v. Warren*, 14 St. Rep., 34 ; 109 N. Y., 615 ; 2 Silv. (Ct. App.), 21.

This section is not intended to apply to the same, but has reference to the future, grand jury. *People ex rel. Pickard v. Sheriff*, etc., 11 Civ. Pro., 185.

But if the statute contemplates a resubmission of a charge to the same grand jury, a resubmission without the direction of the court will not be aught but an irregularity, which will not avoid an indictment found. *Id.*

**Notice.**—This section does not prescribe or contemplate that a person, charged before a grand jury, shall have notice of an application to the court for an order directing the charge to be again submitted after once being dismissed. *Id.*

If an order of resubmission of a charge to the grand jury is granted without notice to the defendant, and an indictment and warrant issued, such indictment and warrant are still due process of law. *Id.*

§ 271. Names of witnesses must be indorsed upon indictment.—When an indictment is found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, as provided in section 255, must be indorsed upon the indictment before it is presented to the court. If not so indorsed, the court must, upon the application of the defendant, at any time before trial, direct the names of such witnesses as they appear upon the minutes of the grand jury to be furnished to him forthwith.

See *People v. Richmond*, 5 N. Y. Cr., 99.



**Names of witnesses.**—Under the requirements of this section, the district attorney is required to endorse upon the indictment the names of the witnesses examined, or whose depositions have been read, before the grand jury. *People v. Jaehne*, 4 N. Y. Cr., 166.

**Copy of evidence.**—A copy of the evidence before the grand jury, upon which indictments were found should be furnished the accused, when necessity therefor is shown to enable him to prepare for trial. *People v. Bellows*, 1 How. N. S., 149 ; the matter is one resting in the discretion of the court. *Id.*

The defendant is not entitled, as a matter of right, to the evidence taken before the grand jury, or to an inspection of their minutes, except for a special reason, such as to move to set aside the indictment. *People v. Jaehne*, 4 N. Y. Cr., 161.

A copy of the minutes of the grand jury may, in the discretion of the court, be ordered to be furnished to the accused when necessary to enable him to prepare for trial. *People v. Bellows*, 2 N. Y. Cr., 12 ; 1 How. N. S., 151.

A refusal of the court to compel the district attorney to furnish to the defendant's counsel all the evidence before the grand jury is not error. *Eighmy v. People*, 79 N. Y., 546. It is a matter within the discretion of the court. *Id.*

**Bill of particulars.**—Where the statements in an indictment are sufficiently definite to advise the defendant of the charge against him, he is not entitled to any further particulars. *People v. Bellows*, 1 How. N. S., 149. But where the counts for an offense, such as grand larceny, are so general and embrace so many subjects of larceny that they do not advise the defendant, with sufficient distinctness, of the charge in each against him, the sums stolen, upon the proof of which the people rely, should be particularly stated so that the defendant may be advised of the precise charges under the counts relating to the crime, and thus be enabled to prepare to meet them. *Id.*

§ 272. **Indictment.**—An indictment, when found by the grand jury, as prescribed in section 268, must be presented by their foreman, in their presence, to the court, and must be filed with the clerk, and remain in his office as a public record, but it must not be shown to any person other than a public officer, until the defendant has been arrested or has appeared.

Amended by chap. 360 of 1882.

This amendment added a clause forbidding a disclosure of the indictment until after arrest or appearance of defendant.

See section 313, *post*.

See *People v. Petrea*, 30 Hun, 101 ; *People v. Menken*, 36 *id.*, 90 ; 3 N. Y. Cr., 239 ; *People v. Clements*, 5 *id.*, 292.

The provision of this section, requiring the filing of an indictment, is directory. *Dawson v. People*, 25 N. Y., 399. The omission to file it, it seems, does not avoid the indictment. *Id.*

## CHAPTER II.

### FORM OF THE INDICTMENT.

**SECTION 273.** Forms of pleading heretofore existing, abolished.

274. First pleading for the people is indictment.

275. Indictment, what to contain.

276. Form of indictment.

277. When defendant is indicted by fictitious or erroneous name, his true name may be inserted in subsequent proceedings.

278. Indictment must charge but one crime and in one form, except where it may be committed by different means.

279. Separate counts.

280. Statement as to time when crime was committed.



- SECTION 281.** Statement as to person injured or intended to be injured.  
**282.** Construction of words used in indictment.  
**283.** Words used in a statute need not be strictly pursued.  
**284.** Indictment when sufficient.  
**285.** Indictment not insufficient for defect of form, not tending to prejudice defendant.  
**286.** Presumptions of law and matters of which judicial notice is taken, need not be stated.  
**287.** Pleading a judgment or determination of, or proceeding before a court or officer of special jurisdiction.  
**288.** Private statute, how pleaded.  
**289.** Pleading in indictment for libel.  
**290.** Pleading in indictment for forgery, where the instrument has been destroyed, or withheld by defendant.  
**291.** Pleading in indictment for perjury or subornation of perjury.  
**292.** Upon indictment against several, one or more may be convicted or acquitted.

**§ 273. Forms of pleading heretofore existing abolished.**—All the forms of pleading in criminal actions, heretofore existing, are abolished; and hereafter, the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code.

See notes under section 332, *post*.

The case of *People v. Richards*, 7 St. Rep., 656; 44 Hun, 286; 5 N. Y. Cr., 355, was reversed in 13 St. Rep., 515; 108 N. Y., 187.

**Object.**—It was not intended, by this section, to obliterate forms of expression, or the judicial construction theretofore given to the language employed in criminal pleading. *People v. Conroy*, 97 N. Y., 69; 2 N. Y. Cr., 565. Its true office was to abrogate the technical rules which formerly governed the construction of criminal pleadings, and to substitute therefor the simplicity and liberality of interpretation presented by the new system of criminal procedure. *Id.*

It was the intention of the legislature to prescribe a more liberal and flexible system of pleadings in criminal cases than that which obtained under the common law, or was in vogue in this state prior to this code. *People v. Menken*, 36 Hun, 95; 3 N. Y. Cr., 237.

By this code, all forms of pleading in criminal action before existing were abolished. *People v. Laurence*, 51 St. Rep., 288; 137 N. Y., 521.

**Test of sufficiency.**—The sufficiency of an indictment is not now to be determined by considering and applying the technical principles of the common law. *People v. Reavey*, 38 Hun, 420; 4 N. Y. Cr., 14. They have been, in a great measure, superseded by the enactment of this code. *Id.*

The indictment must be tested by the rules prescribed by sections 275 and 276, *post*, to determine whether it substantially conforms to their requirements. *People v. Gregg*, 35 St. Rep., 758; 59 Hun, 110; 13 N. Y. Supp., 115.

The provisions of this section do not leave the pleader in criminal actions without well-defined rules by which he must be governed, and the sufficiency of his pleading determined. *Id.*

See *People v. Rugg*, 98 N. Y., 537, 548; 3 N. Y. Cr., 179; *People v. Wilson*, 15 St. Rep., 503; 109 N. Y., 351; *People v. Dumar*, 11 St. Rep., 19; 106 N. Y., 509; 8 N. Y. Cr., 269.

*People v. Laurence*, 51 St. Rep., 288; 137 N. Y., 521.

**§ 274. First pleading for the people is indictment.**—The first pleading on the part of the people is the indictment.

See *People v. Dumar*, 11 St. Rep., 19; 106 N. Y., 509; 8 N. Y. Cr., 269.

**§ 275. Indictment, what to contain.**—The indictment must contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

plain and concise statement of the act constituting the offense without unnecessary repetition.

*People v. Dimick*, 3 St. Rep., 398 ; 41 Hun, 616 ; 5 N.Y. Cr., reversed in 11 St. Rep., 739 ; 107 N. Y., 18.

*People v. Dumar*, 3 St. Rep., 490 ; 42 Hun, 83 ; 5 N. Y. Cr., reversed in 11 St. Rep., 19 ; 106 N. Y., 502 ; 8 N. Y. Cr., 269.

**Code.**—An indictment, found before this Code took effect, is to stand without regard to its provisions. *Jefferson v. People*, 101 N. Y., Cr., 575.

**Essentials.**—The requisites of a good indictment are prescribed by this Code. *People v. Conroy*, 97 N. Y., 68 ; 2 N. Y. Cr., 565.

An indictment must show, on its face, jurisdiction of the offense in the court by which it was found. *People v. Horton*, 42 St. Rep., 588 ; 62

St. Rep., 521. A requisite of an indictment, besides the formal parts, is that it contain "a plain and concise statement of the act constituting the offense without unnecessary repetition." *People v. Laurence*, 51 St. Rep., 521.

An indictment is required to contain in the description of the crime which has been committed a concise statement of it without unnecessary repetition. *People v. Buddensieck*, 4 N. Y. Cr., 251.

Averment of the facts, constituting an alleged crime, is essential to a valid indictment. *People v. Barber*, 15 St. Rep., 601 ; 48 Hun, 200.

Particulars, requisite to show the exact character and nature of the offense, must be stated. *People v. Stark*, 35 St. Rep., 150 ; 59 Hun, 55 ; 100 N. Y. Supp., 691.

An indictment, which does not accurately and clearly allege all the ingredients of the offense, so as to bring the accused within the meaning and intent of the statute defining the offense, is insufficient. *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 512 ; *People v. Stark*, 35 St. Rep., 150 ; 59 Hun, 55 ; 100 N. Y. Supp., 691.

An indictment must not only charge the crime, but state the act constituting the crime. *People v. Dunn*, 25 St. Rep., 460 ; 7 N. Y. Cr., 184 ; 53 N. Y. Supp., 807.

Article 40 of Criminal Procedure in sections 275, 276, 284 and 285, provides that the sufficiency of an indictment may be tested. *People v. Conroy*, 97 N. Y., 68 ; 107 N. Y., 13, 29.

An indictment is fatally defective, where it charges a crime against the accused which is not defined by the present criminal statutes of the state. *People v. Jeffrey*, 38 St. Rep., 313.

An indictment, which is insufficient to charge the crime, or to state the act constituting the crime, is necessarily fatal to the indictment. *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 509.

**Indictment.**—The manifest intention of the legislature in requiring the accused to state an act constituting the crime was, among other things, that the accused should learn from it what he was called upon to meet. An indictment, which is sufficient to inform the defendant of the nature of the accusation against him, to enable him to prepare his defense, to leave him no doubt as to the act for which it should inflict punishment, to admit of conviction, and to admit of the record as a bar to a second indictment for the same offense, and in which none of the allegations are contradictory or incongruous, fully accomplishes its purpose. *People v. Conroy*, 97 N. Y., 68 ; 107 N. Y., 13, 29.

An indictment is good if it contains sufficient averment to inform defendant of the accusation against him so as to enable him to prepare his defense, and to admit of the record as a bar to a second prosecution for the same offense. *People v. Martin*, 2 N. Y. Cr., 51 ; *People v. Conroy*, 97 N. Y., 68 ; 107 N. Y., 13, 29.

The statements of an indictment are sufficiently definite to advise the accused of the charge made against him, he is not entitled to any further particulars. *People v. Bellows*, 2 N. Y. Cr., 12 ; 1 How. N. S. 151.

Counts are so general and embrace so many subjects that they do not mislead him, with sufficient distinctness, of the charge in each made.

against him, the particulars as to these charges should be given to him so that he may prepare to meet them. *Id.*

Sections 275, 276, 284 and 285 of the Code of Criminal Procedure provide the tests for determining the sufficiency of an indictment. *People v. Ostrander*, 45 St. Rep., 559; 64 Hun, 335; 19 N. Y. Supp., 325.

An indictment is sufficient if it contains the title to the action, specifying the name of the court to which it is presented and the names of the parties, and a plain and concise statement of the act constituting the crime. *People v. Johnson*, 5 St. Rep., 606; 104 N. Y., 216.

The time when and the place where the court, at which the indictment was found, was held, the name of the justice who held the court, and the names of the grand jurors, are not now required to be stated. *People v. Wilson*, 15 St. Rep., 503; 109 N. Y., 351.

Upon an indictment alleging that the defendant committed the crime named therein, he may be convicted upon proof that, though absent, he advised and procured its commission. *People v. Bliven*, 20 St. Rep., 490; 112 N. Y., 79; 6 N. Y. Cr., 375.

Surplusage does not vitiate an indictment. *People v. Laurence*, 51 St. Rep., 288; 137 N. Y., 517. That it contains more than is necessary, is not a legal ground for an attack upon it. *Id.*

This section prescribes what the indictment must contain, while the following section sets forth what may be substantially the form of the indictment. *People v. Sullivan*, 4 N. Y. Cr., 197.

The common law doctrine as to repugnant allegations still obtains under this section. *People v. Wise*, 3 N. Y. Cr., 305; 2 How. N. S., 98. If there are inconsistent or incongruous allegations in a count, the crime cannot be said to be stated plainly, or at all. *Id.*

An indictment, which shows that the offense was committed more than five years before it was found and filed is good, on demurrer on the ground that it contains matter which, if true, will constitute a legal bar to the prosecution. *People v. Durrin*, 2 N. Y. Cr. 328.

**Statute.**—An indictment, which charges the offense as the statute defines it, is sufficient. *People v. Kelly*, 3 N. Y. Cr., 274.

There are no exceptions to the rule that an indictment under a statute must state all the facts and circumstances which constitute the statutory offense, so as to bring the accused perfectly within the provisions of the statute. *People v. Stark*, 35 St. Rep., 150; 59 Hun, 55; *People v. Dumar*, 11 St. Rep., 19; 106 N. Y., 505; *People v. Burns*, 25 St. Rep., 99; 7 N. Y. Cr., 96; 6 N. Y. Supp., 611, 613.

An indictment is good if it follows the language of the statute defining the crime. *People v. Kelly*, 3 N. Y. Cr., 272.

In framing an indictment on a statute, all the circumstances which constitute the definition of the offense in the statute, so as to bring the accused precisely within it, must be stated. *People v. Weldon*, 20 St. Rep., 112; 111 N. Y., 574; *Eckhardt v. People*, 83 N. Y., 462; *People v. West*, 8 St. Rep., 713; 106 *id.*, 293. But no other description of the thing, in which the offense was committed, than that contained in the statute itself, is necessary to be stated. *Id.*

An indictment, so far as it charges the offense substantially in the language of the statute, must, in that respect, be regarded sufficient. *People v. Burns*, 25 St. Rep., 99; 53 Hun, 276; 7 N. Y. Cr., 96; 6 N. Y. Supp., 611. *People v. West*, 8 St. Rep., 713; 106 N. Y., 293; *People v. Taylor*, 8 Denio, 92.

An indictment, which charges the crime in the language of the statute creating and defining it, is sufficient under the rules provided for testing its sufficiency. *People v. Quinn*, 44 St. Rep., 921; 18 N. Y. Supp., 509; *People v. Weldon*, 20 St. Rep., 112; 111 N. Y., 569; *Phelps v. People*, 72 N. Y., 349; *Eckhardt v. People*, 83 *id.*, 462.

An indictment for larceny, *it seems*, is sufficient, without setting forth the false pretense, where it charges the larceny in the form used in common-law indictments. *People v. Laurence*, 51 St. Rep., 288; 137 N. Y., 517.

**Counts.**—The provisions of this section do not prohibit the charging of the offense in different forms in different counts. *People v. Rugg*, 98 N. Y.,

37 ; 3 N. Y. Cr., 179. Such an indictment is not subject to the objection that it charges more than one crime. *Id.*

There is no inhibition against using several counts, or against varying the language in different counts to meet any aspect of the evidence, which may be presented, tending to support the general charge against the defendant. *People v. Menken*, 36 Hun, 94 ; 3 N. Y. Cr., 233 ; 21 W. Dig., 552.

**Surplusage.**—Statements in an indictment, which are unnecessary in framing it and may be omitted, but which do not in any way mislead the defendant, may be regarded as surplusage. *People v. Everest*, 20 St. Rep., 56 ; 51 Hun, 24 ; 3 N. Y. Supp., 613.

**Joint.**—Joint wrongdoers may be indicted together. *People v. Kelly*, 3 N. Y. Cr., 273.

**Arson.**—As to what it was necessary to allege in an indictment for arson in the third degree under section 5 of § R. S., 2483, (7th ed.), see *Carncross v. People*, 1 N. Y. Cr., 518 ; 17 W. Dig., 384.

**Assault.**—It is a mere conclusion to allege, in an indictment for an assault, that the assaulted person was engaged in the execution of a lawful process. *People v. Cooper*, 3 N. Y. Cr., 119.

The facts, from which the legal conclusion follows, must be alleged. *Id.*

An indictment for assault in the second degree, under subd. 5, section 218 of the Penal Code, is insufficient, where it does not allege that the assault was committed with the intent therein specified. *Id.*

**Burglary.**—The indictment in this case was held sufficient to uphold a charge of the crime of burglary in the third degree. *People v. Bosworth*, 5 St. Rep., 517 ; 34 Hun, 77.

An indictment for burglary, charging the breaking into a store in which goods are kept for use, sale and deposit, is not sustained by evidence of breaking into an inner room of a building, not a store, but a mere business office, in which were kept furniture and articles for business use. *People v. Marks*, 4 Park., 153.

It is not necessary, *it seems*, in an indictment charging the crime of burglary that it shall specify the means used by the burglar to effect the entrance, or what particular property he intended to take when he had entered. *People v. Farrell*, 28 St. Rep., 43, 45 ; 5 Silv. (Sup. Ct.), 24 ; 8 N. Y. Supp., 231. It is sufficient if it charges that he, with criminal intent, broke and entered the premises. *Id.*

**Conspiracy.**—The indictment for conspiracy, in *People v. Everest*, 20 St. Rep., 459 ; 51 Hun, 219 ; 3 N. Y. Supp., 613, was held, after discarding some of the words and paragraphs as surplusage, to be, in the form and arrangement of the facts stated, in full compliance with the general rules of criminal pleading, as prescribed by this and the following section.

The indictment for conspiracy and coercion was, in this case, held good under this and the following section. *People v. Lenhardt*, 4 N. Y. Cr., 324.

**Cruelty to animals.**—Form of indictment of driver and conductor on city railroad car for overdriving and overloading, etc., horses, in violation of section 655 of Penal Code. *People v. Tinsdale*, 10 Abb. N. S., 374.

**Destruction of papers.**—An indictment, which charges, in substance, that a certain person was commissioner of labor statistics, that official papers were in his custody, and that he and another party willfully and unlawfully mutilated, obliterated and destroyed the same, is not demurrable. *People v. Peck*, 51 St. Rep., 475.

**Diluting milk.**—An indictment, which charges that the defendant brought to a certain cheese-factory, named and described therein, milk diluted with water, and that he sold the same to the individuals named therein, contrary to the provisions of section 3, chap. 202 of 1884, sufficiently complies with the requirements of this and the following section. *People v. Harris*, 28 St. Rep., 300 ; 4 Silv. (Sup. Ct.), 532, 537, note ; 7 N. Y. Supp., 744 ; *aff'd*, 33 St. Rep., 168.

The omission, in an indictment for a violation of section 1, chap. 183 of 1885, to allege to whom the milk was sold by the defendant, constitutes a material defect and is fatal. *People v. Burns*, 25 St. Rep., 99 ; 53 Hun, 278 ; *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 502.

**Excise law.**—An allegation in an indictment, under sections 1 and 2, chap. 163 of 1890, that the defendant did “willfully, fraudulently and in-

entionally engage in the manufacture and sale of spirituous liquors," is not a compliance with this section. *People v. Gregg*, 35 St. Rep., 758; 59 Hun, 107; 13 N. Y. Supp., 114.

**Fighting animals.**—The indictment for keeping a place where animals are fought, in *People v. Klock*, 16 St. Rep., 565; 48 Hun, 275, was held sufficient to answer the requirements of this section.

**Forcible entry.**—An indictment, charging that the defendant, with force and arms, unlawfully entered a dwelling-house named, and used force and violence in entering therein, is sufficient. *People v. Farrell*, 28 St. Rep., 43; 4 Silv. (Sup. Ct.), 532, 537, note; 7 N. Y. Supp., 774. The particular acts or means, which constitute the force or violence used, need not be specified. *Id.*

**Forgery.**—An indictment for forgery in the second degree, under section 511 of the Penal Code, must allege that the acts were committed with an intent to defraud. *People v. D'Argencour*, 32 Hun, 179.

The indictment for forging a mortgage, in *People v. Dewey*, 35 Hun, 308, was held to be sufficient.

**Fraudulently conveying property.**—For form of indictment for conveying property with intent to defraud creditors, see *Loomis v. People*, 19 Hun, 601.

**Homicide.**—The ordinary common-law counts, through all the mutations of the statutes defining the crime of murder, and discriminating between its different degrees, have been held sufficient as a pleading to sustain a conviction. *People v. Willett*, 1 St. Rep., 384; 102 N. Y., 251, 254; *People v. Conroy*, 97 *id.*, 62; 2 N. Y. Cr., 565.

An indictment, charging defendant with killing the deceased by means and in a manner to the jurors unknown, and in another count, charging that defendant, without a design to effect death, killed her while engaged in an attempt to commit rape, was held to be sufficient, in *People v. Wright*, 49 St. Rep., 70.

It is not necessary that the particular intent, with which a homicide was committed, should be set forth in the indictment. *People v. Conroy*, 97 N. Y., 68; 2 N. Y. Cr., 565.

The crime of murder is sufficiently charged, when alleged "with malice aforethought." *Id.*

It is undoubtedly the better way of pleading, to charge the crime of murder to have been committed with one of the several intents described in the Penal Code. *Id.* But, if it states all of the facts necessary to constitute the crime in the phraseology formerly in vogue, it is not bad, provided that the matters are communicated with sufficient clearness to fully inform the defendant of the charge which he is required to answer. *Id.*

The ordinary common law count in an indictment for murder is, notwithstanding the numerous statutory enactments, sufficient to sustain a conviction, where the murder was perpetrated while engaged in the commission of a felony. *People v. Willett*, 1 St. Rep., 384; 4 N. Y. Cr., 200.

A conviction, under a common law indictment of murder in the first degree, may be had in any case where the offense proved is brought within either of the statutory definitions. *Cox v. People*, 80 N. Y., 514.

An indictment for murder in the common law form is proper, and under it the prosecution may prove any case amounting to murder under the statute. *People v. Osmond*, 138 N. Y., 80.

Ever since the adoption of the Revised Statutes, it has been held, without interruption, that an indictment for murder in the common-law form was proper, and that under it the People might prove any case which amounted to murder under the statute; if the proof did not bring the case within some one of the statutory definitions of murder, it was the duty of the court to give proper instructions to that effect to the jury; and, unless it appeared that the court has failed so to do upon request, the appellate court would presume that the proper instructions were given. *People v. Osmond*, 51 St. Rep., 729; *Fitzgerald v. People*, 37 N. Y., 413; *People v. Conroy*, 97 N. Y., 62; *People v. Giblin*, 24 St. Rep., 592; 115 N. Y., 196.

**Larceny.**—For form of an indictment for petit larceny charged as a second offense, see *People v. Caesar*, 1 Park., 645.

The indictment for larceny, in *People v. Laurence*, 51 St. Rep., 284; 187 N. Y., 517, was held to be sufficient.



or form of an indictment for obtaining money by false pretenses, see *People v. Smith*, 5 Park., 490.

The indictment in *People v. Dimick*, 11 St. Rep., 739 ; 107 N. Y., 13, was sufficient to stand the test of this section.

Under an indictment for larceny, as described at common law and under Revised Statutes, no conviction can be had for larceny for obtaining property by false pretense. *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., ; *People v. Gottschalk*, 49 St. Rep., 728. But under such indictment, proof, tending to support or establish such offense as it existed at common law and as defined in the Penal Code, may be given. *Id.*

In an indictment for embezzlement, it is sufficient to state the sum and fix value of the money taken. *People v. Hearne*, 49 St. Rep., 406. An allegation as to whether it was lawful money of the United States, or other money, is immaterial. *Id.*

An indictment for larceny in the first degree, which alleges that the defendant obtained possession of two street cars by certain false pretenses and representations, and that possession was thus obtained with the intent to appropriate them to his own use, but does not allege that, after obtaining possession, he did actually so appropriate them, is insufficient where the alleged false pretenses and representations are not of a character upon which the crime can be predicated. *People v. Laurence*, 51 St. Rep., 247 ; 21 N. Y. Rep., 818.

As between false pretenses and embezzlement, and the common-law offense of larceny, a distinction remains which must be observed in the presentation by indictment. *Benedict v. Williams*, 15 St. Rep., 677 ; 48 Hun,

In an indictment for larceny, it is regular and proper to allege the ownership of the stolen property to be in the lawful custodian or bailee. *People v. Herman*, 10 St. Rep., 66 ; 45 Hun, 175 ; 6 N. Y. Cr., 194.

Where the offense is an appropriation to his own use, by a clerk, of property in his possession, the indictment may properly charge the defendant with either having stolen the property, or as a clerk having appropriated it to his own use. *People v. Dunn*, 25 St. Rep., 460 ; 53 Hun, 885 ; 7 N. Y. Cr., ; 6 N. Y. Supp., 807.

It is not necessary that an indictment should be drawn under one or the other of the special classes of larceny as defined in section 528 of the Penal Code. *Id.*

It is sufficient that it charges the crime, and then gives a plain and concise statement of the act, such as to fairly apprise the defendant of the charge made against him. *Id.*

Where the indictment accuses the defendant of the crime of grand larceny in the first degree, and then states, that the defendant "unlawfully and feloniously did steal, take and carry away" the property described therein, the offense charged is sufficiently made out by these averments. *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 510 ; 8 N. Y. Cr., 269.

An indictment for larceny is insufficient, which does not accurately and fully allege all the ingredients of which the offense is composed, so as to bring the accused within the true meaning and intent of the statute defining the offense. *Id.*

An allegation in an indictment for grand larceny that the property was obtained "by color or aid of false representations," etc., is equivalent to an averment that it was done "by means of such representations," etc., and necessarily implies that the owner of the property relied upon those representations. *People v. Rice*, 35 St. Rep., 188 ; *aff'd*, 40 *id.*, 978 ; *Clark v. People*, 2 Laus., 329.

In *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 502 ; 8 N. Y. Cr., 269, the indictment made no allegation whatever of false pretenses, and false pretense was the burden of the evidence. It was not a question as to the sufficiency of the indictment, but a question of variance between pleadings and proof.

It is a sufficient averment of the crime of larceny to follow the precise words of the statute. *Phelps v. People*, 72 N. Y., 350.

An indictment for larceny, which avers that the pretenses or representations, made use of by the defendant, were not only false, but were also known to him to be false at the time when they were made, and were both

false and fraudulent, is sufficient. *People v. Reavey*, 38 Hun, 422; 4 N. Y. Cr., 15.

As to what averment in an indictment for larceny is a sufficient description of the money alleged to have been obtained, see *People v. Reavey*, *ante*.

An indictment for larceny, which charges that the defendant "with force and arms, then and there being found, feloniously did steal, take and carry away, against the peace of the people," etc., the draft in question, is a sufficient compliance with this section. *People v. Moore*, 37 Hun, 87; 3 N. Y. Cr., 464.

An omission in an indictment for libel to state the manner in which the alleged malicious publication was made, is not a compliance with the provisions of this section. *People v. Stark*, 49 St. Rep., 900; 136 N. Y., 538; aff'd 35 St. Rep., 150; 59 Hun, 51. Where such indictment contains no averment as to the manner of publication, or of the person or persons to whom it was addressed, or by whom it was seen or read, or that the names of such persons were unknown to the grand jurors, it is defective and a conviction under it is error. *Id.*

If the libel complained is a newspaper publication, *it seems* that it is sufficient to state, that it was published in a designated newspaper, having a circulation in the county in which the indictment is found. *Id.*

An indictment, which merely alleges the publication of a libel, but contains no plain or other statement of the facts, showing how it was published or in what way, states no act constituting the crime. *People v. Stark*, 35 St. Rep., 150; 59 Hun, 56, 58; aff'd, 49 St. Rep., 900; 136 N. Y., 538.

No criminal offense is charged in an indictment for libel, where it does not charge the defendant with either writing, printing or circulating written or printed matter. *Id.*

**Nuisance.**—An indictment for carrying on the business of tar-rendering within the limits of a city, which does not allege that such business was carried on as a public nuisance, is insufficient. *People v. Rosenberg*, 53 St. Rep. 1; rev'g 51 *id.*, 189.

**Receiving Stolen goods.**—For form of an indictment for feloniously receiving and having stolen property, with counts charging some of the defendants as accessories. *Mills v. People*, 3 Park, 473.

In an indictment for receiving stolen goods, under section 550 of the Penal Code, it is not necessary, *it seems*, to allege in terms that the property was received by the accused feloniously or with criminal intent. *People v. Weldon*, 20 St. Rep., 112; 111 N. Y., 574.

An allegation, in an indictment for receiving stolen goods, that the defendant criminally received the property, is equivalent to an averment of feloniously receiving it, and constitutes a sufficient statement of criminal intent. *Id.*

**Second offense.**—A prior conviction, in order to be available in increasing the punishment for a second offense, must be alleged in the indictment. *People v. Price*, 6 N. Y. Cr., 141.

**Voting.**—As to what statement of facts, in an indictment charging a female with voting at an election, is sufficient to establish the offense, see *People v. Barber*, 15 St. Rep., 601; 48 Hun, 198.

§ 276. **Form of Indictment.**—The indictment should be signed by the district attorney, and may be substantially in the following form:

Supreme court, of the county of \_\_\_\_\_, [stating the proper county.]

or

Supreme court, city and county of New York.

or

County court of the county of \_\_\_\_\_, [stating the proper county.]

or

Court of general sessions of the city and county of New York.



people of the state of New York }  
 against  
 A. B.

grand jury of the \_\_\_\_\_, [here insert the  
 of the county, or of the city, or of the city and county, in  
 the indictment is found,] by this indictment accuses A.  
 the crime of \_\_\_\_\_, [here insert the name of the  
 if it have one, such as treason, murder, arson, man-  
 ter, or the like, or, if it be a misdemeanor, having no  
 name, such as libel, assault, or the like, insert a brief  
 tion of it, as it is given by statute], committed as fol-

said A. B., on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at the  
 \_\_\_\_\_ or city or village, as the case may be] of \_\_\_\_\_ in this  
 \_\_\_\_\_, [here set forth the act charged as an offense.]

A. B.,

*District Attorney of the county of*

by chap. 880 of 1895. In effect January 1, 1896.

added by chap. 360 of 1882.

amendment required the indictment to be signed by the district  
 r, and added such signature to the form given.

otes under preceding section.

edent.—A general precedent, required to be followed in framing in-  
 ts, has been inserted in this section. *People v. Buddensieck*, 4 N.  
 251.

orm, set forth in this section, was approved by the legislature and  
 ended to the public prosecutor as a proper form to be observed and  
 d in preparing an indictment. *People v. Everest*, 20 St. Rep., 456 ;  
 23 ; 3 N. Y. Supp., 613.

is section, a general form of an indictment has been provided, which  
 no more than the name of the crime and a brief description of it as  
 en by the statute. *People v. Reavey*, 38 Hun, 421 ; 4 N. Y. Cr., 14.

ntials.—This section requires a statement of the name of the crime,  
 d to be charged, to be made in the first clause of the body of the  
 ent. *People v. Everest*, 20 St. Rep., 459 ; 51 Hun, 24 ; 3 N. Y. Supp.,

mply with this section, all that is required is that the indictment  
 ntain the name of the crime, if it has one, such as treason, murder,  
 nanslaughter and the like ; or, if it is a misdemeanor, having no  
 name, such as libel, assault or the like, it shall contain a brief de-  
 n of it as it is given by the statute. *People v. Grimshaw*, 33 Hun,  
 N. Y. Cr., 392 ; 20 W. Dig., 116.

ame of the crime is mere matter of form, which may or may not be  
*People v. Sullivan*, 4 N. Y. Cr., 197. If it is stated incorrectly, it  
 t vitiate or control the character of the crime as against the allega-  
 nstituting it. *Id.*

ection requires that the indictment shall state both the accusation  
 rime and the facts whereby it was committed. *People v. Maxon*, 32  
 , 133 ; 57 Hun, 370 ; 10 N. Y. Supp., 594. A substantial variance be-  
 he crime charged and the facts proved is fatal. *Id.*

ndictment, beginning in the usual common-law form, contains a  
 t statement of its finding by a grand jury, and is a substantial com-  
 with the requirements of this section, as to form of indictments.  
*v. Peck*, 2 N. Y. Cr., 316 ; 18 W. Dig., 527.

Code does not require the indictment to show that the grand jury  
 own or sworn. It is sufficient if it states that the grand jury of the  
 in which the indictment was found, accuse the defendant of the  
 lled in it. *People v. Reavey*, 38 Hun, 421 ; 4 N. Y. Cr., 15.

An indictment is deemed to allege what can, by fair and reasonable intendment, be implied from the facts stated. *People v. Clements*, 11 St. Rep., 384 ; 107 N. Y., 210.

In charging murder to have been committed, while the accused was engaged in the commission of a felony, the indictment must describe the felony and state substantially facts showing that the accused was engaged in the commission thereof, when he committed the murder charged. *People v. Cole*, 2 N. Y. Cr., 112 ; *Dolan v. People*, 64 N. Y., 485.

It is sufficient, in an indictment for perjury, to charge that the false oath was material on the trial of the issue, upon which it was taken, without showing particularly how it was material. *People v. Grimshaw*, 2 N. Y. Cr., 392 ; 33 Hun, 507 ; 20 W. D., 116.

See *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 510 ; 8 N. Y. Cr., 270 ; *People v. Conroy*, 97 N. Y., 70 ; 2 N. Y. Cr., 578 ; *People v. Menken*, 36 Hun, 94 ; *People v. Wilson*, 15 St. Rep., 503 ; 109 N. Y., 351 ; *People v. Quinn*, 18 N. Y. Supp., 569 ; *People v. Burns*, 25 St. Rep., 99 ; 6 N. Y. Supp., 611 ; *People v. Rice*, 35 St. Rep., 186 ; 13 N. Y. Supp., 162 ; *People v. Ostrander*, 45 St. Rep., 555 ; 64 Hun, 336, 340 ; 19 N. Y. Supp., 325 ; *People v. Gregg*, 35 St. Rep., 757 ; 59 Hun, 109, 110 ; 13 N. Y. Supp., 114, 5 ; *People v. Bellows*, 2 N. Y. Cr., 14 ; 1 How. N. S., 151 ; *People v. Farrell*, 28 St. Rep., 44 ; 5 Silv. (Sup. Ct.), 24 ; 8 N. Y. Supp., 231 ; *People v. Harris*, 33 St. Rep., 170 ; 123 N. Y., 70 ; 4 Silv. (Sup. Ct.), 532, 537, note ; aff'g 28 St. Rep., 298 ; 7 N. Y. Supp., 774.

§ 277. When defendant is indicted by fictitious or erroneous name, his true name may be inserted in subsequent proceedings.—If a defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings, his true name is discovered it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment.

**Alias.**—It was held prior to the Code that, where the true name preceded the *alias dictus*, a plea in abatement would not be sustained. *Barnesciotta v. People*, 10 Hun, 139 ; aff'd, 69 N. Y., 612.

**Fictitious name.**—After the true name of the defendant has been discovered and included in the subsequent proceedings, the fictitious or erroneous name may, with propriety, be omitted in the administration of the oath to jurors and witnesses. *People v. Everhardt*, 5 St. Rep., 793 ; 2 Silv. (Ct. App.), 510 ; 104 N. Y., 596 ; 6 N. Y. Cr., 235. But it is not error to repeat such name whenever it becomes necessary to name the defendant, and it cannot be assumed that any legal harm is thereby done to him. *Id.*

**Full name.**—Even at common law, an indictment was not necessarily inoperative or void, because of its omission to designate the person charged by the full name. *People ex rel. Nubell v. Byrnes*, 2 N. Y. Cr., 411. He might be indicted by the initials of his Christian name, and legally convicted if he failed to raise the objection by plea in abatement. *Id.* To such plea, it might be shown that the accused was usually known by the name under which he was indicted. *Id.*

§ 278. Indictment must charge but one crime and in one form, except where it may be committed by different means.—The indictment must charge but one crime and in one form except as in the next section provided.

See notes under following section.

The legislature intended to limit the effect of this section by the provisions of the following section. *People v. Infield*, 1 N. Y. Cr., 147.

**Separate counts.**—This and the next section provide that the indictment must charge but one crime and in one form except that the crime may be charged in separate counts to have been committed by different means. *People v. Dimick*, 11 St. Rep., 739 ; 107 N. Y., 13, 31. When the acts complained of may constitute different crimes, such crimes may be charged in separate counts. *Id.*

An indictment is not demurrable, where the counts are under the same

tatute and relate to the same transaction. *People v. Emerson*, 25 St. Rep., 467 ; 53 Hun, 437.

It was not the intention of the legislature to deprive the people of the right to state the acts constituting the supposed crime in different counts, in language appropriate to meet such circumstances and features of the event, as should be developed in the full and careful investigation which takes place in the progress of a trial. *People v. Menken*, 36 Hun, 95.

Nor was it the legislative intention to limit the indictment to a single statement, in one count, of the offense charged against the accused. *People v. Menken*, 36 Hun, 95.

There may be a joinder of various counts in the same indictment stating the same offense distinctly and separately in various ways so as to meet the evidence. *People v. Cole*, 2 N. Y. Cr., 110 ; *People v. Infield*, 1 id., 146.

A count for burglary, with an attempt to commit larceny, may be united with a count for larceny. *People v. Emerson*, 25 St. Rep., 467 ; 53 Hun, 437. So burglary and larceny, rape and assault with intent to commit rape, larceny and receiving stolen goods, assault with intent to kill and a simple assault, if arising out of same transaction, may be united. Id.

It is no objection to uniting such counts that they constitute different grades of offense and call for the imposition of different penalties. *People v. Rose*, 39 St. Rep. 292 ; 15 N. Y. Supp., 816 ; *People v. Emerson*, 25 St. Rep., 467 ; 53 Hun, 437.

Counts charging burglary, larceny and receiving stolen property are properly joined in one indictment, where the offenses so alleged relate to the same transaction. *People v. Rose*, 39 St. Rep., 292 ; 15 N. Y. Supp., 816 ; *Hawker v. People*, 75 N. Y., 487.

Where the different offenses, charged in the separate counts, arise out of the same transaction and are so charged, or it may be fairly inferred from the allegations that they relate to but one offense, the counts are properly joined. *People v. Rose*, *ante*.

The indictment, in *People v. Klock*, 16 St. Rep., 565 ; 48 Hun, 276, was held to charge only one offense, viz. : keeping a place where animals are fought in violation of section 665 of the Penal Code.

Where a conspiracy is formed with one aim and object only, though the means adopted to accomplish it, are many and various in their character, an indictment, setting forth such facts in their proper order in one count, charges but one offense. *People v. Everest*, 20 St. Rep., 456 ; 51 Hun, 24 ; 3 N. Y. Supp., 618.

Where the allegations of the different counts vary in respect to the manner of effecting the killing, the part of the body upon which the wounds were inflicted and the extent of such wounds, the indictment is good, if it shows upon its face that those counts relate to but one and the same transaction. *People v. Cole*, 2 N. Y. Cr., 110.

Where the gist is the same, the prohibited acts may be charged in separate counts with different intents and as against different parties, provided they constitute one and the same transaction. *People v. Lenhardt*, 4 N. Y. Cr., 324.

Where the only difference between the two counts of an indictment for larceny is that one charges, " a more particular description of the property is to the grand jury unknown," etc., the indictment is not bad in charging more than one crime. *People v. Moore*, 37 Hun, 87 ; 3 N. Y. Cr., 462.

An indictment which charges the exposing for sale, and the selling, of milk prohibited by section 1, chap. 183 of 1885, is not obnoxious to the objection that it contains the allegation, in one count, of two crimes in violation of this section. *People v. Burns*, 25 St. Rep., 99 ; 53 Hun, 277 ; 7 N. Y. Cr., 93 ; 6 N. Y. Supp., 611, 612.

An indictment, which charges that, on the 3d and 4th days of August, 1884, the defendant brought to a certain cheese factory, named and described therein, milk diluted with water, and that he sold the same, etc., alleges but a single transaction and is not obnoxious to the provisions of this and the next section. *People v. Harris*, 28 St. Rep. 300 ; 7 N. Y. Supp., 776 ; 4 Silv. (Sup. Ct.), 535, 537, note ; *aff'd*, 33 St. Rep., 168 ; 123 N. Y., 70.

An indictment may properly contain two counts, each alleging a sale of liquor without a license, on the same day, at the same place and to the same person, the first, in quantities less than five gallons, the other, to be drunk

on the premises, in case a single act is charged, which constitutes different crimes. *People v. Charbineau*, 26 St. Rep., 491 ; 115 N. Y., 436.

**Distinct crimes.**—Sections 278 and 279 of the Code of Criminal Procedure abrogated the rule existing before the Code, that several misdemeanors might be joined in the same indictment, when the same judgment was appropriate for all the offenses. *People v. O'Donnell*, 15 St. Rep., 141 ; 46 Hun, 362 ; 7 N. Y. Cr., 346 ; 10 N. Y. Supp., 251, 252 ; *People v. Upton*, 38 Hun, 107 ; 4 N. Y. Cr., 455.

Not more than one separate and distinct crime can be charged in an indictment. *People v. Upton*, 38 Hun, 107 ; 4 N. Y. Cr., 455.

The joinder of counts is bad, when the offenses alleged are for different and independent felonies. *People v. Rose*, 39 St. Rep., 292 ; 15 N. Y. Supp., 816.

An indictment, which contains five counts, in each of which a separate and distinct offense is set forth as having been committed on different days, in taking money in different sums, violates the prohibition of this section and is demurrable. *People v. Upton*, 38 Hun, 110.

The prohibition of this section is violated, where the indictment charges a bank officer with the offenses of over-drawing his account in different amounts and upon different dates. *People v. Upton*, 4 N. Y. Cr., 455.

Under the Code, it is, perhaps, doubtful whether the two offenses of forgery and uttering the forged instrument can be properly united in the same indictment. *People v. Tower*, 48 St. Rep., 439 ; 135 N. Y., 459 ; aff'g 42 St. Rep., 164.

Where either one of several acts constitutes a crime, and the indictment has but one count, charging one of the acts constituting the crime, it cannot be sustained by proof that the crime was committed by different means. *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 502 ; 8 N. Y. Cr., 270.

**Election.**—Where the only variance between the counts of an indictment, charging murder in the first degree, is as to the means used to effect death and the manner in which it was accomplished, a refusal to compel the district attorney to elect upon which count he would rely is not error. *People v. Wilson*, 15 St. Rep., 503 ; 109 N. Y., 351.

Even before the Code, it was held to be discretionary with the court whether it would compel an election in such a case. *People v. Armstrong*, 70 N. Y., 42 ; *People v. Hawker*, 75 id., 490.

See *People v. Clark*, 8 N. Y. Cr., 210 ; 14 N. Y. Supp., 655 ; *People v. Harmon*, 18 St. Rep., 820 ; 6 N. Y. Cr., 172 ; 2 N. Y. Supp., 422 ; *People v. Rice*, 35 St. Rep., 186 ; 13 N. Y. Supp., 162 ; *People v. Crotty*, 30 St. Rep., 45 ; 9 N. Y. Supp., 938 ; *People v. Crowley*, 1 St. Rep., 388 ; *People v. Hatter*, 22 N. Y. Supp., 690.

§ 279. **Crime may be charged in separate counts.**—The crime may be charged in separate counts to have been committed in a different manner or by different means ; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts.

Amended by chap. 306 of 1883.

This amendment inserted, after the word " committed," the words " in a different manner."

See notes under the preceding section.

The case of *People v. Dimick*, 3 St. Rep., 398 ; 41 Hun, 616 ; 5 N. Y. Cr., 200, was reversed in 11 St. Rep., 739 ; 107 N. Y., 13.

This and the preceding section are not limited in their application to indictments for felonies. *People v. O'Donnell*, 15 St. Rep., 141 ; 46 Hun, 362 ; 10 N. Y. Supp., 251, 252.

**Before Code.**—Before the enactment of the Code of Criminal Procedure, an indictment was not bad, because of the joinder of separate and distinct misdemeanors, though followed by different penalties. *Id.* ; *People v. Dunn*, 90 N. Y., 107.

**After Code.**—Even since the adoption of the Code, when the act complained of may constitute different offenses, such offenses may be charged in separate counts of the indictment. *People v. O'Donnell*, *ante* ; *People v. Infield*, 1 N. Y. Cr., 146 ; *People v. Kelly*, 3 N. Y. Cr., 272.

**Counts.**—Separate counts are proper under certain circumstances. *People v. McCarthy*, 18 St. Rep., 267 ; 110 N. Y., 314.

A crime may be charged in separate counts to have been committed by different means. *People v. Lenhardt*, 4 N. Y. Cr., 427 ; *People v. O'Donnell*, 15 St. Rep., 141 ; 46 Hun, 360 ; 9 N. Y. Cr., 233.

Acts may be charged in separate counts, where the acts and circumstances are related to the same transaction. *People v. Crotty*, 30 St. Rep., 938 ; *Taylor v. People*, 12 Hun, 217.

An indictment may state the acts constituting the crime in different counts, so long as it is appropriate to meet the evidence which may be presented on the trial. *People v. Menken*, 3 N. Y. Cr., 233 ; *People v. Crotty*, 30 St. Rep., 938 ; *People v. O'Donnell*, 15 St. Rep., 141 ; 46 Hun, 360 ; 9 N. Y. Cr., 233 ; 251, 252.

An indictment, which contains varying allegations in different counts as to the manner and means of the commission of the crime, but shows, upon its face, that the counts relate to but one and the same transaction, is good. *People v. O'Donnell ante* ; *People v. Cole*, 2 N. Y. Cr., 108.

Where the facts are required to establish the accusations made in the indictment by circumstantial evidence, and the means by which the crime was committed are not clearly and definitely ascertainable or ascertained by the evidence, the indictment is a proper one for the application of the rule laid down in this section. *People v. Menken*, 36 Hun, 97. Where the facts complained of may constitute different offenses, such offenses may be charged in separate counts of the indictment. *People v. Kelly*, 3 N. Y. Cr., 74.

Where one crime is committed, whether the evidence tends to show that it was directly committed by the defendant, or that he was aided in doing the deed, the case is brought within the provisions of this section, and the crime may be charged in separate counts, as to the defendant as principal or accessory. *People v. Clark*, 8 N. Y. Cr., 10 ; 14 N. Y. Supp., 655.

An indictment must name the crime and state the act constituting it ; if more than one of several acts constitute the crime, the several acts must be stated in different counts. *People v. Dumar*, 11 St. Rep., 19 ; 10 N. Y. Cr., 8 ; 8 N. Y. Cr., 270.

Where the counts, charging the three offenses of section 351 of the Penal Code, are arising out of the same acts. *People v. Kelly*, 3 N. Y. Cr., 74.

Where the acts complained of may constitute different crimes, such crimes may be charged in separate counts. *People v. Crotty*, 30 St. Rep., 45 ; 9 N. Y. Cr., 938.

Where the acts complained of, in a criminal prosecution, constitute a felony and a misdemeanor, both may, *it seems*, be joined in the same indictment, if they are charged in separate counts. *People v. Lenhardt*, 4 N. Y. Cr., 327.

Where the acts and coercion, two distinct misdemeanors, may be set up in different counts of the same indictment, where the acts complained of in the different counts are the same, and constitute the different crimes. *Id.* ; *People v. O'Donnell*, 15 St. Rep., 46 ; 9 N. Y. Supp., 938.

Where the same acts constitute larceny and receiving stolen goods, they may be stated in separate counts in the same indictment. *People v. O'Donnell*, 15 St. Rep., 146.

An indictment, containing two counts, one for robbery in the first degree, and the other for larceny in the first degree, is valid, where it is reasonably clear, on the face of the indictment, that the second embraces the same facts as the first count. *People v. Rose*, 22 St. Rep., 390 ; 52 Hun, 34 ; 4 N. Y. Cr., 108.

Where the facts are such as to justify in an indictment two counts, one charging robbery and the other larceny, where each charge is found upon the taking of the same property of personal property from the same person at the same time, the indictment is valid. *People v. Callahan*, 29 Hun, 580 ; 17 W. Dig., 192 ; *People v. O'Donnell*, 15 St. Rep., 46 ; 9 N. Y. Supp., 938. In the above cited case, one count charged the property to have been taken with, and the other without, the person of the owner.

An indictment for grand larceny in the first degree, which charges, in



separate counts, the crime to have been committed in a different manner or by different means, is expressly permitted by this section. *People v. Rice*, 35 St. Rep., 186 ; aff'd, 40 id., 978.

Under the first provision of this section, it is competent to charge in separate counts that the same crime was committed in a different manner or by different means. *People v. Harmon*, 18 St. Rep., 820 ; 6 N. Y. Cr., 172 ; 2 N. Y. Supp., 422. The latter provision of the section refers to crimes having different degrees, such as murder and manslaughter, where the criminal act may constitute different crimes. *Id.*

**Improperly joined.**—An indictment, which charges an illegal sale of spirituous liquors on four different occasions and to different people, charges more than one crime, and is obnoxious to the provisions of this section. *People v. O'Donnell*, 15 St. Rep., 141 ; 46 Hun, 360 ; 10 N. Y. Supp., 251, 252.

It is doubtful whether the two offenses of forgery and uttering the forged instrument can be properly united in the same indictment. *People v. Tower*, 48 St. Rep., 438 ; 135 N. Y., 459 ; aff'g 42 St. Rep., 164.

**Remedy.**—The objection of misjoinder of offenses is waived by appearing and entering a plea of not guilty. *People v. Upton*, 38 Hun, 110.

An indictment for abduction, charging that the defendant took the female in question for the purpose of prostitution and sexual intercourse, is not demurrable upon the ground that more than one crime is charged. *People v. Powell*, 4 N. Y. Cr., 585.

Under certain circumstances, separate counts are proper ; but, if more than one crime is charged in an indictment, except as permitted by this section, the proper and only remedy is by demurrer. *People v. McCarthy*, 18 St. Rep., 267 ; 110 N. Y., 314.

**Election.**—The decision of a motion to compel the prosecution to elect, on which counts of an indictment defendant shall be tried, may properly be deferred till the evidence is in on both sides. *People v. Ward*, 3 N. Y. Cr., 483.

Whether the district attorney shall be compelled to elect upon which of two charges, for different grades of the same offense, he will proceed rests in the discretion of the trial court. *People v. Reavey*, 38 Hun, 423 ; 4 N. Y. Cr., 17.

An application to compel the district attorney to elect under which charge in the indictment he will try the defendant, is addressed to the discretion of the court. *People v. Menken*, 36 Hun, 98.

Where several counts are improperly united in an indictment, the defendant is not entitled, as a matter of right, to an instruction that the district attorney elect upon which count he will proceed. *People v. McCarthy*, 18 St. Rep., 267 ; 110 N. Y., 314. Such a request is an appeal to the discretion of the court, and a denial of the application cannot be successfully assigned as error. *Id.*

**Defective counts.**—Where there is one good count in an indictment, and evidence to support it, the conviction will be sustained, though the indictment contains other counts which were defective. *People v. Menken*, 36 Hun, 97 ; *People v. Davis*, 56 N. Y., 95 ; *Phelps v. People*, 72 id., 865 ; *Pontius v. People*, 82 id., 339 ; *Hope v. People*, 83 id., 419.

See *People v. Wilson*, 15 St. Rep., 503 ; 109 N. Y., 351 ; *People v. Everest*, 3 N. Y. Supp., 613 ; *People v. Rice*, 35 St. Rep., 185 ; 13 N. Y. Supp., 161, 163 ; *People v. Harris*, 28 St. Rep., 300 ; 4 Silv. (Sup. Ct.), 535, 537, note ; 7 N. Y. Supp., 776 ; *People v. Charbineau*, 26 St. Rep., 491 ; 115 N. Y., 436, 7 ; *People v. Burns*, 25 St. Rep., 99 ; 6 N. Y. Supp., 611 ; *People v. Harris*, 33 St. Rep., 168 ; 123 N. Y., 70, 76 ; *People v. Olsen*, 39 St. Rep., 295 ; 15 N. Y. Supp., 781 ; *People v. Rose*, 39 St. Rep., 292 ; 15 N. Y. Supp., 816 ; *People v. Emerson*, 25 St. Rep., 467 ; *People v. Lake*, 9 id., 638 ; *People v. Peck*, 2 N. Y. Cr., 316 ; 18 W. Dig., 527 ; *People v. Johnson*, 5 N. Y. Cr., 219 ; *People v. Hatter*, 22 N. Y. Supp., 690.

§ 280. **Statement as to time when crime was committed.**—The precise time at which the crime was committed need not be stated in the indictment ; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the crime.

The case of *People v. Krank*, 12 St. Rep., 845 ; 46 Hun, 632, was reversed in 18 St. Rep., 418 ; 110 N. Y., 488.

**Essence.**—Where the selling or giving away of intoxicating liquors must be on Sunday, in order to be brought within the prohibition of the statute, the time is a material ingredient in the crime. *People v. Harmon*, 18 St. Rep., 820 ; 6 N. Y. Cr., 171 ; 2 N. Y. Supp., 422.

Where the indictment charges a selling of spirituous liquors on Sunday, May 18, 1884, and the proof establishes a selling on Sunday, April 20, 1884, the variance was held to be fatal. *People v. Lavin*, 4 N. Y. Cr., 547.

It is not necessary to prove the time and place of the transaction, as stated in the indictment, unless they are necessary ingredients in the offense. *People v. Emerson*, 25 St. Rep., 468 ; 53 Hun, 440 ; 7 N. Y. Cr., 105 ; 6 N. Y. Supp., 276.

Evidence as to the day laid in the indictment. *People v. Emerson*, 20 St. Rep., 16 ; 6 N. Y. Cr., 158 ; 5 N. Y. Supp., 374.

**Sufficient.**—It is sufficient that it can be understood from its allegations that the crime was committed at some time prior to the finding of the indictment. *People v. Jackson*, 19 St. Rep., 510 ; 111 N. Y., 369 ; 6 N. Y. Cr., 399.

An allegation, charging the crime to have been committed “at and prior to” a certain date, is a sufficient statement of time in an indictment, where the act alleged was continuous. *People v. Buddensieck*, 4 N. Y. Cr., 251 ; affirmed, 3 St. Rep., 664 ; 103 N. Y., 496 ; 5 N. Y. Cr., 69.

An indictment for manslaughter by culpable negligence, which gives the time of the commission of the offense, the place within the jurisdiction of the court, and the circumstances enumerated in the statute, was held to be sufficient. *People v. Buddensieck*, 3 St. Rep., 664 ; 103 N. Y., 487 ; 5 N. Y. Cr., 69.

**Variance.**—A variance of one day between the time of the commission of the crime, as alleged in the indictment and as proved upon the trial, is immaterial. *People v. Jackson*, 19 St. Rep., 510 ; 111 N. Y., 369 ; 6 N. Y. Cr., 399.

See *People v. Harris*, 28 St. Rep., 300 ; 7 N. Y. Supp., 776 ; 4 Silv. (Sup. Ct.), 585 ; *People v. Crowley*, 1 St. Rep., 388.

§ 281. **Statement as to person injured or intended to be injured.**—When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material.

The case of *People v. Richards*, 7 St. Rep., 656 ; 44 Hun, 268 ; 5 N. Y. Cr., 369 ; was reversed in 13 St. Rep., 515 ; 108 N. Y., 137.

**Variance.**—It is not a material variance that, in an indictment for incest, the middle name of the female is omitted, where there is no question as to her identity. *People v. Lake*, 16 St. Rep., 197 ; 110 N. Y., 61.

Where the offense involves the commission of a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material. *People v. Johnson*, 5 St. Rep., 606 ; 104 N. Y., 216 ; 5 N. Y. Cr., 219.

**Amendment.**—Upon the trial of an indictment for seduction under promise of marriage of one Mary Olyphant, at Wilna, in Jefferson County, the court allowed an amendment of the indictment, to conform to the proof, by substituting “Olivert” for “Olyphant,” and “Champion” for “Wilna.” *People v. Johnson*, 4 N. Y. Cr., 591.

An amendment, in the indictment, of the corporate title of the bank, where it is the person injured, is authorized by sections 281 to 293 of this Code. *People v. Dunn*, 25 St. Rep., 460 ; 53 Hun, 387 ; 7 N. Y. Cr., 187 ; 6 N. Y. Supp., 808.

See *People v. Herman*, 10 St. Rep., 66.

§ 282. **Construction of words used in indictment.**—The words used in an indictment must be construed in their usual accep-



tation, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

**Construction.**—It is the universal rule, in criminal cases, that, where the indictment will admit of a construction in favor of innocence, it should be adopted. *People v. Stark*, 35 St. Rep., 150 ; 59 Hun, 55.

The words in an indictment are to be construed in their usual acceptance in common language, except such as are defined by law, and those are to be construed according to their legal meaning. *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 510 ; 8 N. Y. Cr., 270.

Where the offense is an appropriation to his own use, by a clerk, of property in his possession, the use of the word "Steal" in the indictment, if considered in its technical meaning, is proper. *People v. Dunn*, 25 St. Rep. 464 ; 53 Hun, 385 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807.

The use of the terms "did take, steal and carry away," in such case, if considered in their ordinary interpretation in common language, is equally appropriate. *Id.*

Under this section, it is the duty of the court to ascertain the fair sense and acceptance of the language used, and to disregard captious objections in determining the meaning of the allegations in an indictment. *People v. Klock*, 16 St. Rep., 565 ; 48 Hun, 277. Where two permissible constructions may be had, the court should adopt the one sustaining the proceedings. *Id.*

See *People v. Farrell*, 28 St. Rep., 44 ; 5 Silv. (Sup. Ct.), 24 ; *People v. Wise*, 8 N. Y. Cr., 305 ; 2 How. N. S., 98 ; *People v. Crotty*, 30 St. Rep., 45 ; *People v. Hatter*, 22 N. Y. Supp., 691.

**§ 283. Words used in a statute need not be strictly pursued.**—Words used in a statute to define a crime need not be strictly pursued in the indictment; but other words, conveying the same meaning, may be used.

See notes under section 275, *ante*.

The case of *People v. Dimick*, 3 St. Rep., 398 ; 41 Hun, 621 ; 5 N. Y. Cr., 187, was reversed in 11 St. Rep., 739 ; 107 N. Y., 13.

It is not necessary that the pleader should use the very words of the statute. *People v. Whedon*, 2 N. Y. Cr., 320.

The ordinary common-law counts for murder are sufficient in pleading to sustain a conviction. *People v. Willett*, 1 St. Rep., 384 ; 102 N. Y., 253.

Words used in a statute need not in all cases be used in an indictment. *People v. Gregg*, 35 St. Rep., 761 ; 59 Hun, 112 ; 13 N. Y. Supp., 116.

An indictment for a statutory misdemeanor, which charges the facts constituting the crime in the words of the statute, and contains averments as to time, place, person and other circumstances to identify the particular transaction, is good. *People v. West*, 8 St. Rep., 713 ; 106 N. Y., 295.

In charging an offense in an indictment, the exact words of the statute defining the offense need not be used. *Matter of Gray*, 2 N. Y. Cr., 306. It is sufficient if words of a similar import are employed. *Id.*

It is not necessary that an indictment should follow the precise language of a statute, but words of equivalent import are sufficient. *People v. Jaehne*, 3 St. Rep., 11 ; 4 N. Y. Cr., 528 ; 103 N. Y., 194.

An indictment need not follow the very words of the statute. *People v. Klock*, 16 St. Rep., 565 ; 48 Hun, 276.

It is sufficient that the facts, constituting the crime, are well stated. *Id.*

A charge in an indictment, predicated on a statute, may be made in the very words of the statute, when, by using those words, the act in which the offense consists is fully, directly and expressly alleged, without any uncertainty or ambiguity. *People v. Smith*, 6 N. Y. Cr., 472. Where the pleader has not only followed this ordinary rule, but has also expanded the words of the statute, so as to give the manner and occasion of the commission of the alleged crime, the indictment contains sufficient allegation of facts to constitute a crime. *Id.*

Where the offense is statutory, an indictment, which avers the offense as the statute defines it, is sufficient. *People v. Kelly*, 22 W. Dig., 65.

Words, conveying the meaning of those employed by the statute to express

redients of the offense, may be used in an indictment. *People v. Es*, 42 St. Rep., 362 ; 130 N. Y., 463 ; rev'g 30 St. Rep., 168 ; 55 Hun,

*People v. Dunn*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 Supp., 807 ; *People v. Buddensieck*, 4 N. Y. Cr., 252 ; aff'd, 3 St. Rep., 103 N. Y., 487 ; 5 N. Y. Cr., 69 ; *People v. Wise*, 3 id., 305 ; 2 How. 108 ; *People v. Hatter*, 22 N. Y. Supp., 691.

**34. Indictment, when sufficient.**—The indictment is sufficient if it can be understood therefrom :

That it is entitled in a court having authority to receive it, and that the name of the court be not accurately stated ;

That it was found by a grand jury of the county, or if in a court, of the city in which the court was held ;

That the defendant is named, or if his name can not be discovered, that he is described by a fictitious name, with the statement that it has been found impossible to discover his real name ;

That the crime was committed at some place within the jurisdiction of the court ; except where, as provided by sections 137 and 138, both inclusive, the act, though done without the local jurisdiction of the county, is triable therein ;

That the crime was committed at some time prior to the filing of the indictment ;

That the act or omission, charged as the crime, is plainly and concisely set forth ;

That the act or omission, charged as the crime, is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of justice.

Cases under preceding section.

Notes under section 275, *ante*.

**When sufficient.**—This section is to the same effect as the former subd. 52 of 2 R. S., 728, but more liberal and protective against objections of technical character. *People v. Dewey*, 35 Hun, 311.

This section has defined the form and sufficiency of an indictment. *People v. Bell*, 28 St. Rep., 44 ; 5 Silv. (Sup. Ct.), 24 ; 8 N. Y. Supp., 231.

The old requirements of common law pleading are expressly abandoned, and the use of this section substituted. *Id.*

An indictment must show that the offense was committed in the county in which the grand jury was organized. *People v. Horton*, 42 St. Rep., 588 ; 1, 610 ; 17 N. Y. Supp., 2.

An indictment will be sustained on demurrer, where it appears, on its face, that the facts stated constitute the crime charged. *People v. Bowe*, 1, 533 ; 3 N. Y. Cr., 360.

An indictment, which alleges the crime to have been committed at a place within the jurisdiction of the court, is not defective in omitting to state the precise locality where the offense was designed to be alleged to have been committed. *People v. Buddensieck*, 4 N. Y. Cr., 251 ; aff'd, 3 St. Rep., 664 ; 103 N. Y., 496 ; 5 N. Y. Cr., 69.

This section declares that the indictment is sufficient in the description of the crime if it can be understood from it that the alleged crime was committed at some place within the jurisdiction of the court, prior to the filing of the indictment, that the act or omission charged as the crime is plainly and concisely set forth, and that it is stated with such a degree of certainty as to enable a court to pronounce judgment upon a conviction, according to the right of the case. *People v. Reavey*, 38 Hun, 421 ; 4 N. Y.

An indictment may charge the offense in the language of the statute defining it. *People v. Kelly*, 3 N. Y. Cr., 272.

Where a person aided in, advised and procured the commission of a crime, though absent at the time of its actual commission, an indictment, which alleges the doing of the act by him, is sufficient. *People v. Bliven*, 20 St. Rep., 491 ; 112 N. Y., 79 ; 6 N. Y. Cr., 375.

This section provides, with reference to objections which may be made to an indictment for defects in the description of the offense, that it is sufficient if certain enumerated essentials can be understood therefrom. *People v. Conroy*, 97 N. Y., 68 ; 2 N. Y. Cr., 570.

Even though some of the requirements of sections 275 and 276, *ante*, are omitted from the indictment, yet, if it appears that it was found in the proper court and action, and that no prejudice to the defendant can ensue by reason of such omissions, the court is bound, under this section, to disregard them. *People v. Lenhardt*, 4 N. Y. Cr., 324 ; *People v. Peck*, 2 N. Y. Cr., 314 ; *aff'd*, 96 N. Y., 650.

Where an offense may be committed by doing any of several things, the indictment may, in a single count, group them together, and charge the defendant with having committed them all. *Bork v. People*, 91 N. Y., 13 ; 1 N. Y. Cr., 379.

The omission, in an indictment for a violation of the excise law, to state the exception provided for by the law of 1869, does not render such indictment invalid. *Jefferson v. People*, 28 Hun, 52.

A conviction cannot be had for the offense of selling liquor without a license, under an indictment so charging, when the offense proved was of selling liquor to be drunk on the premises in violation of a storekeeper's license. *People v. Buffum*, 27 Hun, 216.

The indictment for larceny, in *People v. Dimick*, 11 St. Rep., 739 ; 107 N. Y., 13, was held to be sufficient to comply with the requirements of this section.

In an indictment under the Peculation Act of 1875 for the unlawful conversion of property or funds belonging to a municipal corporation by an officer thereof, it is not necessary to aver the fiduciary relation of the defendant. *Bork v. People*, 91 N. Y., 13 ; 1 N. Y. Cr., 379. Neither is it necessary to aver in such indictment that the bonds were held on behalf of any public or governmental interest, as that is necessarily implied from the description in the indictment. *Id.* Nor need it, after alleging that the bonds were the property of the city, further allege that they were negotiable. *Id.*

An indictment, which alleges that the defendant unlawfully sold to a person named a part of a ticket in a certain lottery not expressly authorized by law, commonly called the Louisiana State Lottery, and, further, that a more particular description of the lottery is to the grand jury unknown and cannot be given, and sets out the ticket, is sufficient. *People v. Noelke*, 29 Hun, 461.

See *People v. Dumar*, 11 St. Rep., 19 ; 106 N. Y., 510 ; 8 N. Y. Cr., 270 ; *People v. Jackson*, 19 St. Rep., 506 ; 111 N. Y., 369 ; 6 N. Y. Cr., 399 ; *People v. Upton*, 38 Hun, 107, 113 ; 4 N. Y. Cr., 471 ; *People v. Sullivan*, *id.*, 197 ; *People v. Wise*, 3 N. Y. Cr., 305 ; 2 How, N. S., 98 ; *People v. Olson*, 39 St. Rep., 295, 299 ; 15 N. Y. Supp., 781 ; *People v. Gregg*, 35 St. Rep., 758 ; 13 N. Y. Supp., 114 ; 59 Hun, 112 ; *People v. Quinn*, 18 N. Y. Supp., 570 ; *People v. Ostrander*, 45 St. Rep., 555 ; 64 Hun, 340 ; 19 N. Y. Supp., 327 ; *People v. Dunn*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807 ; *People v. Crotty*, 30 St. Rep., 45 ; *People v. Laurence*, 51 St. Rep., 288 ; 137 N. Y., 522 ; *People v. Hatter*, 22 N. Y. Supp., 691.

§ 285. **Indictment not insufficient for defect of form, not tending to prejudice defendant.**—No indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of an imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits.

See notes under sections 275 and 283, *ante*.

See notes under section 684, *post*.

**Matter of form.**—This section is intended to cure defects under the general rules of pleading. *People v. Williams*, 18 St. Rep., 405 ; 2 N. Y. Cr., 383.

Proceedings are not affected by imperfection in matter of form. *People v. Metrea*, 30 Hun, 102 ; aff'd 92 N. Y., 128 ; 1 N. Y. Cr., 245 ; 65 How., 59.

The omission from the indictment of the title of the action and a statement of the court in which it is found and presented, will be disregarded, if it appears that it is found in the proper court and action, and no prejudice to defendant can ensue. *People v. Peck*, 2 N. Y. Cr., 314 ; 18 W. Dig.,

The trial is not affected by reason of an imperfection in the indictment which does not tend to the prejudice of the substantial rights of the defendant upon the merits. *People v. Osterhout*, 34 Hun, 261.

Defects, which do not tend to the prejudice of defendant, so far as substantial rights upon the merits are concerned, cannot affect either the indictment or the judgment. *People v. Buddensieck*, 3 St. Rep., 664 ; 108 N. Y., 496 ; 5 N. Y. Cr., 69.

Though imperfections in matter of form may be disregarded, the substance of all that is requisite to the offense must be alleged. *People v. Lowndes*, 3 St. Rep., 362 ; 130 N. Y., 463 ; rev'g 30 St. Rep., 168 ; 55 Hun, 469 ; *Antius v. People*, 82 N. Y., 339 ; *People v. King*, 18 St. Rep., 353 ; 110 N. Y., 3 ; *People v. Clements*, 11 St. Rep., 384 ; 107 N. Y., 205.

Indictments, notwithstanding the liberality with which they are to be construed, must allege facts which show that the crime has been committed. *People v. Haight*, 26 St. Rep., 34 ; 54 Hun, 9 ; 7 N. Y. Supp., 90.

The indictment for larceny in *People v. Dimick*, 11 St. Rep., 739 ; 107 N. Y., 13, was held sufficient to stand the test of this section.

An omission, in an indictment for receiving stolen goods, of a sufficient description of the intent, where it is impossible for the defendant to be cured thereby, comes within the provisions of this section. *People v. Aldon*, 20 St. Rep., 114 ; 111 N. Y., 575.

An indictment for burglary, insufficient in its description of the place, is imperfect in form within the meaning of this section. *People v. Haight*, 26 St. Rep., 34 ; 54 Hun, 9.

Where the departure, in an indictment for perjury, from the requirements of section 291, *post*, is nothing more than a matter of form, and does not result to defendant's prejudice in respect to a substantial right, it is immaterial, and the indictment good. *People v. Williams*, 18 St. Rep., 405 ; 2 N. Y. Supp., 383.

An indictment for perjury in verifying a bank report is not rendered sufficient in that it does not directly allege that the statements in the report were, as matter of fact, untrue. *People v. Clements*, 11 St. Rep., 384 ; 107 N. Y., 210.

**Arraignment.**—An objection, that the defendant was not arraigned upon the indictment and did not plead thereto, is waived by going to trial upon the merits, and cannot be raised for the first time after conviction. *People v. Tower*, 42 St. Rep., 164, 166 ; 17 N. Y. Supp., 897.

The court may properly allow the defendant to be arraigned at the close of the trial and direct a plea of not guilty to be entered, where he has not been arraigned by the delay. *People v. McHale*, 39 St. Rep., 762 ; 15 N. Y. Supp.,

see *People v. Quinn*, 44 St. Rep., 920 ; 18 N. Y. Supp., 570 ; *People v. McGee*, 35 St. Rep., 761 ; 59 Hun, 112 ; 13 N. Y. Supp., 116 ; *People v. Vandergrader*, 45 St. Rep., 555 ; 64 Hun, 340 ; 19 N. Y. Supp., 327 ; *People v. Condon*, 39 St. Rep., 295, 299 ; 15 N. Y. Supp., 781 ; *People v. Bradner*, 10 St. Rep., 667 ; 107 N. Y., 1, 10 ; *People v. Sullivan*, 4 N. Y. Cr., 197 ; *People v. Condon*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807 ; *People v. McHale*, 39 St. Rep., 762 ; *People v. Hatter*, 22 N. Y. Supp., 691.

§ 286. **Presumptions of law, and matters of which judicial notice is taken, need not be stated.**—Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment.

See *People v. Dunn*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807.

§ 287. **Pleading a judgment or determination of, or proceeding before, a court or officer of special jurisdiction.**—In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction ; but the judgment or determination may be stated to have been duly given or made. The facts constituting jurisdiction, however, may be established on the trial.

An indictment for perjury, which charges that a referee was duly and legally appointed in an action then pending in the Supreme Court of the state of New York, naming the parties, is a sufficient statement to show that the court had jurisdiction of the parties in that case. *Eighmy v. People*, 79 N. Y., 555.

See *People v. Dunn*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807.

§ 288. **Private statute, how pleaded.**—In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute, by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

See section 530 of Code of Civil Procedure.

See *People v. Dunn*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807.

§ 289. **Pleading in indictment for libel.**—An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled, of the defamatory matter on which the indictment is founded ; but it is sufficient to state generally, that the same was published concerning him ; and the fact that it was so published, must be established on the trial.

**Libel.**—The sole purpose and effect of this provision are to dispense with the allegation of extrinsic facts showing the application of the libel to the complainant. *People v. Stark*, 35 St. Rep., 155 ; 59 Hun, 59 ; 12 N. Y. Supp., 692.

It does not dispense with the allegation of all or any facts necessary to bring the act of the defendant within the definition of the crime sought to be charged. *Id.*

This section does not change in the least the necessity of explaining an ambiguous term, but only renders it no longer necessary to set forth any extrinsic facts for the purpose of showing the application of the libelous matter to the complainant. *People v. Isaacs*, 1 N. Y. Cr., 152.

An innuendo is still necessary and essential in an indictment for libel to explain an ambiguous expression claimed to be libelous and defamatory, and its absence in such case renders such indictment fatally defective. *Id.*

See *People v. Dunn*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807 ; *People v. Wise*, 3 N. Y. Cr., 305 ; 2 How. N. S., 98.

§ 290. **Pleading in indictment for forgery where the instrument has been destroyed, or withheld by defendant.**—When an instrument, which is the subject of an indictment for forgery, has been destroyed or withheld by the act or procurement of the defendant, and the fact of the destruction or withholding is alleged in the indictment, and established on the trial, the misdescription of the instrument is immaterial.



See *People v. Dunn*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807 ; *People v. Wise*, 3 N. Y. Cr., 305 ; 2 How. N. S., 98.

§ 291. **Pleading in indictment for perjury or subornation of perjury.**—In an indictment for perjury or subornation of perjury is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court, or before whom, the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned ; but the indictment need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person where or before whom the perjury was committed.

**Sufficient.**—This section recognizes the necessity of setting forth, in the indictment, proper allegations of the falsity of the matter on which the perjury is assigned. *People v. Clements*, 3 St. Rep., 700 ; 42 Hun, 858 ; 5 N. Y. Cr., 287 ; *aff'd*, 11 St. Rep., 384 ; 107 N. Y., 205.

An objection that an indictment for perjury is defective, in that it did not directly allege that the statements in the report were, as matter of fact, untrue, is untenable, where the averments therein amounted to an allegation that the statements were false. *People v. Clements*, 11 St. Rep., 384 ; 107 N. Y., 205.

The indictment for perjury, in *People v. Bowe*, 34 Hun, 533 ; 3 N. Y. Cr., 30, was held not to be too general in its allegations as to the fact that the oath was false.

The indictment for perjury, in *People v. Williams*, 18 St. Rep., 403 ; 2 N. Y. Supp., 382, 383 ; was held to be a substantial compliance with the requirements of this section.

The omission of the direct averment of the falsity and untruthfulness of the statements is a fatal defect in an indictment for perjury in verifying a bank report. *People v. Clements*, 3 St. Rep., 700 ; 42 Hun, 858 ; 5 N. Y. Cr., 282.

An indictment for perjury, which charges that the false statements were made by defendant in a certain specified action brought for a limited divorce, contains a sufficient statement of the issue involved in such action. *People v. Grimshaw*, 2 N. Y. Cr., 391 ; 33 Hun, 507.

A statement, in an indictment for perjury in verifying a false bank report, that the liabilities are a much larger sum than the amount mentioned in the report, is sufficient. *People v. Ostrander*, 45 St. Rep., 559 ; 64 Hun, 335, 340, 345 ; 19 N. Y. Supp., 327.

It is not necessary, in an indictment for perjury for verifying a false report, to set out the whole affidavit which is claimed to constitute the perjury. *Id.*

Deviations from the special requirements of this section are cured by section 684, *post*, more specifically than by the provisions of section 285, *ante*. *People v. Williams*, 18 St. Rep., 405 ; 2 N. Y. Supp., 382, 383.

This section and section 684, *post*, must be read together as bearing upon the sufficiency of an indictment for perjury. *Id.*

Under the provisions of section 8 of 2 R. S., it was held that it was not essential to the validity of an indictment for an offense that it should aver that the accused incited or solicited the other person to commit perjury. *Stratton v. People*, 81 N. Y., 629. An averment of an offer of such a valuable consideration for the purpose specified is sufficient. *Id.*

See *People v. Dunn*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807 ; *People v. Wise*, 3 N. Y. Cr., 310 ; 2 How. N. S., 98.

292. **Upon indictment against several, one or more may be convicted or acquitted.**—Upon an indictment against several defendants any one or more may be convicted or acquitted.

**Joint Indictment.**—In an indictment against several defendants for an assault and battery, some may be convicted of an assault and battery, and others of an assault only. *White v. People*, 32 N. Y., 465.

Where two are jointly indicted for committing a larceny, and one of them pleads guilty of an attempt to commit a larceny, and is sentenced, the other defendant may be lawfully tried for the larceny, and, on conviction, be sentenced to suffer the penalty of the law therefor. *Klein v. People*, 81 N. Y., 229.

See *People v. Dunn*, 25 St. Rep., 464 ; 53 Hun, 381 ; 7 N. Y. Cr., 185 ; 6 N. Y. Supp., 807 ; *People v. Cotto*, 42 St. Rep., 716 ; 131 N. Y., 580 ; 4 Silv. (Ct. App.), 10.

## CHAPTER III.

### AMENDMENT OF THE INDICTMENT.

SECTION 293. When amendment allowed.

294. Trial to proceed.

295. Effect of verdict, etc.

§ 293. **When amendment allowed.**—Upon the trial of an indictment, when a variance between the allegation therein and the proof, in respect to time, or in the name or description of any place, person or thing, shall appear, the court may, in its judgment, if the defendant can not be thereby prejudiced in his defense on the merits, direct the indictment to be amended, according to the proof, on such terms as to the postponement of the trial, to be had before the same or another jury, as the court may deem reasonable.

The case of *People v. Richards*, 7 St. Rep., 656 ; 44 Hun, 268 ; 5 N. Y. Cr., 369, was reversed in 13 St. Rep., 515 ; 108 N. Y., 137.

**Intention.**—The intention of the Code was to discourage technical defenses to indictments. *People v. Petrea*, 92 N. Y., 128 ; 1 N. Y. Cr., 245 ; 65 How., 59.

The intention of the Code was to destroy technical defenses to indictments not affecting the merits, as is apparent from the provisions of this section and section 362, *post*. *People v. Clark*, 8 N. Y. Cr., 175 ; 14 N. Y. Supp., 643.

This section cannot have any other effect than to promote the ends of justice by rendering of no avail a purely technical objection, without depriving the defendant of any substantial right. *People v. Johnson*, 5 St. Rep., 606 ; 5 N. Y. Cr., 220 ; 104 N. Y., 216.

**Constitutional.**—The provisions of this section, allowing amendments of indictments, are constitutional. *People v. Johnson*, 4 N. Y. Cr., 593 ; *People v. Herman*, 10 St. Rep., 66 ; 45 Hun, 176 ; 6 N. Y. Cr., 194 ; 27 W. Dig., 118.

**Name.**—When, upon the trial of an indictment, a variance between its allegation and the proof in respect to the name of any person shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended according to the proof. *People v. Johnson*, 5 St. Rep., 606 ; 104 N. Y., 216 ; 5 N. Y. Cr., 220.

An amendment, to correct a misnomer as to the owner of the property charged in the indictment, is authorized, where such owner and the owner as proved on the trial are the same. *People v. Dunn*, 25 St. Rep., 464 ; 7 N. Y. Cr., 387 ; 6 N. Y. Supp., 808.

Under this section, the court has power to allow, upon the trial of an indictment for larceny, an amendment to meet the proof, by changing the name of the owner of the property to the name of the bailee or custodian. *People v. Herman*, 10 St. Rep., 66 ; 45 Hun, 176 ; 6 N. Y. Cr., 199 ; 27 W. Dig., 118. Where the identity of the particular individual is material and



a part of the offense charged, a change in the name of the person will be permitted to be made. *Id.*

Where an indictment, under section 284 of the Penal Code for seduction or promise of marriage, is defective in not giving the correct surname of female, the court has power, on the trial, to cure the defect by direct amendment. *People v. Johnson*, 5 St. Rep., 606; 104 N. Y., 213; 5 Y. Cr., 220.

The provisions of the Code, allowing such an amendment, are not violative of section 6, art. 1, of the State constitution. *Id.*

A variance between indictment and proof in the name of the complainant may be amended under this section. *People v. Hagan*, 37 St. Rep., 661; 5 Y. Supp., 238.

*Ans.*—A variance between the averment in an indictment for murder and the proof, as to the day on which the crime was committed, may be disregarded, or the indictment may be amended. *People v. Jackson*, 19 St. Rep., 510; 111 N. Y., 369; 6 N. Y. Cr., 399.

A variance between the time alleged in the indictment and that shown by the proof may be amended, under this section, on the trial. *People v. Forster*, 43 St. Rep., 655; 131 N. Y., 481; aff'd 40 St. Rep., 861; 61 Hun, 272.

*Libel.*—An indictment for libel may be so amended, by inserting part of the libel accidentally omitted, as to make it conform to the proof, if it in no way prejudices the defendant. *People v. Clegg*, 82 St. Rep., 702.

*It allowable.*—This section has lodged with the court a new power in respect to indictments, and authorized their amendment in certain cases where there is a variance between the allegation therein and the proof, in respect to time, or in the name or description of any place, person or thing. *People v. Poucher*, 1 N. Y. Cr., 546; 30 Hun, 575. But under this section, the court cannot strike out from an indictment for grand larceny a clause charging the taking of certain gold and silver coins, and substitute therefor a clause charging the taking of bank-bills, etc. *Id.*

An indictment for grand larceny, which charges that the defendant unlawfully and feloniously did steal, take and carry away "the property therein described, cannot be sustained by proof that the defendant obtained possession of the property from the owner upon a sale on credit induced by false and fraudulent representations. *People v. Dumar*, 11 St. Rep., 19; 106 N. Y., 503; 8 N. Y. Cr., 263.

**294. Trial to proceed.**—After such amendment, the trial, however the same shall be proceeded with, shall proceed in the same manner and with the same consequences, as if no such amendment had occurred.

*Notes under last section.*

Where an indictment has been amended, the trial is to proceed in the same manner, and the verdict and judgment have the same effect as if the indictment had been framed originally in its amended form. *People v. Johnson*, 5 St. Rep., 606; 104 N. Y., 213; 5 N. Y. Cr., 217.

*People v. Jackson*, 19 St. Rep., 510; 111 N. Y., 369; 6 N. Y. Cr., 399.

**295. Effect of verdict, etc.**—A verdict and judgment, which may be given after the making of any such amendment, shall have the same force and effect as if the indictment had originally been found in its amended form.

*Notes under sections 293 and 294.* *Ans.*  
*People v. Jackson*, 19 St. Rep., 510; 111 N. Y., 369; 6 N. Y. Cr., 399.

## CHAPTER IV.

## ARRAIGNMENT OF THE DEFENDANT.

## SECTION 296. Arraignment.

297. Defendant, when to be personally present.

298. When personal appearance is necessary, if defendant be in custody, he must be brought before the court.

299. If discharged on bail or deposit, bench warrant to issue.

300. Bench warrant, by whom, and how issued.

301. Form of bench warrant.

302. Direction in bench warrant, if indictment be for misdemeanor.

303. If offense be bailable, order for bail to be indorsed on bench warrant.

304. Bench warrant, how served.

305. Proceedings on bench warrant, when defendant is brought before magistrate of another county.

306. Ordering defendant into custody, or increasing bail, when indictment is for felony.

307. Defendant, if present, to be committed; if not, bench warrant to issue.

308. Defendant appearing for arraignment without counsel, to be informed of his right to counsel.

309. Arraignment, how made.

310. If he gave another name, subsequent proceedings to be had by that name, referring to name in the indictment.

311. Time allowed defendant to answer indictment.

312. How defendant may answer indictment.

§ 296. **Arraignment.**—When an indictment is filed, the defendant must be arraigned thereon, before the court in which it is found, or before the court to which it is sent or removed.

Amended by chap. 360 of 1882.

This amendment eliminated from the original section the words "if it be triable therein,—if not."

**Object.**—The object of the arraignment is to inform the defendant of the charge against him and have him answer the indictment. *People v. Bradner*, 10 St. Rep., 667 ; 107 N. Y., 9.

**Essential.**—In a criminal case, an arraignment and plea are essential and necessary preliminaries to a legal trial upon an indictment. *Id.*

When the indictment is filed, the defendant must be arraigned thereon. *Id.*

**Waiver.**—The arraignment is a matter which the prisoner can waive. *People v. Osterhout*, 34 Hun, 261 ; *Pierson v. People*, 79 N. Y., 424.

In a case where the prisoner appears with his own counsel, the omission formally to arraign and to ask for a plea is immaterial to his rights, and may be deemed to be waived. *People v. Osterhout*, *ante*.

A formal arraignment may be had and a plea of not guilty entered at the close of the trial, where inadvertently omitted, if the defendant is not prejudiced by such delay. *People v. McHale*, 39 St. Rep., 761.

But a formal plea of not guilty is not necessary to put the defendant on trial. *People v. Bradner*, 10 St. Rep., 667 ; 107 N. Y., 1, 9.

An issue is formed, where the defendant, on his arraignment, informs the court that he denies the charge or that he demands a trial. *Id.*

**Corporation.**—*People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 189 ; 5 N. Y. Supp., 19.

§ 297. **Defendant, when to be personally present.**—If an indictment be for a felony, the defendant must be personally present when arraigned ; but if for a misdemeanor only, his personal

appearance is unnecessary, and he may appear upon the arraignment by counsel.

Amended by chap. 360 of 1882.

This amendment added to the first clause of the original section the words, "when arraigned," and omitted the word "if" from the latter clause.

After an indictment is found, the defendant must be before the court, in person in the case of a felony, and, in the case of a misdemeanor, either in person or by counsel. *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 190; 5 N. Y. Supp. 19.

When a conviction will not be set aside because of the temporary voluntary absence of the prisoner. *People v. Bragle*, 26 Hun, 378; *aff'd*, 88 N. Y., 585.

§ 298. When personal appearance is necessary, if defendant is in custody, he must be brought before the court.—When his personal appearance is necessary, if he be in custody, the court may direct the officer in whose custody he is, to bring him before it to be arraigned.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 192; 5 N. Y. Supp., 19.

§ 299. If defendant does not appear, bench warrant to issue.—If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear to be arraigned, or if the defendant be for any cause absent, when his personal attendance is necessary, the court, in addition to the forfeiture of any undertaking of bail, or of any money deposited, may direct the clerk to issue a bench warrant for his arrest.

Amended by chap. 360 of 1882.

This amendment inserted after the word "arraigned," the words "if the defendant be for any cause absent," and substituted the word "any" for the word "the" before the words "undertaking" and "money."

See Section 599, *post*.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 192; 5 N. Y. Supp., 19.

§ 300. Bench warrant, by whom, and how issued.—The clerk, on the application of the district attorney, may accordingly at any time after the order, whether the court be sitting or not, issue a bench warrant to one or more counties. A bench warrant for the arrest of any defendant indicted, may also be issued by the district attorney at any time after the indictment is found.

Amended by chap. 360 of 1882.

This amendment eliminated from the original section the words "in the manner and form now prescribed by law," and substituted "the" for "such" before "indictment."

See sections 306 and 599, *post*.

See *People ex rel. Sherwin v. Mead*, 28 Hun, 231; 64 How., 41; 15 W. Dig., 52; *aff'd*, 92 N. Y., 415; 1 N. Y. Cr., 417; 17 W. Dig., 125.

§ 301. Form of bench warrant. The bench warrant issued upon the indictment must, if the crime be a felony, be substantially in the following form:

"County of *Albany*, [or as the case may be].

"In the name of the People of the State of New York:

"To any peace officer in this state. An indictment having been found on the       day of       , 18       in the *county court of the county of Albany* [or as the case may be] charging C. D. with the crime of [designating it generally].

"You are therefore commanded, forthwith to arrest the above named C. D., and bring him *before that court*, [or if the indictment have been sent or removed to another court], before the *supreme court in the county*, [or as the case may be], to answer the indictment; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of *Albany*, [or as the case may be, or in the city and county of New York "to the keeper of the city prison of the city of New York."]

"City [or town] of       , the       day of       , 18

"By order of the court,

E. F. Clerk."

or G. H.,

*District Attorney of the county of       ."*

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1882.

This amendment dropped the words "by the clerk" after the word "issued," substituted the words "to any peace officer" for the words "to any sheriff, constable, marshal or policeman," and added the words "or G. H., District Attorney of the county of —."

**Form.**—The provisions of this and the following section, as to the form and contents of the bench warrant, have no application to a case, commenced prior to the enactment of this Code. *People ex rel. Sherwin v. Mead*, 28 Hun, 231; 64 How., 41; 15 W. Dig., 552.

This and the next section apply only to the form of a bench warrant to be issued by the clerk. *Id.* The clerk is authorized to issue a bench warrant on the application of the district attorney, in instances where the prisoner has been discharged on bail or has deposited moneys instead thereof, and has failed to appear in pursuance of his recognizance. *Id.*

A warrant, issued after indictment found, may briefly state the offense, and need not be more precise and accurate than is sufficient to apprise the prisoner of the charge against him. *People ex rel. Sherwin v. Mead*, 93 N. Y., 415; 1 N. Y. Cr., 417; 17 W. Dig., 125; 28 Hun, 227; *Pratt v. Bogardus*, 49 Barb., 92.

When the district attorney issues the bench warrant himself, he is not required to follow the form provided in this section. *People ex rel. Sherwin v. Mead*, 28 Hun, 231; 64 How., 41; 15 W. Dig., 552. Does not the amendment of 1882 affect this proposition?

§ 302. **Direction in bench warrant, if indictment be for misdemeanor.**—If the crime be a misdemeanor, the bench warrant must be in a similar form, adding to the body thereof, a direction to the following effect: "or if he require it, that you take him before any magistrate in that county or in the county in which you arrest him, that he may give bail to answer the indictment."

See note under preceding section.

This section seems to be intended to provide for the form of a bench warrant to be issued by the clerk, on the order of the court, when the offense is a misdemeanor only. *People ex rel. Sherwin v. Mead*, 28 Hun, 231; 64 How., 41; 15 W. Dig., 552. Does not the amendment of 1882 to the preceding section make this form applicable to bench warrant, when issued by the district attorney?

§ 303. If offense be bailable, order for bail to be indorsed on bench warrant.—If the crime charged be bailable, the court, upon directing the bench warrant to issue, may fix the amount of bail; and in such case an indorsement must be made upon the bench warrant and signed by the clerk, to the following effect: “The defendant is to be admitted to bail in the sum of \_\_\_\_\_ dollars.”

§ 304. Bench warrant, how served.—The bench warrant may be served in any county, in the same manner as a warrant of arrest, except that, when served in another county, it need not be indorsed by a magistrate of that county.

§ 305. Proceedings on bench warrant, when defendant is brought before magistrate of another county.—If the defendant be brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto, in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings may be had thereon, as provided in sections 159 to 161, both inclusive.

§ 306. Ordering defendant into custody, or increasing bail, when indictment is for felony.—If the defendant, before the finding of an indictment, has given bail for his appearance to answer the charge, the court, to which the indictment is presented or sent or removed for trial, may order the defendant to be committed to actual custody, either without bail, or unless he give bail in an increased amount, to be specified in the order.

See section 800, *ante*, and section 599, *post*.

§ 307. Defendant, if present, to be committed; if not, bench warrant to issue.—If the defendant be present when the order is made, he must be forthwith committed accordingly. If he be not present, a bench warrant must be issued and proceeded upon, in the manner provided in this chapter.

See section 600, *post*.

§ 308.\* Defendant appearing for arraignment without counsel to be informed of his right to counsel.—If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. When services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment is punishable by death or on an appeal from a judgment of death, the court in which the defendant is tried or the action or indictment is otherwise disposed of, or by which the appeal is finally determined, may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with the clerk of such court, and also reasonable compensation for his services in such court, not exceeding the sum of five hundred dollars, which allowance shall be a charge upon the county in which the indictment in the action is found, to be paid out of the court fund, upon the certificate of the judge or justice presiding at the trial or otherwise disposing of the indictment, or upon the certificate of the appellate court, but no such allowance shall be made unless an affidavit is filed with the clerk of the county by or on behalf of the defendant, showing that he is wholly destitute of means.

Am'd, ch. 427 of 1897. \*See § 830, *post*.

This section does no more than declare the unwritten law in force when the Code was adopted. *People ex rel. Brown v. Supervisors, etc.*, 4 N.Y. Cr., 107.

This section is silent as to the duty of the court in case the defendant appears for trial without counsel. *Id.*

**Assigned counsel.**—Counsel, assigned under this section by the court to defend a prisoner, is not entitled to compensation from the county for his services rendered under such assignment. *Id.*

Stenographer's minutes of testimony may be furnished, on order of court, to assigned counsel of indigent prisoner. *People v. Willett*, 3 N. Y. Cr., 55; 1 How. N. S., 197.

**§ 309. Arraignment, how made.**—The arraignment must be made by the court, or by the clerk or district attorney, under its direction, and consist in stating the charge in the indictment to the defendant, and in asking him whether he pleads guilty or not guilty thereto. If the defendant demand it, the indictment must be read, or a copy thereof furnished to him before requiring him to plead.

An arraignment and plea are, *it seems*, necessary, preliminary to a legal trial upon an indictment. *People v. Bradner*, 10 St. Rep., 677; 107 N.Y., 1.

**Corporation.**—*People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 190; 5 N.Y. Supp., 20.

**§ 310. If he gave another name, subsequent proceedings to be had by that name, referring to name in the indictment.**—If when arraigned the defendant allege that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment; and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted.

Where the defendant is indicted by several fictitious or alias names, and his true name is discovered upon the trial and inserted in the indictment and other proceedings, though they may, with propriety, have been omitted in the administration of the oaths to the jurors and witnesses subsequently, their repetition, in such case, is not error, and it cannot be assumed that any legal harm was thereby done to the defendant. *People v. Everhardt*, 5 St. Rep., 793; 2 Silv. (Ct. App.), 507; 104 N. Y., 591; 25 W. Dig., 300.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 190; 5 N.Y. Supp., 20.

**§ 311. Time allowed defendant to answer indictment.**—If on the arraignment the defendant require it, he must be allowed until the next day, or such further time may be allowed him as the court deems reasonable, to answer the indictment.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 190; 5 N. Y. Supp., 20.

**§ 312. How defendant may answer indictment.**—In answer to the indictment, the defendant may either move the court to set the same aside, or may demur or plead thereto.

**Motion to set aside.**—This section provides that, in answer to an indictment, the defendant may either move to set it aside, or may demur or plead thereto. *People v. Petrea*, 92 N. Y., 128; 1 N. Y. Cr., 244; 65 How., 59; *aff'd* 30 Hun, 112.

This section does not preclude the defendant from the use of any grounds formerly available upon such motions. *People v. Clements*, 3 St. Rep., 700; 42 Hun, 353; 5 N. Y. Cr., 294.



as held in *People v. Price*, 6 N. Y. Cr., 143; 2 N. Y. Supp., 415, that on to set aside an indictment was authorized, under this section, on grounds than those specified in the next section.

motion to set aside an indictment can be made until the arraignment of the defendant. *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 189; 5 Supp., 20.

*People v. Clark*, 8 N. Y. Cr., 174; 14 N. Y. Supp., 643; *People ex rel. v. Court*, etc., 46 St. Rep., 256; 19 N. Y. Supp., 509.

## CHAPTER V.

### SETTING ASIDE THE INDICTMENT.

§ 313. Indictment, when set aside on motion.

314. Defendant, when precluded from objecting to indictment in any other manner.

315. Motion, when heard.

316. If denied, defendant must immediately demur or plead.

317. If granted, defendant discharged, unless the case be submitted to the same or another grand jury.

318. Effect of order for re-submission.

319. When new indictment not found.

320. Order to set aside indictment, no bar to another prosecution.

§ 313. **\*Indictment, when set aside on motion.**—The indictment must be set aside by the court in which the defendant is arraigned, and upon his motion, in either of the following cases, and no other:

When it is not found, indorsed and presented, as prescribed in sections 268 and 272;

When a person has been permitted to be present during the impaneling of the grand jury, while the charge embraced in the indictment was under consideration, except as provided in sections 263 and 264.

Enacted by chap. 427, 1897.

See notes under sections 252 and 256, *ante*.

Under the Code, it was discretionary with the court whether or not to grant the motion to set aside an indictment. *People v. Brickner*, 8 N. Y. Cr., 220; 15 N. Y. Supp., 529. By this section, the right to make such a motion, on the grounds specified therein, is given to the defendant absolutely, and is no longer in the discretion of the court. *Id.*

This section declares in what cases only the defendant may have the indictment set aside. *People v. Petrea*, 30 Hun, 112; 1 N. Y. Cr., 198.

The Code seems to have substituted a motion to set aside an indictment for the former motion to quash. *Id.*

The causes, for which the defendant may move to have the indictment set aside, are defined in this section. *People v. Petrea*, 92 N. Y., 128; 1 N. Y. Cr., 244; 65 How., 59.

**When made.**—Until an indictment shall be found, a motion to quash it may be made. *People v. Fitzpatrick*, 30 Hun, 497; 1 N. Y. Cr., 425; 66 How., 23.

This section imposes restrictions as to procedure before the grand jury, and requires the motion upon the specified grounds to be made before the defendant pleads to the indictment. *People v. Clements*, 3 St. Rep., 700; 1 N. Y. Cr., 294.

**When made.**—On a motion to quash an indictment, the defendant may set forth the facts constituting the alleged irregularity upon information and affidavit, and if they are within the knowledge of the district attorney. *People v. Briggs*, 60 How., 17; *People v. Price*, 6 N. Y. Cr., 142.

If the facts alleged, they may be sufficient to call upon him to disprove them, and if not, they may be set forth in the moving affidavits. *Id.*

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\* See § 830, *post*.



A motion to quash an indictment, and so a motion to set it aside, should be made on affidavits. *People v. Petrea*, 30 How., 101; 1 N. Y. Cr., 198. The defendant cannot, on such motion, offer to prove certain facts, and endeavor to take exceptions to the exclusion of such offer. *Id.*

The defendant is not entitled, as a matter of right, to the evidence taken before the grand jury, or to an inspection of their minutes except for the purpose of moving to set aside the indictment on the grounds set forth in this section. *People v. Richmond*, 5 N. Y. Cr., 97; *People v. Jaehue*, 4 N. Y. Cr., 161.

**Grounds of motion.**—Such motion will be denied unless it is founded upon one of the grounds specified in section 313 of the Code. *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 189; 5 N. Y. Supp. 20.

The Code, by defining the causes for which the indictment may be set aside, must, by the general rule of construction, be held to exclude the entertaining of the motion for other causes than those specified. *People v. Petrea*, 92 N. Y., 128; 1 N. Y. Cr., 244; 65 How., 59.

A motion to quash or set aside the indictment on the ground that the grand jury which found the indictment was not a legal grand jury, is not for any cause embraced in this section. *Id.*

The remark of Judge ANDREWS, in this case, was held, in *People v. Brickner*, 8 N. Y. Cr., 222; 15 N. Y. Supp., 529, not to be controlling as to the limitation of grounds for motions to set aside indictments.

The weight of adjudication is that the motion may be made upon other grounds than those specified in this section. *People v. Clements*, 5 N. Y. Cr., 288; *People v. Singer*, 5 id., 1; *People v. Selleck*, 4 id., 329; *People v. Haines*, id., 100; 1 N. Y. Supp., 55; *People v. Price*, 6 N. Y. Cr., 141; 2 N. Y. Supp., 415; *People v. White*, 6 N. Y. Cr., 145, note; *People v. Clark*, 8 id., 169; 14 N. Y. Supp., 643; *People v. Brickner*, 8 N. Y. Cr., 222; 15 N. Y. Supp., 529; *People v. Moore*, 65 How., 177.

A motion to set aside an indictment may be made on other grounds than those specified in this section. *People v. Price*, 6 N. Y. Cr., 143; 2 N. Y. Supp., 415.

Courts will entertain motions to set aside indictments on grounds not specified in this section, though not distinctly authorized by the provisions of the Criminal Code. *People v. Clark*, 8 N. Y. Cr., 177; 14 N. Y. Supp., 643.

A motion to set aside an indictment may be made on other grounds than those enumerated in this section. *People v. Brickner*, 8 N. Y. Cr., 222; 15 N. Y. Supp., 529.

It was held in *People v. Price*, *ante*, that a motion to set aside an indictment may be made on other grounds than those specified in this section.

This section does not limit the power of the court to set aside an indictment. *People v. Brickner*, 8 N. Y. Cr., 220; 15 N. Y. Supp., 529.

It does not refer to motions for such relief on other grounds than those stated. *Id.* It changes the rule of the common law by giving to the defendant the legal right to move on these grounds at the time stated, and at no other time, and taking away the discretion formerly resting with the court whether to entertain, or not entertain, the motion. *Id.*

**When granted.**—When the defect invades a constitutional right, the court is bound to take notice of it, though unauthorized to do so by any statute, and even though a statute seems to preclude the raising of the objection. *People v. Petrea*, 92 N. Y., 128; 1 N. Y. Cr., 244; 65 How., 59; *People v. Haines*, 6 N. Y. Cr., 100; 1 N. Y. Supp., 55.

A motion was made and granted, in *People v. Singer*, 5 N. Y. Cr., 1, to set aside an indictment on the ground that the defendant had been compelled to testify against himself before the grand jury which found the indictment.

See also *People v. Haines*, 6 id., 100; 1 N. Y. Supp., 55.

An indictment, founded upon illegal evidence taken by the grand jury, will be vacated. *People v. Haines*, 6 N. Y. Cr., 100; 1 N. Y. Supp., 55; *People v. Sellick*, 4 N. Y. Cr., 329.

An indictment will be set aside, on motion, when it has been found by the grand jury without, or upon illegal, evidence. *People v. Brickner*, 8 N. Y. Cr., 217; 15 N. Y. Supp., 529.

An indictment was set aside because attempts had been made to influence the grand jury. *People v. Sellick*, 4 N. Y. Cr., 329.

An indictment, which alleges a prior conviction, will be set aside, if there was no testimony before the grand jury identifying the accused as the person previously convicted. *People v. Price*, 6 N. Y. Cr., 141 ; 2 N. Y. Supp., 115.

The indictment must be set aside when it is not found, indorsed and presented as prescribed in sections 268 and 272, *ante*. *People v. Petrea*, 30 Hun, 101 ; 1 N. Y. Cr., 198.

The court, in *People v. Clark*, 8 N. Y. Cr., 169 ; 14 N. Y. Supp., 643, granted a motion to set aside the counts of the indictment, which were found, not only without evidence, but directly against the evidence.

An indictment, found against a defendant who has been required to attend before a grand jury and has made a statement in answer to their interrogatories, after being cautioned by the district attorney as to answering, will be quashed. *People v. Singer*, 5 N. Y. Cr., 1.

Where an indictment has been found by a grand jury, drawn under color of law, it is a good indictment, though the law under which the selection is made is void. *People v. Fitzpatrick*, 66 How., 14 ; 30 Hun, 493 ; 1 N. Y. Cr., 425 ; *People v. Petrea*, 92 N. Y., 144 ; *People v. Hooghkerk*, 96 N. Y., 158.

**Waiver.**—If an indictment for violation of the excise law is false in alleging that the sales were made to citizens and persons unknown, when, in fact, they were known, it may be that a motion may be made to quash the indictment, in case the defendant is prejudiced or misled. But when, without preliminary objection, the case proceeds to trial, the knowledge of the grand jury is of no importance. *People v. Bradley*, 33 St. Rep., 565.

See *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 256 ; 8 N. Y. Cr., 355 ; 19 N. Y. Supp., 509 ; *People v. Havens*, 3 N. Y. Cr., 286.

§ 314. Defendant, when precluded from objecting to indictment in any other manner.—If the motion to set aside the indictment be not made, the defendant is precluded from afterward taking the objections mentioned in the last section.

See *People v. Clements*, 5 N. Y. Cr., 292.

§ 315. Motion, when heard.—The motion to set aside an indictment must be heard at the time of the arraignment, unless, for good cause, the court postpone the hearing to another time.

**When made.**—The motion to set aside the indictment must be made at the time of the arraignment, or at such time as the court may appoint to hear it, after the defendant is informed of the nature of the charge contained in the indictment, and it cannot be made at any other time. *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 190 ; 5 N. Y. Supp., 20.

Where the defendant, in case of a felony, has not appeared in person, or, in case of a misdemeanor, either in person or by counsel, a motion to set aside the indictment cannot be entertained. *Id.* An appearance by counsel solely for the purpose of the motion, and not generally for the defendant, is not sufficient. *Id.*

§ 316. If denied, defendant must immediately demur or plead.—If the motion be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto.

§ 317. If granted, defendant discharged, unless the case be submitted to the same or another grand jury.—If the motion be granted, the court must order that the defendant, if in custody, be discharged therefrom, or if under bail, that his bail be exonerated, or if he have deposited money instead of bail, that the money be refunded to him ; unless the court direct that the case be re-submitted to the same or another grand jury.

In case a grand jury has found a bill, and the same has been set aside upon motion, under section 313, *ante*, by the court, the same charge should

not be again presented to a grand jury, without the direction of the court. *People v. Clements*, 5 N. Y. Cr., 297.

§ 318. **Effect of order for re-submission.**—If the court direct that the case be re-submitted, the defendant, if already in custody must so remain, unless he be admitted to bail, or if already admitted to bail, or money have been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment.

**Re-submission.**—Where, on quashing an indictment, the case is remanded to another grand jury, the defendant, if he is in custody, must so remain, unless admitted to bail. *People v. Price*, 6 N. Y. Cr., 141, 145; 2 N. Y. Supp., 416.

Under a direction to re-submit the matter, the defendant is at all times liable to be arrested and imprisoned, and his bail is liable for his default in appearing before the court, whenever required, under an undertaking given prior to the term at which the demurrer to the indictment was sustained. *People v. Clements*, 5 N. Y. Cr., 298.

§ 319. **When new indictment not found.**—Unless a new indictment be found before the next grand jury of the county is discharged, the court must, on the discharge of such grand jury, make the order prescribed by section 317.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

§ 320. **Order to set aside indictment, no bar to another prosecution.**—An order to set aside an indictment, as provided in this chapter, is no bar to a future prosecution for the same offense.

## CHAPTER VI.

### DEMURRER.

**SECTION 321.** Only pleading for defendant, is demurrer or plea.

322. Demurrer or plea, when put in.

323. Grounds of demurrer.

324. Demurrer, how put in, and its form.

325. When heard.

326. Judgment on demurrer.

327. If allowed, judgment a bar to another prosecution, unless direction that the case be re-submitted to the same or another grand jury.

328. If re-submission not ordered, defendant discharged.

329. Proceedings, if re-submission ordered.

330. If demurrer disallowed, defendant may be permitted to plead. When he must do so, and effect of his omission.

331. When objection, forming ground of demurrer, may be taken at the trial, or in arrest of judgment.

§ 321. **Only pleading for defendant, is demurrer or plea.**—The only pleading on the part of the defendant is either a demurrer or a plea.

**Plea.**—The plea makes the issue of law or fact to be tried. *People v. Bradner*, 10 St. Rep., 667; 107 N. Y., 9.

It is sufficient to constitute an issue that the defendant, on his arraignment, informs the court that he denies the charge or that he demands a trial. *Id.*

The sufficiency of the evidence, upon which a grand jury finds an indictment, is not a question which can be raised by plea to the indictment. *Hope v. People*, 83 N. Y., 422.

See *People v. Petrea*, 92 N. Y., 128 ; 1 N. Y. Cr., 244 ; 65 How., 59 ; *aff'g* 80 Hun, 112 ; 1 N. Y. Cr., 198.

§ 322. **Demurrer or plea, when put in.**—Both the demurrer and the plea must be put in, either at the time of the arraignment, or at such other time as may be allowed to the defendant for that purpose.

**When demurrer proper.**—All technical questions and formal defects appearing upon the face of the indictment must be taken by demurrer, and cannot be raised on the trial or on a motion in arrest of judgment. *People v. Upton*, 38 Hun, 111 ; 4 N. Y. Cr., 470.

**Withdrawing plea.**—Leave to withdraw plea of not guilty and for permission to interpose a demurrer, is discretionary with the trial court. *Id.*

§ 323. **Grounds of demurrer.**—The defendant may demur to the indictment, when it appears upon the face thereof,

1. That the grand jury, by which it was found, had no legal authority to inquire into the crime charged, by reason of its not being within the local jurisdiction of the county ; or

2. That the indictment does not conform substantially to the requirements of sections 275 and 276 ; or

3. That more than one crime is charged in the indictment within the meaning of sections 278 or 279 ; or

4. That the facts stated do not constitute a crime ; or

5. That the indictment contains matter, which, if true, would constitute a legal justification or excuse for the acts charged, or other legal bar to the prosecution.

See notes under sections 275, 276, 278 and 279, *ante* ; section 331, *post*.

The case of *People v. Richards*, 7 St. Rep., 656 ; 44 Hun, 288 ; 5 N. Y. Cr., 370, was reversed in 13 St. Rep., 515 ; 108 N. Y., 137.

This section declares the cases in which a demurrer may be interposed, and confines the demurrer to matters appearing on the face of the indictment. *People v. Petrea*, 30 Hun, 112 ; 1 N. Y. Cr., 198.

**Joinder of offenses.**—Where more than one separate and distinct crime is charged in an indictment, the objection should be taken by demurrer. *People v. Upton*, 38 Hun, 107 ; 4 N. Y. Cr., 455.

An objection to the improper joinder of two crimes in one count of an indictment is waived by the failure to demur to it on that ground. *People v. Tower*, 42 St. Rep., 165 ; 17 N. Y. Supp., 396 ; *aff'd*, 48 St. Rep., 438 ; 135 N. Y., 459.

Where it appears upon the face of an indictment, that more than one crime is charged therein, a demurrer will be sustained. *People v. Cole*, 2 N. Y. Cr., 110.

Where offenses cannot be united in the same indictment, the remedy is by demurrer. *People v. Tower*, 48 St. Rep., 439 ; 135 N. Y., 459 ; *aff'g* 42 St. Rep., 165 ; 17 N. Y. Supp., 396.

Where more than one crime is charged in the indictment, except as permitted by section 279, *ante*, the proper and only remedy is by demurrer. *People v. McCarthy*, 18 St. Rep., 267 ; 110 N. Y., 314.

So, an indictment which, in separate counts, charges a bank officer with the offenses of overdrawing his account in different amounts and upon different dates, is subject to the objection that it charges more than one offense, and, therefore, violates the prohibition of section 278 of the Code of Criminal Procedure. *People v. Upton*, 4 N. Y. Cr., 455 ; 38 Hun, 107.

In the case cited, the defendant, by his appearance and plea of not guilty, waived the misjoinder. *Id.*

An indictment which charges an illegal sale of spirituous liquors on four different occasions and to different people, is demurrable on the ground that it charges more than one crime. *People v. O'Donnell*, 15 St. Rep., 141 ; 46 Hun, 360 ; 7 N. Y. Cr., 347 ; 10 N. Y. Supp., 251.

An indictment, which charges a violation of section 18, and also violations of section 14, of the former excise act of 1857, is demurrable. *People v. O'Donnell*, 15 St. Rep., 141; 46 Hun, 361, dissenting opinion of FOLLETT, J.

**One offense.**—An indictment which charges, in its several counts, only one crime, though such crime is charged in separate counts to have been committed in a different manner or by different means, is not demurrable. *People v. Rice*, 35 St. Rep., 186.

**Imperfection in form.**—This section does not permit a demurrer for imperfection in the form of the allegations of an indictment. *People v. Clements*, 11 St. Rep., 384; 107 N. Y., 210.

A demurrer to an indictment is not permitted for imperfections in the form of the allegations. *People v. Gregg*, 35 St. Rep., 757; 59 Hun, 112; 18 N. Y. Supp., 116.

A general demurrer for insufficiency is not sustainable on the ground that the facts are argumentatively, or otherwise imperfectly or informally, stated. *People v. Clements*, 11 St. Rep., 384; 107 N. Y., 210.

A demurrer to an indictment on the grounds stated in this section is not supported, by pointing out mere informalities which present no substantial failure to conform to the requirements of sections 275 and 276, *ante*, declaring the form and frame of the indictment. *People v. Peck*, 2 N. Y. Cr., 817; 18 W. Dig., 527.

**Sufficiency.**—An indictment which, in attempting to set forth an assault in the second degree, in fact only shows an assault in the third degree, is not demurrable. *People v. Cooper*, 3 N. Y. Cr., 119.

In *People v. Wise*, 3 N. Y. Cr., 310; 2 How. N. S., 92; a count, under section 649 of Penal Code, was held demurrable, on the ground that it failed to allege facts constituting a crime, in that it omitted to aver, (1) that the defendant was a supervisor, or, (2) that he was a messenger, or, (3) that he took the certificate from a messenger, or, (4) that the certificate was to have been used for any legal purpose, or that such use was prevented.

**Indefiniteness.**—The Criminal Code does not make indefiniteness a ground of demurrer. *People v. Draper*, 28 Hun, 3; 1 N. Y. Cr., 141.

**Statute of limitations.**—A demurrer cannot be interposed to an indictment on the ground that it appears, upon its face, that the prosecution is barred by the statute of limitations. *People v. Durrin*, 2 N. Y. Cr., 834.

The statute need not be set out and negatived in the indictment. *Id.*

See *People v. Quinn*, 44 St. Rep., 920; 18 N. Y. Supp., 569; *People v. Carr*, 3 N. Y. Cr., 582; *People v. D'Argencour*, 32 Hun, 179.

§ 324. **Demurrer, how put in, and its form.**—The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment, or it may be disregarded.

See notes under preceding section.

See *People v. McCarthy*, 18 St. Rep., 267; 110 N. Y., 314.

§ 325. **When heard.**—Upon the demurrer being filed, the objections presented thereby must be heard at such time as the court may appoint.

§ 326. **Judgment on demurrer.**—The court must give judgment upon the demurrer either allowing or disallowing it; and an order to that effect must be entered upon the minutes.

Where the demurrer is to the whole indictment, the indictment is good if either count is good. *People v. Rice*, 35 St. Rep., 186.

See *People v. Cooper*, 3 N. Y. Cr., 119.

§ 327. **If allowed, judgment a bar to another prosecution, unless direction that the case be re-submitted to the same or another grand jury.**—If the demurrer be allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the court, being of opinion



that the objection on which the demurrer is allowed may be avoided in a new indictment, direct the case to be re-submitted to the same or another grand jury.

The case of *People v. Richards*, 7 St. Rep., 656 ; 44 Hun, 288 ; 5 N. Y. Cr., 870 : was reversed in 13 St. Rep., 515 ; 108 N. Y., 137.

**Re-submission.**—When a demurrer to an indictment is sustained by the court, it is a bar to any other prosecution for the same offense, unless the court direct the case to be re-submitted to the grand jury. *People v. Clements*, 5 N. Y. Cr., 297.

Where a case has been re-submitted to the grand jury by the direction of the court, upon sustaining a demurrer to an indictment, the operative power of such direction ceases, and the case cannot afterward be submitted to another grand jury by virtue of that direction. *Id.*

If, after a new indictment has been found upon such re-submission, another indictment is found for the same offense without the direction of the court for a further submission of the case, the latter indictment will be set aside. *Id.*

§ 328. **If re-submission not ordered, defendant discharged.**—If the court do not direct the case to be re-submitted, the defendant, if in custody, must be discharged, or if admitted to bail his bail is exonerated, or if he have deposited money instead of bail, the money must be refunded to him.

See sections 317 and 318, *ante*.

The reference to this section on page 144 of 92 N. Y., should be to section 283, *ante*.

Where the case cannot be re-submitted, on reversal, by reason of the limitation prescribed in section 142 of the Code of Criminal Procedure, the prisoner must be discharged and his bail, if any, exonerated. *People v. O'Donnell*, 15 St. Rep., 141 ; 46 Hun, 362 ; 7 N. Y. Cr., 350 ; 10 N. Y. Supp., 252.

See *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 256 ; 8 N. Y. Cr., 357 ; 19 N. Y. Supp., 509 ; *People v. Clements*, 5 N. Y. Cr., 298.

§ 329. **Proceedings, if re-submission ordered.**—If the court direct that the case be submitted anew, the same proceedings must be had thereon as are prescribed in sections 318 and 319.

The reference to this section in *People v. Petrea*, 92 N. Y., 144, should be to section 328, *ante*.

The reference to this section in *People v. Murphy*, 4 N. Y. Cr., 98, should be to section 392, *post*.

See *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 256 ; 8 N. Y. Cr., 357 ; 19 N. Y. Supp., 509.

§ 330. **If demurrer disallowed, defendant may be permitted to plead. When he must do so, and effect of his omission.**—If the demurrer be disallowed, the court must permit the defendant, at his election, to plead ; which he must do forthwith, or at such time as the court may allow. If he do not plead, judgment must be pronounced against him, if the crime charged is a misdemeanor, otherwise a plea of "not guilty" must be entered.

See section 342, *post*.

**Form of judgment.**—As to form of judgment on disallowance of demurrer in case of misdemeanor, see *People v. Cooper*, 3 N. Y. Cr., 119.

**Plea of not guilty.**—In the event of the defendant's failing to plead to the indictment after the reversal of the judgment and overruling of the demurrer, a plea of "not guilty" must be entered, if the crime charged is not a misdemeanor. *People v. Crotty*, 30 St. Rep., 46 ; 9 N. Y. Supp., 939 ; *People v. Cole*, 2 N. Y. Cr., 108.

§ 361. When objections, forming ground of demurrer, may be taken at the trial, or in arrest of judgment.—The objections mentioned in section 359 can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject-matter is waived if that the facts stated do not constitute a crime may be taken at the trial under the plea of not guilty, and in arrest of judgment.

See also under section 359, note.

See also under section 457, note.

The provisions of this section are imperative and cannot be disregarded by the court. *People v. Upton*, 38 Hun. 110.

**Demurrer.**—The objection that an indictment does not conform to the requirements of sections 375 and 376, *infra*, can only be taken by demurrer. *People v. Murphy*, 95 N. Y. 73.

If more than one crime is charged in an indictment, except as permitted by section 376, *infra*, the proper and only remedy is by demurrer. *People v. McLaughlin*, 10 St. Rep. 367; 10 N. Y. 314.

**Waiver.**—An objection that the indictment does not sufficiently describe the offense, must be taken by demurrer. *People v. Carr*, 3 N. Y. Cr. 582.

It is otherwise waived. *Id.*

The defendant, by failing to demur to the indictment on the ground of an improper joining of two crimes, waives such objection. *People v. Tower*, 10 St. Rep. 196; 17 N. Y. Supp. 395; *aff'd* 40 St. Rep. 439; 135 N. Y. 457.

Where an indictment improperly unites two or more offenses, the objection, if not taken by demurrer, is waived. *People v. Tower*, 40 St. Rep. 439; 135 N. Y. 457; *aff'd* 40 St. Rep. 196; 17 N. Y. Supp. 395.

An objection that the indictment is too indefinite and uncertain, if not taken by demurrer, is waived. *People v. Quinn*, 44 St. Rep. 930; 15 N. Y. Supp. 592.

When an indictment is defective in failing to set forth the value of the property taken, or to sufficiently identify such property, the objection is waived if not taken by demurrer. *People v. Upton*, 38 Hun. 107; 4 N. Y. Cr. 455.

The objection to an indictment, which charges more than one separate and distinct crime, must be taken by demurrer, and is waived by a plea of not guilty. *Id.*

**Arrest of judgment.**—Upon a motion in arrest of judgment, the only objections available are the two specified in this section. *People v. Buddensieck*, 3 St. Rep. 664; 103 N. Y. 493; *aff'd* 4 N. Y. Cr. 252.

By the enumeration of the grounds, in this section, upon which an arrest of judgment may be made, any other is probably intended to be excluded. *People v. Menahan*, 36 Hun. 29; 3 N. Y. Cr. 242.

The objection of misjoinder of offenses can only be taken by demurrer and cannot be raised on the trial or on a motion in arrest of judgment. *People v. Upton*, 38 Hun. 110.

Where the facts stated in the indictment constitute a crime, and the court has jurisdiction over the subject of the indictment, a motion in arrest of judgment is properly denied. *People v. Buddensieck*, 3 St. Rep. 664; 4 N. Y. Cr. 252; *aff'd* 103 N. Y. 493.

See *People v. Connor*, 48 St. Rep. 26; 65 Hun. 392; 8 N. Y. Cr. 441; *People v. Meekins*, 44 St. Rep. 749; 8 N. Y. Cr. 407; 133 N. Y. 219; *aff'd* 40 St. Rep. 680; 61 Hun. 327; *People v. Kelly*, 94 N. Y., 526; 2 N. Y. Cr. 74; *aff'd* 31 Hun. 226; 2 N. Y. Cr. 18.



## CHAPTER VII.

## PLEA.

332. Pleas to indictment. Conviction upon plea of guilty restricted.  
 333. Plea, how put in.  
 334. Its form.  
 335. Plea of guilty, how put in.  
 336. Plea of insanity.  
 337. Plea may be withdrawn by permission of the court.  
 338. What is denied by a plea of not guilty.  
 339. What may be given in evidence under it.  
 340, 341. What is deemed a former acquittal.  
 342. If defendant refuse to answer indictment, plea of not guilty to be entered.

**32. \*Pleas to indictment. Conviction upon plea of guilty restricted.**—There are three kinds of pleas to an indictment:

A plea of guilty.

A plea of not guilty.

A plea of a former judgment of conviction or acquittal of crime charged, which may be pleaded either with or without a plea of not guilty.

no conviction shall not be had upon a plea of guilty where the crime charged is or may be punishable by death.

enacted by chap. 427, 1897.

notes under sections 464 and 700, *post*.

**ANALYSIS.**—This section declares that pleas are of three kinds: (1) guilty; (2) not guilty; (3) a former judgment of conviction or acquittal. *People v. ...*, 92 N. Y., 145; 1 N. Y. Cr., 244; 65 How., 59; *aff'd* 30 Hun, 101; 1 N. Y. Cr., 198.

It is proper to require the defendant to plead one of the three pleas authorized by this section. *People v. Petrea*, 30 Hun, 101; 1 N. Y. Cr., 198.

No other plea than guilty, not guilty, and former conviction or acquittal, is allowed by the Code. *Id.*

In a case where the prisoner appears with his own counsel, the omission to arraign and to ask for a plea is immaterial to his rights and may be deemed to be waived. *People v. Osterhout*, 34 Hun, 262; 3 N. Y. Cr., 100 W. Dig., 294.

A plea setting forth certain alleged defects in the formation of the grand jury which indicted the defendant, is no longer allowed. *People v. Petrea*, 30 Hun, 101; 1 N. Y. Cr., 198.

**Effect of guilty plea.**—Where the prisoner pleads guilty, no conviction is necessary. *People v. Evans v. McEwan*, 2 N. Y. Cr., 307; 67 How., 105. There is nothing for the court to do but to pronounce sentence. *Id.*

**Effect of plea of not guilty.**—Where the plea of not guilty was interposed, and subsequently the plea of former conviction is put in without withdrawing the defense, both pleas stand upon the record and form separate issues of law to be disposed of in the same trial and before the same jury. *People v. ...*, 48 St. Rep., 28; 65 Hun, 392; 8 N. Y. Cr., 443.

Where the pleas of not guilty and of former judgment are separately interposed, it is not the intention of the statute that they should be both tried by the same jury. *People v. Trimble*, 38 St. Rep., 998; 60 Hun, 366; 15 N. Y. Cr., 60; *aff'd*, 42 St. Rep., 717; 131 N. Y., 121.

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\* See § 830, *post*.

**Former acquittal, etc.**—The defense of former acquittal must be pleaded, and, in the absence of a plea setting it up, the question cannot be raised. *People v. Cignarale*, 16 St. Rep., 155 ; 110 N. Y., 29 ; 6 N. Y. Cr., 95.

An irregularity, if any, in not entering a formal judgment upon a verdict rendered for the people on the sole issue of former conviction, furnishes no ground upon which the court, on the second trial, can be required to direct a verdict of acquittal. *People v. Trimble*, 42 St. Rep., 717 ; 131 N. Y., 121 ; aff'g 38 St. Rep., 998 ; 60 Hun, 366 ; 15 N. Y. Supp., 60.

The only possible and proper judgment, when the plea of a previous conviction or acquittal is interposed, must be either an acquittal because of the former trial, or that the plea has not been sustained and the defendant must answer over. *Id.*

If it is made to appear, in a capital case, that there had been a former acquittal, the court of appeals would, under the statute of 1887, take notice of the fact, though not presented by a formal plea. *People v. Cignarale*, 16 St. Rep., 155 ; 110 N. Y., 29 ; 6 N. Y. Cr., 95.

See *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 256 ; 8 N. Y. Cr., 357 ; 19 N. Y. Supp., 509 ; *People v. McHale*, 39 St. Rep., 761 ; 15 N. Y. Supp., 499.

**§ 333. Plea, how put in.**—Every plea must be oral, and must be entered upon the minutes of the court.

See section 342, *post*.

**Oral.**—A plea must be oral. *People v. Petrea*, 30 Hun, 101 ; 1 N. Y. Cr., 198.

**Upon minutes.**—The plea must be entered upon the minutes. *People v. O'Neil*, 13 St. Rep., 231 ; 47 Hun, 157.

**Time.**—There is nothing in this section prescribing the time when the plea shall be entered. *People v. McHale*, 39 St. Rep., 761 ; 15 N. Y. Supp., 499.

**§ 334. Its form.**—The plea must be entered in substantially the following form :

1. If the defendant plead guilty to the crime charged in the indictment, “the defendant pleads that he is guilty.”

2. If he plead guilty to any lesser crime than that charged in the indictment, “the defendant pleads guilty to the crime of” — (naming it).

3. If he plead not guilty, “the defendant pleads not guilty.”

4. If he plead a former conviction or acquittal, “the defendant pleads that he has already been convicted (or acquitted, as the case may be), of the crime charged in this indictment, by the judgment of the court of — (naming it), rendered at — (naming the place), on the — day of —.”

**Form.**—The form of the plea is prescribed by this section. *People v. O'Neil*, 13 St. Rep., 231 ; 47 Hun, 157.

Subd. 3 of this section prescribes the form of a plea in the case the defendant pleads not guilty. *People v. McHale*, 39 St. Rep., 651 ; 15 N. Y. Supp., 499.

**§ 335. Plea of guilty, how put in.**—A plea of guilty can only be put in by the defendant himself in open court, except upon an indictment against a corporation ; in which case it may be put in by counsel.

It was held, in *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 189, that the Code had made no provision for compelling a corporation, which has been indicted, to appear before the court and plead to the indictment. But see section 681. *post*.

**§ 336. Plea of insanity.**—Whenever a person, in confinement or indictment, desires to offer the plea of insanity, he may present such plea at the time of his arraignment, as a specification under the plea of not guilty.

See section 658, *post*.

**Under plea of not guilty.**—A defendant is permitted by this section to plead insanity by way of a specification to the plea of not guilty. *People v. Hinelander*, 2 N. Y. Cr., 338.

There is no provision in the statutes for a plea of insanity, except that authorized by this section which is required to be made upon arraignment. *People v. McElvaine*, 36 St. Rep., 180 ; 125 N. Y., 605 ; 8 N. Y. Cr., 159.

The defendant in this case, after his demurrer had been overruled, pleaded guilty and added specifications of insanity. *People v. Norton*, 2 N. Y. Cr., 320.

The question of the accused's insanity at the time of the commission of the offense is always open for trial under a plea of not guilty. *People v. Elvaine*, 36 St. Rep., 181 ; 125 N. Y., 609 ; 8 N. Y. Cr., 159.

**Affirmative issue.**—The defense of insanity is an affirmative issue which the defendant is bound to prove. *Brotherson v. People*, 75 N. Y., 159. But, where there is a well-founded doubt as to his sanity at the time of the commission of the crime, he should be acquitted. *Id.*

The prisoner is entitled to the benefit of any doubt resting upon the question of sanity. *People v. McCann*, 16 N. Y., 58.

See *People v. Whedon*, 2 N. Y. Cr., 320.

**§ 337. Plea may be withdrawn, by permission of the court.**—The court may in its discretion, at any time before judgment on a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted.

An application, under this section, is addressed to the judicial discretion of the presiding judge. *People v. Joyce*, 4 N. Y. Cr., 348.

**§ 338. What is denied by plea of not guilty.**—The plea of not guilty is a denial of every material allegation in the indictment.

See section 331, *ante*.

The reference to this section in *People v. Petrea*, 30 Hun, 115 ; 1 N. Y. Cr., 217, should be to section 238, *ante*.

This section does not change the rule that, on the trial of indictment under the former excise law, it devolved upon the defendant to prove a license. *People v. Bradley*, 33 St. Rep., 565 ; 11 N. Y. Supp., 596.

See *People v. McHale*, 39 St. Rep., 761 ; 15 N. Y. Supp., 499.

**§ 339. What may be given in evidence under it.**—All matters of fact, tending to establish a defense, other than that specified in the third subdivision of section 332, may be given in evidence under a plea of not guilty.

The reference to this section in *People v. Petrea*, 30 Hun, 115 ; 1 N. Y. Cr., 217, should be to section 238, *ante*.

By this section, all matters of fact tending to establish a defense, except former judgment of conviction or acquittal of the crime charged, may be given in evidence under the plea of not guilty. *People v. Durrin*, 2 N. Y. Cr., 333. The pleas of not guilty and of former conviction or acquittal are the only special pleas now allowed to an indictment. *Id.*

The statute of limitations can be proved under the general issue of not guilty. *Id.*

It cannot be interposed by special plea. *Id.* No reply is allowed to the accusation. *Id.*

See *People v. Cignarale*, 16 St. Rep., 155 ; 110 N. Y., 29 ; 6 N. Y. Cr., 95 ; *People v. McHale*, 39 St. Rep., 761 ; 15 N. Y. Supp., 499.

**§ 340. What is deemed a former acquittal.**—If the defendant were formerly acquitted on the ground of a variance between the indictment and the proof, or the indictment were dismissed upon an objection to its form or substance, without a judgment of acquittal, it is not deemed an acquittal of the same offense.

An acquittal on the ground of variance between the indictment and the proof forms no bar to a trial and conviction upon a subsequent indictment for the same offense. *People v. Meakim*, 40 St. Rep., 686 ; 61 Hun, 338 ; 8 N. Y. Cr., 315 ; 15 N. Y. Supp., 917. The defendant, having obtained an acquittal on such ground, cannot, on the second indictment, claim that it was on the merits. *Id.*

A plea of an alleged acquittal, had on the ground of variance between the indictment and the proof, in that the proof failed to show certain facts necessary to establish the offense alleged, was held, in *Canter v. People*, 1 Abb. Ct. Dec., 305, not to be sufficient as a bar to a trial and conviction upon a subsequent indictment for the same offense.

**§ 341. What is deemed a former acquittal.**—When, however, the defendant was acquitted on the merits, he is deemed acquitted of the same offense, notwithstanding a defect in form or substance, in the indictment on which he was acquitted.

Where it does not appear that the former acquittal resulted from a variance between the indictment and proof, or from any exception to the form and sufficiency of the indictment, the presumption is that the acquittal was on the merits, and that it is, therefore, a bar to a second trial. *Croft v. People*, 15 Hun, 484.

**§ 342. If defendant refuse to answer indictment, plea of not guilty to be entered.**—If the defendant refuse to answer an indictment, by demurrer or plea, a plea of not guilty must be entered.

The defendant need not plead unless he desires to do so. *People v. Osterhout*, 34 Hun, 262 ; 3 N. Y., 445 ; 20 W. Dig., 294.

See *People v. McHale*, 39 St. Rep., 761 ; 15 N. Y. Supp., 490.

## CHAPTER VIII.

### REMOVAL OF THE ACTION, BEFORE TRIAL.

**SECTION 343.** Existing writs and proceedings, to remove indictment before trial abolished.

344. When, and in what cases, indictment may be removed before trial.

345. If former trial were had, indictment may be removed before the new trial.

346. Application for removal, how made.

347. Stay of trial, how obtained, to enable defendant to apply for removal.

348. Decision on application for stay, to be indorsed on papers and filed.

349. If application for stay be denied, no other application can be made.

350. Violation of last section, a misdemeanor and contempt, and order of removal to be vacated.

351. Order of removal to be filed, and pleadings and proceedings to be transmitted.

352. Proceedings on removal, if defendant be in custody.

353. Order for removal must be filed, before a juror is sworn.  
Authority of the court to which indictment is removed.

§ 343. **Existing writs and proceedings, to remove indictment before trial abolished.**—All writs and other proceedings heretofore existing, for the removal, upon the application of the defendant, of criminal actions prosecuted by indictment, from one court to another before trial, are abolished.

§ 344. **When and in what cases, indictment may be removed before trial.**—A criminal action, prosecuted by indictment, may at any time before trial, on the application of the defendant, be removed from the court in which it is pending, as provided in this chapter, in the following cases :

1. From a county court or a city court, to a term of the supreme court held in the same county, for good cause shown ;

2. From the supreme court, or a county court, or a city court, to a term of the supreme court held in another county, on the ground that a fair and impartial trial can not be had in the county or city where the indictment is pending.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**Discretion.**—The application, under this section, rests in the sound discretion of the court or judge who is to determine it. *People v. Sessions*, 62 W., 415 ; 10 Abb. N. C., 192.

**Sessions to oyer and terminer.**—What is “ good cause ” for the removal of an indictment from the sessions to the oyer for trial, see *People v. Sessions, ante* ; *People v. Squire*, 1 St. Rep., 534 ; 4 N. Y. Cr., 445.

**Persons, indicted in the court of sessions for the county of New York, have no vested right to be tried by that court, either before or after plea.** *Impson v. People*, 6 Hun, 135. The indictment may, by order of said court, be transferred to the court of oyer and terminer. *Id.* After arraignment and conviction in the latter court, it is too late for the prisoner to object that the removal was without his consent. *Id.*

The court of general sessions has power to transfer a case to the court of oyer and terminer, even though the latter court is then in session. *Dolan v. People*, 6 Hun, 493.

The high character and political prominence of defendants is not “ good cause ” for which, under this section, an indictment will be removed from the court of general sessions to the court of oyer and terminer. *People v. Clark*, 15 N. Y. Supp., 79.

When a motion to remove an indictment from the court of sessions to the court of oyer and terminer will be granted. *People v. Squire*, 1 St. Rep., 534 ; 4 N. Y. Cr., 445 ; *People v. Sessions*, 62 How., 415 ; 10 Abb. N. C., 192.

The grounds for the removal of the indictment from the court of sessions to the court of oyer and terminer were held insufficient in *People v. Rourke*, 10 Abb. N. C., 89.

**Upon what proof.**—To entitle a defendant to a removal of a criminal action to another county, he must make out a clear and convincing case that, by reason of popular passion or prejudice, he cannot have a fair trial in the county where the venue is laid. *People v. Sharp*, 5 N. Y. Cr., 155 ; *People v. Sammis*, 3 Hun, 560.

When an accused person applies to remove a criminal action from a court of sessions to the court of oyer and terminer to the same court of another county, he must affirmatively and clearly show that, by reason of popular passion or prejudice, he cannot have a fair and impartial trial in the county where the venue is laid. *People v. Squire*, 1 St. Rep., 534 ; 4 N. Y. Cr., 455.

**Notice.**—It is not necessary to give to defendant notice of an application, on the part of the district attorney, to transfer an indictment, found in one court, to another, court for trial. *People v. Carolin*, 24 St. Rep., 595 ; 115 N. Y., 3 ; 7 N. Y. Cr., 122.

**Stay.**—By this section *et seq.*, a prisoner may apply to remove his case from a court in which the indictment is pending, and, for that purpose, may apply to a judge for a stay. *People ex rel. Munsell v. Court, etc.*, 101 N. Y., 251 ; 4 N. Y. Cr., 75 ; 3 How. N. S., 418.

§ 345. **If former trial were had, indictment may be removed before the new trial.**—If one or more trials be had, and a new trial is necessary, either by reason of the discharge of a jury without a verdict, or of the granting of a new trial, the removal may be allowed at any time before the new trial.

§ 346. **Application for removal, how made.**—The application for the order of removal must be made to the supreme court, at a special term in the district, upon notice of at least ten days to the district attorney of the county where the indictment is pending, with a copy of the affidavits or other papers on which the application is founded.

Under the provision of the Revised Statutes, authorizing courts of general sessions to send indictments to the next court of oyer and terminer, it was not necessary to give the accused notice of application for an order of removal. *Leighton v. People*, 88 N. Y., 117; 10 Abb. N. C., 261. But for the practice in this respect under the Code, see this section.

**Notice by district attorney.**—Notice to the defendant of an application on the part of the district attorney to transfer an indictment found in one court to another for trial, is not necessary. *People v. Carolin*, 24 St. Rep., 595; 115 N. Y., 658; 7 N. Y. Cr., 122.

See *People v. Sessions*, 62 How., 415; 10 Abb. N. C., 192.

§ 347. **Stay of trial, how obtained, to enable defendant to apply for removal.**—To enable the defendant to make the application, a judge of the supreme court may, in his discretion, upon good cause shown by affidavit, make an order staying the trial of the indictment, until the application can be made and decided.

An application for a stay of proceedings under this section should ordinarily be made upon notice to the district attorney. *People v. Rourke*, 11 Abb. N. C., 89. The affidavit should state, with precision and accuracy, the exact situation of the indictment, the steps already taken in the court from which removal is sought, and the supposed intended action in such court, while the application is being made. *Id.*

See *People v. Sessions*, 62 How., 415; 10 Abb. N. C., 192.

§ 348. **Decision on application for stay, to be indorsed on papers and filed.**—When an application for an order to stay the trial is made to the supreme court, it must indorse its decision on the affidavits or other papers presented, and cause them to be immediately filed with the clerk of the court, in which the indictment is pending.

§ 349. **If application for stay be denied, no other application can be made.**—If the application for an order to stay the trial has been made before one judge and denied, a similar application cannot be made to another judge.

§ 350. **Violation of last section a misdemeanor and contempt, and order of removal to be vacated.**—A violation of the last section is punishable not only as a misdemeanor, but as a contempt of the court in which the indictment is pending; and that court must vacate an order of removal made in violation thereof.

This section includes cases only for the punishment of a party, who obtains an order staying proceedings from one, after an application for it has



been denied by another judge. *People ex rel. Munsell v. Court, etc.*, 36 Hun, 280 ; 3 N. Y. Cr., 208 ; aff'd, 101 N. Y., 251 ; 4 N. Y. Cr., 75.

Where an application, made under section 347, *ante*, is denied, a further appeal to another judge is forbidden and made punishable as a contempt. *People ex rel. Munsell v. Court, etc.*, 101 N. Y., 251 ; 4 N. Y. Cr., 75 ; aff'g 36 Hun, 280 ; 3 N. Y. Cr., 208.

A violation of this section is classed as a simple, and is not denominated a criminal contempt. *Id.*

The obtaining of an order staying the trial, to enable the defendant to apply for an order of removal, from one judge, after an application for it has been denied by another, may be punished as a criminal contempt. *People ex rel. Munsell v. Court, etc.*, 36 Hun, 277 ; 3 N. Y. Cr., 216.

§ 351. **Order of removal to be filed, and pleadings and proceedings to be transmitted.**—If the supreme court order the removal of the action, a certified copy of the order for that purpose must be delivered to and filed with the clerk of the court where the indictment is pending ; who must thereupon transmit the same with the pleadings and proceedings in the action, including all undertakings for the appearance of the defendant or of the witnesses, or a certified copy of the same, to the court, to which the action is removed.

§ 352. **Proceedings on removal, if defendant be in custody.**—If the defendant be in custody, and the removal be into another county than that where the indictment is pending, the order must provide for the removal of the defendant, by the sheriff of the county where he is imprisoned, to the custody of the proper officer of the county to which the action is removed ; and he must be forthwith removed accordingly.

Am'd by chap. 880 of 1895. In effect January 1, 1896

§ 353. **Order for removal must be filed, before a juror is sworn. Authority of the court to which indictment is removed.**—An order for the removal of the action is of no effect, unless a certified copy thereof be filed, as required by section 351, before a juror is sworn to try the indictment. When thus filed, the court to which the action is removed, must proceed to trial and judgment therein.

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## TITLE VI:

### OF THE PROCEEDINGS ON THE INDICTMENT, BEFORE TRIAL.

#### CHAPTER I. The mode of trial.

##### II. Formation of the trial jury.

##### III. Challenging the jury.

### CHAPTER I.

#### THE MODE OF TRIAL.

##### SECTION 354. Issue of fact, defined.

##### 355. How tried.

##### 356. Appearance.

##### 357. Preparation for trial.



§ 354. **Issue of fact, defined.**—An issue of fact arises,

1. Upon a plea of not guilty ; or
2. Upon a plea of a former conviction or acquittal of the same crime.

See notes under following section.

**Issue of fact.**—Where both defenses are interposed, upon each an issue of fact exists. *People v. Connor*, 48 St. Rep., 28 ; 65 Hun, 392 ; 8 N. Y. Cr., 443.

**Bar.**—A conviction on a void verdict forms no basis for a defense of former conviction. *Id.*

§ 355. **How tried.**—An issue of fact must be tried by a jury of the county in which the indictment was found, unless the action be removed, by order of the supreme court, into another county, as provided in the second subdivision of section 344.

A'md by chap. 880 of 1895. In effect January 1, 1896.

**Trial by jury.**—Section 2, art. 1 of the State Constitution provides: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever ; but a jury trial may be waived in all civil cases in the manner to be prescribed by law."

The trial by jury referred to evidently means a trial by a common-law jury of twelve men. *People ex rel. Comaford v. Dutcher*, 83 N. Y., 242 ; *Hill v. People*, 20 id., 363 ; *Wynehamer v. People*, 13 id., 378.

The trial must be by a jury of twelve, and not by a less number, though the defendant consent thereto. *Cancemi's case*, 18 N. Y., 128.

**Trial.**—The proceedings of the commissioners, appointed under section 658, *post*, form no part of the trial of the issue joined by the plea of the defendant to the indictment. *People v. Haight*, 3 N. Y. Cr., 62 ; 13 Abb. N. C., 199.

§ 356. **Appearance.**—If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel ; but if the indictment be for a felony, the defendant must be personally present.

See notes under section 297, *ante* ; and sections 427 and 434, *post*.

**Motion to set aside indictment.**—On a motion to quash an indictment, it is not necessary that the defendant should be present in court during the argument. *People v. Vail*, 57 How., 85 ; 6 Abb. N. C., 206. The court may refuse to hear it in his absence. *Id.*

**Trial.**—In *People v. Bragle*, 88 N. Y., 585, the prisoner wishing to communicate with a witness by telephone, which was in an anteroom connected with the court-room by swinging doors and within call, went there against the objection of the district-attorney, and was absent about five minutes. During his absence, his counsel continued the examination of a witness. It was held that this was not a violation of a statutory provision (2 R. S., 734, section 13), substantially similar to this section.

**Judgment need not state.**—The judgment record upon a conviction for a felony need not state the constant presence of the prisoner during the trial. *Stephens v. People*, 19 N. Y., 549 ; 4 Park., 396.

**Appeal.**—The personal attendance of the defendant on the argument of the appeal, or at the decision of the appellate court, in a capital case, is not necessary to give such court jurisdiction. *People v. Clark*, 1 Park., 360.

§ 357. **Preparation for trial.**—After his plea, the defendant is entitled to at least two days to prepare for his trial, if he require it.

See subd. 7, § 8347, Civil Code.

## CHAPTER II.

### FORMATION OF THE TRIAL JURY.

#### SECTION 358. Jurors in criminal courts.

§ 358. Jurors in criminal courts.—The trial jury is formed, as prescribed by the Code of Civil Procedure.

See Code of Civil Procedure, sections 1027–1062 inclusive.

Formation of the jury. Sections 1163–1180 ; 1190, 3350, 3351 of Code of Civil Procedure.

Trial jurors in city and county of New York. Sections 1029, 1079–1125, 4, 1191, of Code of Civil Procedure. Trial jurors in King's county. Sections 1029, 1126–1162, 1174, 1191 of Code of Civil Procedure. Alien not entitled to special jury. Section 1190 of Code of Civil Procedure.

The forms prescribed for the drawing and return of the jury are found in sections 1043–1048 of Code of Civil Procedure. *People v. Petrea*, 30 Hun, 1 ; 1 N. Y. Cr., 198.

**Seneca county.**—The provisions of section 8, chap. 137 of 1822, in reference to the drawing of jurors in the county of Seneca, have not been repealed. *People v. Johnson*, 16 St. Rep., 846 ; 110 N. Y., 134.

The provisions of this section do not apply to that county. *Id.*

**Changes by legislature.**—It is within the power of the legislature to make, from time to time, such changes in the law in respect to the mode of securing and impaneling a jury, as it may deem expedient, limited only by the constitutional obligation to preserve the right of trial by an impartial jury. *Stokes v. People*, 53 N. Y., 164.

**Drawing jury.**—Mere irregularities in the drawing of petit jurors do not furnish a ground for reversing a conviction, unless it appears that they operated to the injury or prejudice of the defendant. *Cox v. People*, 80 N. Y., 500.

An objection to the panel of jurors, on the ground that they were drawn from the north jury district instead of the entire county, is not well taken. *People v. Johnson*, 13 St. Rep., 48 ; 46 Hun, 672 ; 7 N. Y. Cr., 403.

In *People v. Kiernan*, 3 N. Y. Cr., 247, there was but one jury box brought into court, from which the additional jurors were drawn, instead of the three boxes prescribed by sections 1050–1052 of Code of Civil Procedure. It was held that there was a substantial compliance with the law in the organization of the jury, and that, if there were any irregularities, they could not and did not affect the rights of the defendant, and must be disregarded. See also same case on appeal to court of appeals, 101 N. Y., 1 ; 4 N. Y. Cr., 88 ; 3 How. N. S., 364.

In the over and terminer, the trial jury is formed as prescribed in this section. *People v. Jackson*, 19 St. Rep., 510 ; 111 N. Y., 369 ; 6 N. Y. Cr., 1 ; for this court, whether held by original appointment or by adjournment, any number of trial jurors, and whenever the court deems necessary, may be summoned by its direction.

## CHAPTER III.

### CHALLENGING THE JURY.

SECTION 359. Definition and division of challenges.

360. When there are several defendants, they must unite in their challenges.

361. Challenge to the panel, defined.

362. Upon what founded.

363. When and how taken.

364. If sufficiency of facts be denied, adverse party may except. Exception, how made and tried.

- SECTION 365.** If exception overruled, court may allow denial of challenge. If allowed, may permit challenge to be amended.
366. Denial of challenge, how made, and trial thereof.
367. Who may be examined on trial of challenge.
368. If challenge allowed, jury to be discharged. If disallowed, jury to be impaneled.
369. Defendant to be informed of his right to challenge an individual juror.
370. Kinds of challenge to individual juror.
371. Challenge, when taken.
372. Peremptory challenge.
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374. Definition and kinds of challenge for cause.
375. General causes of challenge.
376. Particular causes of challenge.
377. Grounds of challenge for implied bias.
378. Grounds of challenge for actual bias.
379. Exemption not a ground of challenge.
380. Causes of challenge, how stated.
381. Exceptions to challenge and denial thereof.
382. Challenge, how tried, if denied.
383. Juror challenged may be examined as a witness.
384. Rules of evidence on trial of challenge.
385. Challenges, first by defendant and then by the people.
386. Order of challenges.
387. Jury to be sworn, etc.

§ 359. **Definition and division of challenges.**—A challenge is an objection made to trial jurors, and is of two kinds :

1. To the panel ;
2. To an individual juror.

**Objection.**—An objection to a panel of jurors, and to each juror, is intended as a challenge. *People v. Petrea*, 80 Hun, 103 ; 1 N. Y. Cr., 198.

**Waiver.**—The defendant may waive the right to challenge the jury. *People v. Guidici*, 100 N. Y., 503 ; 3 N. Y. Cr., 558.

§ 360. **Where there are several defendants, they must unite in their challenges.**—When several defendants are tried together they cannot sever their challenges, but must join therein.

§ 361. **Challenge to the panel, defined.**—A challenge to the panel is an objection made to all the trial jurors returned, and may be taken as well to the panel returned for the term, as to an additional panel ordered to complete the jury.

**Definition.**—A challenge is an objection to trial jurors either to the panel or to an individual juror. *People v. Welch*, 1 N. Y. Cr., 488.

**Acts of omission.**—This section, by explicit language, is confined to acts of omission from a prescribed procedure. *People v. Jackson*, 19 St. Rep., 509 ; 111 N. Y., 369.

**What objection cannot be taken.**—The objection that the court has discharged jurors from the panel and excused them from further service during the term, cannot be taken by a challenge to the panel. *People v. Pakenham*, 115 N. Y., 302 ; 24 St. Rep., 564 ; *People v. Jackson*, 19 St. Rep., 509 ; 111 N. Y., 369.

The dismissal of the regular panel, if erroneous, is not within this section. *People v. Jackson*, *ante*.

**Waiver.**—After the defendant's challenge to the array has been sustained, he can withdraw his challenge, and thereby waives the irregularity. *Pier-son v. People*, 79 N. Y., 424.

§ 362. **Upon what founded.**—A challenge to the panel can be founded only on a material departure, to the prejudice of the defendant from the forms prescribed by the Code of Civil Pro-

cedure, in respect to the drawing and return of the jury, or on the intentional omission of the sheriff to summon one or more of the jurors drawn.

See notes under section 358, *ante*.

**Prejudice.**—Challenges to the array existed formerly for the reason that there might be prejudice on the part of the sheriff. *People v. Petrea*, 30 Hun, 105 ; 1 N. Y. Cr., 197. Since such prejudice cannot now affect the drawing, these challenges have been limited, and there must be a departure “to the prejudice of the defendant.” *Id*.

Irregularities in reference to the working of the machinery provided by statute for procuring jurors, offer no ground for reversing a conviction, unless it appears that the defendant was in fact injured or prejudiced thereby. *Cox v. People*, 19 Hun, 439 ; 80 N. Y., 500.

**Preparing ballots.**—The provision conferring the right to challenge the panel says nothing, in express words, as to a challenge for any material departure in respect to preparing the ballots. *People v. Petrea*, 30 Hun, 103 ; 1 N. Y. Cr., 205.

**Omission to summon.**—The intentional omission of the sheriff to summon one or more of the jurors drawn to serve at a court, is, by this section, made a ground of challenge to the whole panel. *People v. McQuade*, 18 St. Rep., 288 ; 21 Abb. N. C., 449 ; 110 N. Y., 306.

See *People v. Petrea*, 92 N. Y., 145 ; 1 N. Y. Cr., 245 ; 65 How., 59 ; *People v. Clark*, 8 N. Y. Cr., 175 ; 14 N. Y. Supp., 643.

§ 363. **When and how taken.**—A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying distinctly the facts constituting the ground of challenge.

**Writing.**—A challenge to the array must be in writing. *People v. Petrea*, 30 Hun, 103 ; 1 N. Y. Cr., 105.

**Unverified.**—The fact that the challenge is unverified, is not a ground of demurrer. *Cox v. People*, 19 Hun, 430 ; 80 N. Y., 510.

See *People v. Wilber*, 39 St. Rep., 743 ; 15 N. Y. Supp., 436.

§ 364. **If sufficiency of the facts be denied, an adverse party may except. Exception, how made and tried.**—If the sufficiency of the facts alleged as a ground of challenge be denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered upon the minutes of the court ; and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

See section 381, *post*.

**Trial.**—Where the challenge is excepted to, under this section, the court must try its sufficiency upon the assumption that the facts alleged therein are true. *People v. Wilber*, 39 St. Rep., 743 ; 15 N. Y. Supp., 436.

Upon an exception to the challenge to the panel, the proceedings required by section 365, *post*, must be taken. *People v. Petrea*, 30 Hun, 103 ; 1 N. Y. Cr., 436.

§ 365. **If exception, overruled, court may allow denial of challenge. If allowed, may permit challenge to be amended.**—If, on the exception, the court deem the challenge sufficient, it may, if justice require it, permit the party excepting, to withdraw his exception, and to deny the facts alleged in the challenge. If the exception be allowed, the court may, in like manner, permit an amendment of the challenge.

See *People v. Petrea*, 30 Hun, 103 ; 1 N. Y. Cr., 198.

§ 366. **Denial of challenge, how made, and trial thereof.**—If

the challenge be denied the denial may, in like manner, be oral, and must be entered upon the minutes of the court; and the court must proceed to try the question of fact.

**Trial before Court.**—Where the facts upon which the challenge rests, are denied, the trial of the challenge must be had before the court. *People v. Welch*, 1 N. Y. Cr., 488.

**When disallowed.**—Where the facts of the challenge are denied and no evidence is given, the challenge is properly disallowed. *People v. Wilber*, 39 St. Rep., 743; 15 N. Y. Supp., 436.

See *People v. Petrea*, 30 Hun, 193; 1 N. Y. Cr., 198.

§ 367. **Who may be examined on trial of challenge.**—Upon the trial of the challenge, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

See *People v. Welch*, 1 N. Y. Cr., 488.

§ 368. **If challenge allowed, jury to be discharged. If disallowed, jury to be impaneled.**—If, either upon an exception to the challenge, or a denial of the facts, the challenge be allowed, the court must discharge the jury, so far as the trial of the indictment in question is concerned. If the challenge be disallowed, the court must direct the jury to be impaneled.

§ 369. **Defendant to be informed of his right to challenge an individual juror.**—Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intend to challenge an individual juror, he must do so when the juror appears, and before he is sworn.

The established provisions of the common law are preserved by this section and section 371, *post*. *People v. Carpenter*, 36 Hun, 317; 3 N. Y. Cr., 99; 16 Abb. N. C., 130.

**Swearing jury, time of.**—There is no rule of practice which requires the court to postpone the swearing of the jury, until the drawing of the panel is wholly completed. *People v. Carpenter*, 1 St. Rep., 648; 102 N. Y., 248; 4 N. Y. Cr., 185; *affg* 36 Hun, 317; 3 N. Y. Cr., 99; 16 Abb. N. C., 130.

**Time of Challenge.** An accused party may challenge a person who appears as a juror at any time before he is sworn, and it is not in the power of a court to deprive him of that right. *People v. Carpenter*, 36 Hun, 317; 3 N. Y. Cr., 99; 12 Abb. N. C., 130. But see this case on second appeal in 1 St. Rep., 648; 102 N. Y., 247.

This section and section 371, *post*, established a rule for the benefit of the accused which not only defines his rights as to the time when his challenge may be made, but secures them to him by force of statutory law. *People v. Carpenter*, 36 Hun, 315; 3 N. Y. Cr., 100; 16 Abb. N. C., 130.

After the prisoner has been allowed a fair opportunity to interpose a peremptory challenge to a proposed juror, his legal right is not impaired, in case he is foreclosed as to the further exercise of the privilege, by the administration of the oath to the juror at any time after he has been examined and accepted. *People v. Carpenter*, 1 St. Rep., 648; 102 N. Y., 248; 4 N. Y. Cr., 185.

**Presumption.**—Where it does not appear that the court did not instruct the defendant, at the time the jurors were drawn, in respect to his right to challenge, no such question arises on appeal. *People v. O'Loughlin*, 3 N. Y. Cr., 121. From a statement in the case that a jury was impaneled and sworn, the general term, on appeal, is bound to presume that there was a compliance with all the requirements of the law. *Id.*

§ 370. **Kinds of challenges to individual jurors.**—A challenge to an individual juror may be taken either by the people or by the defendant, and is either

1. Peremptory, or
2. For cause.

This section divides challenges into two kinds. *People v. Welch*, 1 N. Y. Cr., 488.

§ 371. **Challenge, when taken.**—A challenge must be taken when the juror appears, and before he is sworn; but the court may, in its discretion, for good cause, set aside a juror at any time before evidence is given in the action.

See notes under section 369, *ante*.

The reference to this section in *People v. Carpenter*, 36 Hun, 315; 3 N. Y. Cr., 100, should be to section 372, *post*.

**Discretion.**—The trial judge may, in his discretion, discharge a juror, after he has been accepted and sworn, but his refusal is not error. *People v. Beckwith*, 3 St. Rep., 104; 5 N. Y. Cr., 222, 232; 103 N. Y., 369.

The court may, in its discretion, for good cause shown, remove a juror, or cause him to stand aside after he has been accepted. *People v. Hughes*, 46 St. Rep., 415; 8 N. Y. Cr., 451; 19 N. Y. Supp., 551, 552; *aff'd*, 50 St. Rep., 5.

The discretion, conferred by this section, may be exercised at any time before the actual commencement of the trial, in case the challenging party has not exhausted his peremptory challenges. *People v. Hughes*, 46 St. Rep., 415; 8 N. Y. Cr., 451; 19 N. Y. Supp., 551, 552; *People v. Tweed*, 13 Abb. N. S., 371. This point was reversed, on appeal, in *People v. Hughes*, 50 St. Rep., 5.

The court can exercise such discretion without requiring the counsel publicly to disclose their reasons for interposing it. *People v. Hughes*, 46 St. Rep., 415; 8 N. Y. Cr., 451; 19 N. Y. Supp., 551, 552; especially in case the court is satisfied that substantial reasons exist, which render it improper to allow such juror to sit in the case. *People v. Tweed*, 13 Abb. N. S., 371. This point was reversed, on appeal, in *People v. Hughes*, 50 St. Rep., 65. The rule laid down in *Tweed's case*, 13 Abb. N. S., 371, was changed by the code. *People v. Hughes*, 50 St. Rep., 65; *aff'g* 46 *id.*, 415; 8 N. Y. Cr., 451; 19 N. Y. Supp., 551, 552.

**Peremptory.**—A peremptory challenge cannot be made after the jury has been sworn. *People v. Carpenter*, 36 Hun, 496; 4 N. Y. Cr., 49.

Subsequently swearing the jury as a body does not restore this right, especially when done at the request of the party complaining. *Id.*

The court, *it seems*, has no discretion to allow a peremptory challenge to a juror after he is sworn in the case. *People v. Hughes*, 50 St. Rep., 65; *aff'g* 46 *id.*, 415; 8 N. Y. Cr., 451; 19 N. Y. Supp., 551, 552.

No waiver of the right of peremptory challenge will be implied from the defendant's mere submission to a rigid and illegal rule made by the court. *People v. Carpenter*, 36 Hun, 320; 3 N. Y. Cr., 102.

**"Good cause."**—What constitutes the "good cause," referred to in this section, is declared by the succeeding sections 375, 376 and 377. *People v. Hughes*, 50 St. Rep., 65; *aff'g* 46 St. Rep., 415; 19 N. Y. Supp., 551, 552; 8 N. Y. Cr., 451.

A peremptory challenge, under section 372, *post*, is not a challenge for "good cause," within the meaning of this section. *Id.*

The obvious meaning of this section is that a challenge for "good cause," which is required to be taken before the juror is sworn, may, nevertheless, be taken thereafter, and before evidence is given, in the discretion of the court. *Id.*

**When lost.**—The right to a peremptory challenge is, by this section, lost when the jury is sworn, unless the party desiring to use the challenge can show cause why he shall be permitted to do so. *People v. Hughes*, 46 St. Rep., 415; 8 N. Y. Cr., 451; 19 N. Y. Supp., 551, 552.



And if the court, in the exercise of its discretion, allows the challenge, it sets aside the juror. *Id.*

**Waiver.**—Where the prisoner's counsel concedes that a juror, after having been sworn, may be peremptorily challenged in the discretion of the court, a ruling allowing such challenge, against an objection on the ground that such discretion can not be exercised upon the bare statement of the prosecuting attorney and after the defendant has exhausted his peremptory challenges, is not error, and the exception is unavailing where there has been no abuse of such discretion. *Id.*

§ 372. **Peremptory challenge.**—A peremptory challenge is an objection to a juror, for which no reason need be given, but upon which the court must exclude him.

See notes under sections 371, 376 and 385, *post.*

**No discretion.**—Under this section, the court has no discretion in excluding a juror, when peremptorily challenged. *People v. Hughes*, 46 St. Rep., 415; 8 N. Y. Cr., 451; 19 N. Y. Supp., 552; *aff'd*, 50 St. Rep., 65.

**No reason given.**—It is the very essence of a peremptory challenge that it is one for which no reason need be given. *People v. Carpenter*, 36 Hun, 317; 3 N. Y. Cr., 99.

**Time.**—The prisoner may be compelled to use his challenges as each juror appears, by the court directing that each one be sworn before he takes his seat. *Id.* But this does not militate, in the slightest degree against the right of the prisoner to challenge peremptorily up to the last moment before the oath is administered, where the other mode of impaneling is pursued. *Id.*

§ 373. **Number of peremptory challenges to which defendant is entitled.**—Peremptory challenges must be taken in number as follows:

1. If the crime charged be punishable with death, thirty;
2. If punishable with imprisonment for life, or for a term of ten years or more, twenty;
3. In all other cases, five.

Upon the trial of an indictment for a crime punishable by imprisonment, in the discretion of the court, for ten years or more, the defendant is entitled to twenty peremptory challenges. *People v. Keating*, 40 St. Rep., 829; 61 Hun, 261, 262, 263, 264; 16 N. Y. Supp., 749, 750.

It was held that the defendant had a right to this number in case of a charge of manslaughter in the first degree. *Id.*

§ 374. **Definition, and kinds of challenge for cause.**—A challenge for cause is an objection to a particular juror, and is either,

1. General, that the juror is disqualified from serving in any case; or
2. Particular, that he is disqualified from serving in the case on trial.

**Definition.**—A challenge for cause is an objection to a particular juror, and may be either general or particular. *People v. Welch*, 1 N. Y. Cr., 498.

§ 375. **General causes of challenge.**—General causes of challenge are,

1. A conviction for a felony;
2. A want of any of the qualifications prescribed by the Code of Civil Procedure, to render a person a competent juror.

See for general provisions as to qualifications of trial jurors, sections 1027 and 1028 of Code of Civil Procedure; for qualifications in city and county of New York, *id.* Sections 1029, 1079; for qualifications in Kings county,



tions 1029, 1126 ; for disqualification of public officers, *id.*, section

**ition.**—A challenge is general when the objection is that the juror is disqualified from serving in any case. *People v. Welch*, 1 N. Y. Cr., 488. *People v. Hughes*, 50 St. Rep., 65 ; *People v. Petrea*, 30 Hun, 104 ; 1 Cr., 198.

**3. Particular causes of challenge.**—Particular causes of challenge are of two kinds :

or such a bias, as, when the existence of the facts is ascertained, does in judgment of law disqualify the juror, and is known in this Code as implied bias ;

or the existence of a state of mind on the part of the juror in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that such juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this Code as actual bias. But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for implied bias, to any person otherwise legally qualified, if he declares under oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict.

See also under sections 385, 455, 485 and 517, *post*.

Section on Competency of Jurors in Criminal Cases in 6 N. Y. Cr., 89.

Section on Challenging Jurors in 21 Abb. N. C., 453.

**Application.**—The statute, in its application, is expressly limited to criminal trials. *Young v. Johnson*, 11 St. Rep., 590 ; 46 Hun, 167.

This section is a re-enactment of section 1, chap. 475 of 1872, which was amended in *People v. Balbo*, 80 N. Y., 484. *People v. Cornetti*, 92 N. Y., 303 ; *People v. Casey*, 96 N. Y., 118 ; 2 N. Y. Cr., 196 ; *People v. Welch*, 1 *id.*, 489.

The statute of 1872 has been literally incorporated into subdivision 2 of this section. *People v. McGonegal*, 48 St. Rep., 903 ; 136 N. Y., 70.

**History.**—The legislature intended to remove the strict and stringent rule which existed before the statute of 1872, and which attached a disqualification to the fact of forming and expressing an opinion. *Balbo v. People*, 80 N. Y., 484.

**Particular.**—A challenge is particular when the objection is to the effect that the juror is disqualified from serving in the cause on trial. *People v. Welch*, 1 N. Y. Cr., 488.

—By this section, particular causes of challenge are of two kinds ; the first is when there is "simple bias," and the second is when there is "implied bias." *Id.*

**Effect of Code.**—As to the results deduced from the cases determined at the time the Code was enacted, see *People v. Welch*, 1 N. Y. Cr., 489.

**Scope of examination.**—The range of examination on a challenge under subdivision 2 of this section must largely rest in the discretion of the court. *O'Neill*, 14 St. Rep., 829 ; 109 N. Y., 264 ; 6 N. Y. Cr., 53.

A district attorney, in this case was permitted to state that the people were entitled to examine accomplices as witnesses, and to follow it by the direct examination as to the juror's state of mind in respect to witnesses in the situation of accomplices, with a view of ascertaining whether he will be a fair and unprejudiced juror for the people.

The existence of the state of mind on the part of the juror, in reference to the case or to either party, is a proper subject of inquiry, to ascertain whether the juror has, or has not, actual bias. *People v. O'Neill*, 5 N. Y. Cr., 326.

An acceptance by defendant of the jury selected and his consent to their sitting, operate as a waiver of his objection to the allowance of erroneous questions on the examination of a proposed juror. *People v. O'Neill*, 14 St. Rep., 829; 109 N. Y., 264; 6 N. Y. Cr., 53.

**Determined by Court.**—It is for the trial court to determine whether the juror entertains such an opinion or impression as will influence his verdict. *People v. Otto*, 4 N. Y. Cr., 155.

The question of a juror's competency is to be determined as a fact. *People v. Welch*, 1 N. Y. Cr., 489; *Balbo v. People*, 80 N. Y., 494. Each case must rest upon its own peculiar features. *Id.*

**When Qualified.**—Where the trial court is justified in being satisfied that the juror does not have any present opinions, which will influence his verdict, the challenge for bias is properly overruled. *People v. Crowley*, 4 N. Y. Cr., 170.

An opinion or impression, which does not implicate the defendant, or in any manner predetermine the point of his guilt, will not disqualify the person entertaining it as a juror. *People v. Buddensieck*, 4 N. Y. Cr., 252.

This section makes no discrimination between opinions formed from the reading of the testimony upon a former trial and those based upon information gathered from other authentic sources. *People v. McGonegal*, 48 St. Rep., 904; 136 N. Y., 70.

In determining the fact of indifference, there is a wide distinction to be noted between an opinion based upon the testimony given on a former trial, and one formed after reading the proceedings upon the inquisition of a coroner. *Id.*

A juror, who has read of the transaction, and formed an opinion, but notwithstanding states that he *thinks* that he can render an impartial verdict according to the evidence, is competent, and, unless peremptorily challenged, may sit in the case. *People v. Martell*, 51 St. Rep., 679; 138 N. Y. 595.

Such an opinion or impression as the juror can lay aside, and then render an impartial verdict according to the evidence, does not disqualify. *People v. Otto*, 4 N. Y. Cr., 155.

A juror, who states that he has formed an opinion which will require evidence to remove, but can nevertheless go into the jury box and render an impartial verdict upon the evidence, without being influenced by such opinion, is competent within this section. *People v. Buddensieck*, 3 St. Rep., 664; 103 N. Y., 497.

Where the juror declares on oath that he has no opinion which will influence him in his consideration of the evidence or in the verdict, the trial court is warranted in overruling the challenge. *People v. Otto*, 38 Hun. 99; 4 N. Y. Cr., 152.

The substance of the acts of 1872 and 1873, so far as this point is concerned, is incorporated in this section. *Id.*; *Thomas v. People*, 67 N. Y., 218; *Phelps v. People*, 72 *id.*, 334; *Balbo v. People*, 80 N. Y., 484; *Cox v. People*, *id.*, 500; *People ex rel. Phelps v. Court*, etc., 83 *Id.* 436; *Abbott v. People*, 36 *id.*, 460.

In the cases of *Greenfield v. People*, 74 N. Y., 277, and of *People v. Casey*, 96 *id.* 115; 2 N. Y. Cr., 194, there were facts which, the court of appeals thought, took them out of the line of the above cited authorities. *People v. Otto*, *ante*.

A juror who, upon examination as to his qualifications, testifies that he has read newspaper accounts of, and heard conversation about, the murder, and has some opinion or impression as to the defendant's guilt which may take some testimony to remove, but believes that such opinion or impression will not influence his verdict and he can render an impartial verdict according to the evidence, is competent within this section. *People v. Wilson*, 15 St. Rep., 503; 109 N. Y., 351.

*People v. Greenfield*, 74 N. Y., 277; *People v. Balbo*, 80 *id.*, 493; *People v. Abbott*, 86 *Id.* 467; *People v. Casey*, 96 *id.*, 115; *People v. Otto*, 101 *id.* 690; *People v. Carpenter*, 1 St. Rep., 648; 102 *id.*, 238.

Where a juror states that he has formed, from reading the newspapers, an opinion in regard to the guilt or innocence of the accused, and that it will require strong evidence to remove it, but finally says that he can decide upon the testimony he hears in court uninfluenced by anything else whatever, the challenge is properly overruled. *People v. Wah Lee Mon*, 37 St. Rep., 286.

Where the evidence shows that, notwithstanding the impression which a report in a newspaper may have made upon his mind, the juror can and will decide the case according to, and be governed by, the evidence, the mere fact that he states that the impression, which he received from such accounts, will remain until he hears the evidence in the case, in no way disqualifies him. *People v. McGonegal*, 42 St. Rep., 310.

Where a juror has read the newspaper reports of the proceedings before the coroner's jury, which the district attorney announced was the same as would be offered at the trial, and has formed and expressed an opinion, based upon the information thus obtained, as to the guilt or innocence of the defendant, he is competent to serve, provided he makes the declaration under oath required by subd. 2 of this section. *People v. McGonegal*, 48 St. Rep., 904; 136 N. Y., 71.

The personal appearance and demeanor of the juror and the intelligence exhibited by him upon his examination are important factors in reaching a just conclusion in all such cases. *Id.*

**Test of competency.**—What the law requires to render a person, entertaining an opinion, a qualified juror in a criminal case, is that he shall be able to, and shall, swear that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict, according to the evidence. *People v. Buddenseick*, 3 St. Rep., 664; 4 N. Y. Cr., 253; 103 N. Y., 486. If the court is satisfied of the truth of such statements, he is a competent juror, though he still retains such opinion in all its force. *Id.*

The proposed juror must be able to declare on oath that he believes he is in such a state of mind that he can weigh the evidence impartially, uninfluenced by any opinion or impression which he has formed. *People v. Casey*, 96 N. Y., 125; 2 N. Y. Cr., 203; *People v. Willett*, 36 Hun, 502; 3 N. Y. Cr., 325.

It is not necessary that the juror, in his examination, shall swear in the very words of this section. *People v. Martell*, 51 St. Rep., 679; 138 N. Y., 95.

It is not necessary that the declarations required by this section, be made literally. *People v. Casey*, 96 N. Y., 123; 2 N. Y. Cr., 201.

It is enough if they are made in substance. *Id.*

The juror is not required to say on oath that he *knows*, but only that he *believes*, that he will not be influenced by his previous or present opinion or impression, and that he *believes* that he can render an impartial verdict. *People v. Willett*, 36 Hun, 503; 3 N. Y. Cr., 326.

A juror, who has read and talked about the case and formed an opinion of the guilt or innocence of the accused, but who declares on oath that his opinion would not influence his verdict, and that he could render an impartial verdict according to the evidence, is competent. *People v. Cornetti*, 3 N. Y., 85; 1 N. Y. Cr., 305; 16 W. Dig., 442.

A juror, who has an impression as to the guilt or innocence of the accused, is competent within the established rule, if he testifies that he will be governed by the evidence, that his previous impression will not influence his verdict, that it is his belief that he can render an impartial verdict according to the evidence, and that he will give the accused the benefit of every reasonable doubt, and acquit him, if such doubt exists. *People v. Clark*, 2 St. Rep., 543; 1 Silv. (Ct. App.), 166; 102 N. Y., 735.

The fact that a juror has formed an opinion as to the guilt or innocence of the prisoner, is no longer, in any case, a legal disqualification, provided he makes the declaration specified in this section. *People v. Welch*, 1 N. Y. Cr., 489; *Cox v. People*, 80 N. Y., 513.

An existing opinion by a person, called as a juror, of the guilt or innocence of a defendant charged with crime is *prima facie* a disqualification; but it is not a conclusive objection, provided the juror makes the declaration specified, and the court, as judge of the fact, is satisfied that such opinion will

not influence his action. *People v. McQuade*, 18 St. Rep., 288 ; 110 N. Y., 284 ; 21 Abb. N. C., 444 ; 6 N. Y. Cr., 1. It does not satisfy the requirement of this section if the declaration is qualified or conditional. *Id.* ; *People v. McGonegal*, 48 St. Rep., 903 ; 136 N. Y., 70.

**Prejudice against crime.**—A juror, who declares on oath that, notwithstanding an opinion or impression entertained in reference to the charge to be investigated, he believes that he can render a verdict without being influenced in any way by such opinion, is competent. *People v. Crowley*, 4 N. Y. Cr., 35.

The bias or prejudice, which disqualifies the juror, must relate to the offense of which the party stands charged, and not to any of the various defenses or collateral issues which may be interposed and created, and by which the accused may be relieved from responsibility. *People v. Carpenter*, 38 Hun, 492 ; 4 N. Y. Cr., 45.

**Against person.**—A statement by a juror that he has so strong a prejudice against a person charged with the crime for which the defendant is indicted, that it would take overwhelming evidence to remove it, does not render him incompetent, where he knows nothing about the case and has no personal feeling against the defendant, and swears that, if accepted, he can give him the benefit of the legal presumption of innocence. *People v. McGonegal*, 48 St. Rep., 905 ; 136 N. Y., 62.

In *People v. Larubia*, 53 St. Rep. 415 ; 69 Hun, 197 ; 23 N. Y. Supp., 579, where the killing was done with a pistol which the defendant had been in the habit of carrying, a juror, on his *voir dire*, stated that he had a great prejudice against defendant because he carried a pistol, etc., it was held, in the absence of a request to declare on oath that he believed that such prejudice would not influence his verdict, and that he could render an impartial verdict according to the evidence, that it was error to overrule a challenge for actual bias. The court, on this ground, distinguished this case from *People v. Carpenter*, 102 N. Y., 238 ; 1 St. Rep., 648, and *People v. McGonegal*, 48 St. Rep., 900.

**Against defense.**—The existence of an abstract opinion, on the part of an individual, as to the propriety or impropriety of certain defenses in cases theretofore coming to his knowledge, does not necessarily disqualify him from sitting in other cases, even where such defenses are intended to be made. *People v. Carpenter*, 1 St. Rep., 648 ; 102 N. Y., 245 ; 4 N. Y. Cr., 184.

**Disqualified.**—A person is not a competent juror, where the defendant is required to introduce evidence to remove a strong impression, before his verdict can be secured. *People v. Tyrrell*, 3 N. Y. Cr., 147.

A juror, who has an opinion as to the guilt or innocence of the prisoner, which he describes as fixed and of long standing, and which will influence his conduct in the jury-box, is properly rejected. *People v. Wood*, 48 St. Rep., 294 ; 131 N. Y., 619.

A challenge to a juror by the people is properly sustained where he states that he will follow his own view as to the weight to be given to circumstantial evidence in disregard of the instructions of the court. *People v. Fanshawe*, 47 St. Rep., 331 ; 8 N. Y. Cr., 326 ; 65 Hun, 77.

Unless the three things specified in this section concur, a person who has formed or expressed an opinion or impression in reference to the guilt or innocence of the defendant, is disqualified to sit as a juror. *People v. Casey*, 96 N. Y., 118 ; 2 N. Y. Cr., 197.

Where a juror states, in substance, that he will hesitate to convict, even where the circumstances are of such a character as to establish guilt beyond a reasonable doubt, a challenge on the part of the people is properly sustained. *People v. Fanshawe*, 50 St. Rep., 4 ; aff'g 47 Id., 331 ; 65 Hun, 77 ; *People v. McQuade*, 18 St. Rep., 288 ; 110 N. Y., 297 ; *People v. McGonegal*, 48 St. Rep., 900 ; 136 N. Y., 70.

A juror, who has read evidence taken on the coroner's inquest upon the body of the deceased, is properly excluded where the judge is not satisfied that such juror can render an impartial verdict or that the opinion or impression, which he has formed upon reading the evidence, will not influence his verdict. *People v. Wilson*, 15 St. Rep., 503 ; 109 N. Y., 853.

**Waiver.**—Where the challenge for bias is improperly overruled, the exclusion of the juror, upon a peremptory challenge, does not affect the ten-

bility of the exception. *People v. McGonegal*, 48 St. Rep., 901 ; 136 N. Y., 70 ; *People v. McQuade*, 18 St. Rep., 288 ; 110 N. Y., 301 ; 6 N. Y. Cr., 20.

Error in overruling a challenge for bias cannot be disregarded on the ground that the exceptant had the right to challenge the objectionable juror peremptorily. *People v. McQuade*, 18 St. Rep., 288 ; 21 Abb. N. C., 444 ; 110 N. Y., 284 ; 6 N. Y. Cr., 20. Refusal to use a peremptory challenge does not impair the right to rest on an exception to error in the determination of a challenge for cause. *Id.*

Where, by the erroneous ruling of the court, the defendant is obliged to exhaust his peremptory challenges in getting rid of objectionable jurors, he does not waive his objection, by thus excluding them from the panel. *People v. Casey*, 96 N. Y., 118 ; 2 N. Y. Cr., 201 ; *People v. Tyrrell*, 3 *Id.*, 48.

The casual observations of the court of appeals in *People v. Casey*, 96 N. Y., 115 ; 2 N. Y. Cr., 194, and *People v. Carpenter*, 1 St. Rep., 648 ; 102 N. Y., 38 ; 4 N. Y. Cr., 177, where the point was not a material one, were not intended to disturb or overrule the doctrine that the defendant does not waive an exception to the ruling of the court on a challenge for cause, by the fact that, when the jury was sworn, he still had peremptory challenges unused. *People v. McQuade*, 18 St. Rep. 288 ; 6 N. Y. Cr., 1, 32. The cases of *People v. Petmecky*, 2 N. Y. Cr., 450 ; and *People v. Tyrrell*, 3 *Id.*, 142, are overruled on this point by *People v. McQuade*, 18 St. Rep. 288 ; 6 N. Y. Cr., 1.

The defendant's objection that certain jurors should have been rejected for cause is of no avail, where they were subsequently challenged peremptorily and the jury accepted by him, before exhausting the number of peremptory challenges allowed him. *People v. Carpenter*, 1 St. Rep., 648 ; 102 N. Y., 243.

In *People v. Price*, 24 St. Rep., 934 ; 53 Hun, 189 ; *aff'd*, 119 N. Y., 650, without written opinion, it was held that an objection and exception taken to the erroneous ruling of the court to the effect that a juror was not disqualified, were not available to a prisoner, on an appeal taken by him, where such juror was thereafter peremptorily challenged by the prisoner and excluded from the panel, and it appeared that the prisoner did not, upon the trial, exhaust the number of peremptory challenges given to him by law.

Where the challenge for bias is improperly overruled, the exclusion of the juror, upon a peremptory challenge, does not affect the tenability of the exception. *People v. McGonegal*, 48 St. Rep., 904 ; 136 N. Y., 66. The defendant cannot be compelled to use his peremptory challenges for such a purpose, but should be permitted to reserve them for the rejection of unsatisfactory jurors against whom challenges for cause could not be successfully maintained. *Id.* ; *People v. McQuade*, 18 St. Rep., 288 ; 110 N. Y., 301 ; *People v. Bodine*, 1 Denio, 308 ; *Freeman v. People*, 4 *Id.*, 31.

**Review.**—As to the right of the general term to review on appeal challenges to juror under this section, see *People v. Willett*, 36 Hun, 503 ; 3 N. Y. Cr., 326.

The decision of the trial judge in overruling the challenge is reviewable in the court of appeals. *People v. Casey*, 96 N. Y., 119 ; 2 N. Y. Cr., 197.

This court must determine upon the evidence elicited by the examination of the person whether he is, or is not, a competent juror. *Id.*

The act of 1872 has been literally incorporated into subd. 2 of this section, and the act of 1873, authorizing a review of the findings of fact of the trial court upon such a challenge was repealed when this Code took effect. *People v. McGonegal*, 48 St. Rep., 903 ; 136 N. Y., 68. The right to review in such cases is now controlled by section 455, *post.* *Id.*

Under the provisions of the latter section, the right to review upon appeal is limited to a decision of the trial court upon a matter of law by which the substantial rights of the defendant are prejudiced ; and, where the disallowance of challenges is based upon some evidence to sustain it, the decision is final and conclusive and not reviewable in the court of appeals. *Id.*

The decision at the trial as to the indifference of a juror is not reviewable in the court of appeals, except in the absence of sufficient evidence to support it, and cannot be reviewed, if the challenge is overruled, unless the evidence discloses a condition of mind on the part of the juror, which, as



matter of law, renders him incompetent for actual bias, after applying the test allowed by subdivision 2 of this section. *Id* ; *People v. McQuade*, 18 St. Rep. 288; 110 N. Y., 301.

The case of *People v. McGonegal*, 48 St. Rep., 900 ; 136 N. Y., 62, is very full and instructive as to the competency of a juror who has formed and expressed an opinion.

See *People v. Hughes*, 50 St. Rep., 65 ; *People v. Sharp*, 5 N. Y. Cr., 158; *Greenfield v. People*, 74 N. Y., 277 ; *People v. Petrea*, 30 Hun, 104 ; 1 N. Y. Cr., 198.

**§ 377. Grounds of challenge for implied bias.**—A challenge for implied bias may be taken for all or any of the following causes, and for no other :

1. Consanguinity or affinity within the ninth degree, to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant ;

2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney or counsel for the people or defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages ;

3. Being a party adverse to the defendant in a civil action or having complained against, or been accused by him in a criminal prosecution ;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment ;

5. Having served on a trial jury, which has tried another person for the crime charged in the indictment ;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside or which was discharged without a verdict, after the cause was submitted to it ;

7. Having served as a juror, in a civil action brought against the defendant, for the act charged as a crime ;

8. If the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty ; in which case he shall neither be permitted nor compelled to serve as a juror.

**Conscientious scruples.**—Where, upon the trial of an indictment for murder in the first degree, a juror, challenged by the people for bias, testified that his scruples were such as to render him extremely reluctant to find the defendant guilty of murder in the first degree, a decision sustaining the challenge was held not to be error, though such testimony was somewhat modified by further examination. *People v. Carolin*, 24 St. Rep. 597 ; 115 N. Y., 658 ; 7 N. Y. Cr., 125.

Jurors, who have conscientious scruples against rendering a verdict of guilty in a capital case, are properly excluded. *People v. Wood*, 43 St. Rep. 294 ; 131 N. Y., 619 ; 4 Silv. (Ct. App.), 41.

**Counsel.**—Acquaintance of a proposed juror with counsel and consultation with him on some occasion not connected with the case on trial, is not ground of challenge for bias. *People v. McQuade*, 18 St. Rep., 288 ; 110 N. Y., 284 ; 21 Abb. N. C., 447 ; 6 N. Y. Cr., 1.

**Defense.**—The grounds, contained in these several subdivisions of this section, do not include any bias against any defense that might be inter-

sed in answer to the crime charged. *People v. Carpenter*, 38 Hun, 492 ; 4 Y. Cr., 46.

**Master and servant.**—A person is not incompetent to sit in a criminal case by reason of his being an employé of a corporation, of which the district attorney is president. *People v. Beckwith*, 4 N. Y. Cr., 335, 341.

**Relationship.**—A challenge for implied bias is valid where the proposed juror is a third cousin of the complainant. *People v. Clark*, 41 St Rep., 3 ; 62 Hun, 84 ; 16 N. Y. Supp., 473, 474.

The method of computing the degrees of consanguinity and affinity of jurors in civil cases (section 1166 of Code of Civil Procedure), though this provision does not in terms apply, was extended, to criminal cases. *Id.*

See *People v. Hughes*, 50 St. Rep., 65 ; *People v. Petrea*, 30 Hun, 104.

§ 378. **Grounds of challenge for actual bias.**—A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section 376, and for no other cause.

See *People v. McQuade*, 18 St. Rep., 288 ; 110 N. Y., 284. 21 Abb. N. C. 7.

§ 379. **Exemption not a ground of challenge.**—An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

**General grounds of exemption.** Code of Civil Procedure, sections 1080, 81 ; in city and county of New York, *Id.*, sections 1081, 1082 ; in Kings county, *Id.*, sections 1127, 1128.

§ 380. **Causes of challenge, how stated.**—In a challenge for implied bias, one or more of the causes stated in section 377 must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section 376 must be alleged. In either case, the challenge may be oral, but must be entered upon the minutes of the court.

See *People v. Otto*, 4 N. Y. Cr., 155 ; 101 N. Y., 690.

By this section, it is provided that, in a challenge for implied or actual bias, the causes, stated in the Code, must be alleged ; and that, wherever a challenge may be overruled, it must be entered upon the minutes of the court. *People v. Larubia*, 23 N. Y. Supp., 579.

Where a juror was examined for actual bias by the people, and when his challenge was withdrawn, the defendant cross-examines as though the challenge had been renewed on his part, and, at the end of the examination, submitted the challenge for cause, it will be assumed that it was the understanding of the court and counsel that a challenge for actual bias was pending. *Id.* In such case, though the statute has not been strictly complied with, the court properly passed upon the challenge. *Id.*

§ 381. **Exceptions to challenge and denial thereof.**—The adverse party may except to the challenge, in the same manner as to a challenge to the panel ; and the same proceedings must be had thereon, as prescribed in section 364, except that, if the challenge be allowed, the juror must be excluded. The adverse party may also orally deny the fact alleged as the ground of challenge.

§ 382. **Challenge, how tried if denied.**—If the facts be denied, the challenge must be tried by the court which must either allow or disallow the same and direct an entry accordingly on the minutes. If the challenge be allowed, the juror must be discharged.

The court upon a criminal trial, is the trier of a challenge for principal



cause, and also of a challenge for favor. *Greenfield v. People*, 74 N. Y., 277. See *People v. Petrea*, 30 Hun, 103 ; 1 N. Y. Cr., 198.

§ 383. **Juror challenged may be examined as a witness.**—Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness, to prove or disprove the challenge ; and is bound to answer every question pertinent to the inquiry therein.

The challenged juror may be examined as a witness to prove or disprove the challenge. *People v. Welch*, 1 N. Y. Cr., 488.

§ 384. **Rules of evidence on trial of challenge.**—Other witnesses may also be examined on either side ; and the rules of evidence applicable to the trial of other issues, govern the admission or exclusion of testimony, on the trial of the challenge.

The same rules of evidence are applicable to the trial of a challenge for actual bias as apply to the trial of their issues. *People v. Welch*, 1 N. Y. Cr., 488.

This section authorizes the examination of other witnesses on either side upon the trial of a challenge of an individual juror. *Id.*

§ 385. **Challenges.**—Challenges to an individual juror must be taken, first by the people and then by the defendant.

Amended by chap. 360 of 1882.

This amendment eliminated from the original section the words “ except those which are peremptory.”

**Order.**—This section, so far as it requires the people to first exercise the right of peremptory challenge, is imperative and not directory. *People v. McQuade*, 18 St. Rep., 288 ; 110 N. Y., 284 ; 21 Abb. N. C., 435.

This section is not a mere rule of procedure for the orderly conduct of criminal trials. It is a right secured to the defendant. *Id.*

All that this section requires is that the people shall exercise its right to challenge as to any one of the classes, enumerated in the following section, before the defendant can be called upon to exercise his right to such class. *People v. McGonegal*, 42 St. Rep., 310 ; 17 N. Y. Supp., 150.

This and the next section are to be read together, and they have the same meaning as though the legislature had declared that challenges must first be made by the people and then by the defendant in the order enumerated in the latter section. *People v. McGonegal*, 48 St. Rep., 901 ; 136 N. Y., 65 ; aff'g 42 St. Rep., 310 ; 17 N. Y. Supp., 150.

The prosecution may reserve its right of peremptory challenge to the jurors in each case until after the challenges on both sides for actual bias have been disposed of, but it must exercise such right, if it desires to do so, before it is known whether the juror is satisfactory to the defendant and before he is sworn in the case. *Id.*

The cases of *People v. Casey*, 96 N. Y., 115 ; 2 N. Y. Cr., 194 ; and *People v. Carpenter*, 1 St. Rep., 648 ; 102 N. Y., 238 ; 4 N. Y. Cr., 177, were limited in *People v. McQuade*, 18 St. Rep., 288 ; 110 N. Y., 284 ; 6 N. Y. Cr., 32.

§ 386. **Order of challenges.**—Challenges of either party must be taken :

1. To the panel ;
2. To an individual juror, for a general disqualification ;
3. To an individual juror, for implied bias ;
4. To an individual juror, for actual bias ;
5. Peremptory ;

Amended by chap. 360 of 1882.

This amendment added to the original section the present fifth subdivision. See notes under preceding section.

**Order.**—This section prescribes the order in which challenges shall be taken. *People v. McQuade*, 18 St. Rep., 288 ; 6 N. Y. Cr., 20 ; 110 N. Y., 284 ; 21 Abb. N. C., 444.

It is sufficient if the different classes are taken up *seriatim*, and in the order specified, and each party called upon to determine whether, as to that class, it is desired to interpose a challenge ; the people first, and then the defendant. *People v. McGonegal*, 48 St. Rep., 901 ; 136 N. Y., 70.

In ordinary practice, the challenges for cause may be grouped. *Id.* One examination will be sufficient to determine whether any tenable grounds exist for any of them. *Id.* The statements made upon an examination to determine one ground of challenge may be considered by the court in determining a subsequent challenge upon a different ground. *Id.* ; *Greenfield v. People*, 74 N. Y., 277.

See *People v. Welch*, 1 N. Y. Cr., 488.

§ 387. **Jury to be sworn, etc.**—The first twelve persons who appear, as their names are drawn and called who are proved as indifferent between the parties, and are not discharged or excused, must be sworn ; and constitute the jury to try the issue.

The statute is silent as to the time when the jury shall be sworn. *People v. Carpenter*, 1 St. Rep., 648 ; 102 N. Y., 248. The trial court, in its discretion, may determine the practice. *Id.*

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## TITLE VII.

### OF THE TRIAL.

#### CHAPTER I. The trial.

- II. Conduct of the jury, after the cause is submitted to them.
- III. The verdict.

#### CHAPTER I.

##### THE TRIAL.

**SECTION 388.** In what order trial to proceed.

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417. Court to decide questions of law arising during trial.
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419. In all other cases, court to decide questions of law, subject to right of defendant to except.
420. Charge to jury.
421. Jury may decide in court, or retire in the custody of officers; oath of the officers.
422. When defendant on bail appears for trial, he may be committed.

**§ 388. In what order trial to proceed.**—The jury having been impaneled and sworn, the trial must proceed in the following order:

1. The district attorney, or other counsel for the people, must open the case, and offer the evidence in support of the indictment;
2. The defendant or his counsel may then open his defense, and offer his evidence in support thereof;
3. The parties may then, respectively, offer rebutting testimony, but the court, for good reason, in furtherance of justice, may permit them to offer evidence upon their original case;
4. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the defendant or his counsel must commence, and the counsel for the people conclude the argument to the jury;
5. The court must then charge the jury.

This section seems to apply to all trials without reference to what kind of defense the defendant interposes. *People v. Connor*, 48 St. Rep., 28; 65 Hun, 392; 8 N. Y. Cr., 443.

No provision is made by the Code for a separate trial in case there are more than one issue. *Id.* A complete trial involves the disposition of all the issues so far as it is necessary in order to arrive at a final judgment. *Id.*

See *People v. Dumar*, 11 St. Rep., 19; 106 N. Y., 505; 8 N. Y. Cr., 263.

**§ 389. Defendant presumed innocent, until contrary proved. In case of reasonable doubt, entitled to acquittal.**—A defendant in a criminal action is presumed to be innocent, until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

**Burden.**—The burden is upon the people to show the guilt of the accused. *People v. Benedict*, 49 St. Rep., 286; 21 N. Y. Supp., 61. The testimony of facts, legitimately pointing in that direction, should be given. *Id.*

A jury are never required to find that it was not possible for another to have committed the crime, before they can convict the prisoner on trial. *People v. Riley*, 3 N. Y. Cr., 374. *People v. People*, 80 N. Y., 645.

**Reasonable doubt.**—The rule that, in criminal cases, the defendant are entitled to the benefit of a reasonable doubt, applies not only to the case as

by the prosecution, but to any defense interposed. *People v. Riordan*, 531 St. Rep., 531 ; 117 N. Y., 73. If, taking the whole case together, the evidence for the prosecution and the evidence respecting the defense, the jury has any doubt of the guilt of the prisoner, they must acquit. *People v. Reavey*, 27 St. Rep., 823 ; 117 N. Y., 480. See *People v. Downs*, 84 St. Rep., 123 N. Y., 558.

In order to convict, the guilt must be established beyond a reasonable, beyond a possible, doubt. *People v. Riley*, 3 N. Y. Cr., 874.

A reasonable doubt as to any element of the crime entitles the defendant to an acquittal. *People v. Willett*, 36 Hun, 500.

This rule is applicable in respect to the degree of the crime charged, and every essential requisite of that degree. *Id.*

If the jury has a reasonable doubt as to the truth of any one of the charges, there is a reasonable doubt whether defendant's guilt is satisfactorily shown, and he is entitled to an acquittal. *People v. Downs*, 29 St. Rep., 122 ; 7 N. Y. Cr., 481 ; 56 Hun, 11 ; 8 N. Y. Supp., 524.

Where the jury entertain a reasonable doubt as to the defendant's guilt, he is entitled to a verdict of acquittal. *People v. Reavey*, 38 Hun, 427.

The benefit of a reasonable doubt, if it arise from the evidence, that the defendant is guilty of the crime, should be given to him. *O'Connell v. People*, 37 N. Y., 377.

The rule of law, that gives to a person accused of crime the benefit of a reasonable doubt, is always one for the jury under proper instructions from the court. *People v. Davis*, 46 St. Rep., 214.

Where there is reasonable doubt as to the prisoner's sanity arising upon the evidence in the case, and upon nothing else, the jury should give him the benefit of such doubt and acquit him. *Walker v. People*, 1 N. Y. Cr., 7, 22.

Where evidence has been given to support the defense of insanity, then the prosecution holds the affirmative, and if a reasonable doubt of sanity arises upon the evidence, the defendant is entitled to the benefit of that doubt. *People v. Coleman*, 1 N. Y. Cr., 5.

The definition that a reasonable doubt "is not a mere guess or surmise as to whether the man may not be guilty, it is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence—a doubt for which some good reason arising from the evidence can be given,"

was approved by the court of appeals in *People v. Guidici*, 100 N. Y., 503 ; 3 N. Y. Cr., 559.

A reasonable doubt is such a doubt as honest, conscientious, painstaking jurors may entertain upon a state of facts presented to them. *People v. Reavey*, 4 N. Y. Cr., 306.

If the jury have any reasonable doubts upon any facts which are necessary to convict the defendant, he is entitled to be acquitted. *People v. Guidici*, 100 N. Y., 503 ; 3 N. Y. Cr., 558.

A defendant is entitled to have the jury instructed that the law presumes him to be innocent of the crime charged, until the contrary is proved. *People v. Van Houton*, 38 Hun, 170.

An instruction that the jury must be satisfied beyond a reasonable doubt of his guilt is not equivalent. *Id.*

The court is not bound to subdivide the point of reasonable doubt by confining it to any particular branch of the case. *People v. Reavey*, 38 Hun, 427.

The jury, in order to convict the defendant, are required to find that the evidence presented remove reasonable doubt of his guilt. *People v. Newton*, 3 N. Y. Cr., 406. Such conclusion must be based on testimony of facts legitimately pointing in that direction. *Id.*

This rule is not applicable to an action for a penalty in which the people are the party plaintiff. *People v. Briggs*, 22 St. Rep., 317 ; 114 N. Y., 65.

The question of reasonable doubt is always one for the jury under proper instructions from the court. *People v. Davis*, 46 St. Rep., 214.

When there is evidence upon which the jury might, or might not, entertain rational doubts, it is not for the court on appeal to say that the jury should have been so instructed and have given the defendant the benefit of such doubt by his acquittal. *Id.*

See *People v. Brickner*, 8 N. Y. Cr., 221, 223 ; 15 N. Y. Supp., 530, 531.

**390. When reasonable doubt of which degree he is guilty,**

**he must be convicted of the lowest.**—When it appears that a defendant has committed a crime, and there is reasonable ground of doubt, in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only.

A jury have no right to convict of a less degree of a crime, simply because they doubt whether the defendant committed a greater degree, but the elements which constitute such degree must themselves be proved. *People v. Downs*, 29 St. Rep., 117 ; 56 Hun, 5 ; 7 N. Y. Cr., 481.

See *People v. Davis*, 46 St. Rep., 214.

**§ 391. Separate trial of defendants jointly indicted.**—When two or more defendants are jointly indicted for a felony, any defendant requiring it, must be tried separately. In other cases, defendants jointly indicted may be tried separately or jointly in the discretion of the court.

The right of the prosecution to try the prisoner separately is fixed by this section. *People v. Clark*, 4 N. Y. Cr., 575.

**Discretion.**—The making or refusing an order directing one of several persons jointly indicted to be tried separately, is within the discretion of the trial court. *People v. Clark*, 38 Hun, 214 ; 2 St. Rep., 540 ; 102 N. Y., 735 ; 4 N. Y. Cr., 575 ; 1 Silv. (Ct. App.), 162.

**Proof.**—When a party jointly indicted with another for an offense, charged to have been the result of their joint act, is tried separately, either upon his own election or otherwise, the indictment is well supported by proof sufficient to warrant a conviction if the party on trial had been indicted for the offense alone. *People v. Cotto*, 42 St. Rep., 716 ; 131 N. Y., 580 ; 4 Silv. (Ct. App.), 10.

**§ 392. Rules of evidence. Evidence of certain children, how received.**—The rules of evidence in civil cases are applicable also to criminal cases except as otherwise provided in this Code. Whenever in any criminal proceedings a child actually or apparently under the age of twelve years offered as a witness does not in the opinion of the court or magistrate understand the nature of an oath, the evidence of such child may be received though not given under oath if, in the opinion of the court or magistrate, such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offense upon such testimony unsupported by other evidence.

Amended by chap. 279 of 1892.

This amendment added to the original, all after the first sentence of the present section.

**Same.**—The rules of evidence are the same in civil and criminal cases, except as otherwise provided by this section. *People v. Burns*, 2 N. Y. Cr., 427.

This section provides that the rules of evidence in civil cases are applicable also to criminal cases. *People v. Hill*, 47 St. Rep., 779 ; 65 Hun, 420.

**Section 834 of Civil Code.**—Section 834 of the Code of Civil Procedure was made applicable to criminal actions by the amendment of 1879.

This section makes section 834 of the Code of Civil Procedure applicable to criminal trials. *People v. Brower*, 24 St. Rep., 939 ; 53 Hun, 219 ; 6 N. Y. Supp., 731 ; *People v. Murphy*, 101 N. Y., 129.

Whatever possible doubt may have existed that section 834 of the Code of Civil Procedure is applicable to criminal actions is fairly dispelled by this section. *People v. Murphy*, 4 N. Y. Cr., 98.

**Husband and wife.**—As to admissibility of confidential communications between husband and wife on the trial of either when indicted or accused of a crime, see *People v. Lewis*, 42 St. Rep., 772 ; 16 N. Y. Supp., 884.



**Conviction.**—The record of conviction for a crime or misdemeanor is admissible in evidence, to affect the weight of the testimony of a witness in a criminal action. *People v. Kelly*, 35 Hun, 304; 3 N. Y. Cr., 47.

A witness cannot be discredited by showing that he has been indicted. *Von Bokkelen v. Berdell*, 41 St. Rep., 314; 130 N. Y., 145.

See *Stowell v. Amer. Co-operative R. Ass'n.*, 1 Silv. (Sup. Ct.), 253, note.

§ 393. **Defendant as witness.**—The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him.

**Constitutional.**—The provisions of this section are not in conflict with section 6, art. 1, of the state constitution. *People v. Courtney*, 31 Hun, 202; 1 N. Y. Cr., 557; 94 N. Y., 490.

**Protection.**—The law, so far as it can, protects a defendant, who omits to be sworn, from having that fact weigh against him. *People v. Tice*, 43 St. Rep., 576; 131 N. Y., 656; 4 Silv. (Ct. App.), 104.

The district attorney violates the rights of the defendant in commenting to the jury upon the significance of the latter's neglect or refusal to testify in his own behalf. *People v. Rose*, 22 St. Rep., 393; 52 Hun, 38; 4 N. Y. Supp., 790.

The practical meaning of this section is that the court and jury must, so far as they can, determine the defendant's case without prejudice or inference against him, founded upon his omission to testify. *Id.*

In criminal prosecutions, the fact that the prisoner does not avail himself of the provision of this section, is not to militate against him. *Sigel v. Sigel*, 47 St. Rep., 399.

This statutory declaration is not in accord with experience. *People v. Rose, ante.*

**Offering himself as witness.**—The accused is not compelled, by this section, to become a witness. *People v. Tice*, 43 St. Rep., 576; 131 N. Y., 656; 4 Silv. (Ct. App.), 104. But if he accepts the privilege, he takes it with its attendant dangers. *Id.*

The defendant cannot be compelled to be a witness against himself; but, by consenting to take the stand, he waives the constitutional protection, and may be examined in the same manner as any other witness. *Connors v. People*, 50 N. Y., 240; *People v. Guidici*, 100 id., 503; 3 N. Y. Cr., 551.

The defendant, by making himself a witness, becomes subject to the same rules of cross-examination made applicable to other witnesses in legal proceedings. *People v. Courtney*, 94 N. Y., 490; 1 N. Y. Cr., 490; 1 N. Y. Cr., 566; *People v. Casey*, 72 N. Y., 394.

A defendant, who has availed himself of the privilege, accorded him by the act, of testifying, cannot afterwards object that his rights were violated by his being permitted to avail himself of that privilege. *People v. Courtney*, 31 Hun, 202; 1 N. Y. Cr., 557.

The court of appeals has announced in many cases that an accused person, who becomes a witness in his own behalf, thereby places himself in the attitude of any other witness in respect to the right of cross-examination. *People v. Tice*, 43 St. Rep., 576; 131 N. Y., 657; 4 Silv. (Ct. App.), 104; *Brandon v. People*, 42 N. Y., 265; *Connors v. People*, 50 id., 240; *Stover v. People*, 56 id., 315; *People v. Casey*, 72 id., 394; *People v. Crapo*, 76 id., 288; *People v. Noelke*, 94 id., 137.

**Extent of cross-examination.**—The extent to which the cross-examination of a prisoner, as a witness on the trial, may be carried, is necessarily very much in the discretion of the trial court. *People v. Clark*, 2 St. Rep., 543; 1 Silv. (Ct. App.), 166; 102 N. Y., 736.

The range and extent of the cross-examination of a defendant, who makes himself a witness, is within the discretion of the trial judge, provided only that it relates to relevant matters or to matters affecting credibility. *People v. Tice*, 43 St. Rep., 576; 131 N. Y., 657; 4 Silv. (Ct. App.), 104.

**Credibility.**—It was held, in *People v. Kiernan*, 3 N. Y. Cr., 247, that it was not error for the court to charge that the defendant, who had testified, "has, doubtless, every interest in this world to falsify, if falsifying would bring any immunity to him, and he is undoubtedly to be judged bearing that in mind, but he is not to be discredited for that reason."

Where the accused testifies in his own behalf, on the trial of an indictment for rape, it is not improper for the trial court to instruct the jury that, while his evidence is to be considered as that of any other witness, they should, in determining his credibility, consider the fact that he stands charged with the commission of a serious criminal offense. *People v. Crowley*, 1 St. Rep., 388; 102 N. Y., 234; 4 N. Y. Cr., 168.

Where the defendant testifies in his own behalf, the jury have a right to disbelieve his story. *People v. Roehl*, 52 St. Rep., 147.

The jury are not bound to accept the exculpatory statements of defendant as unquestionably true. *People v. Beckwith*, 4 N. Y. Cr., 387.

**Perjury.**—This section, which allows a witness to take the stand in his own behalf, subjects him to the same consequences as other witnesses, and exposes him, where he gives false testimony knowingly, to prosecution by way of indictment afterwards, though his testimony may result in his favor. *People v. Sculley*, 3 N. Y. Cr., 245.

§ 394. **Compensation of witnesses.**—The rules as to the compensation of witnesses attending trials in criminal cases, prescribed by special statutes, are continued as there defined.

See sections 615 and 731, *post*.

§ 395. **Confession of defendant, when evidence, and its effect.**—A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.

See note in *People v. Everhardt*, 2 Silv. (Ct. App.), 518, 519, 520, 522, 523, 524, 525, 526.

The case of *People v. Mondon*, 38 Hun, 188; 4 N. Y. Cr., 112, was reversed in 2 St. Rep., 713; 103 N. Y., 211.

The reference in *People v. Mondon*, 2 St. Rep., 713; 103 N. Y., 211; 4 N. Y. Cr., 561, to section 395 of Penal Code should be to this section of Criminal Code.

The reference to this section in *People v. Welch*, 1 N. Y. Cr., 488, should be to section 361, *ante*.

This section does not supersede the case of *People v. McMahon*, 15 N. Y., 484, nor is the case of *People v. McGloin* in conflict with the former case. *People v. Mondon*, 2 St. Rep., 793; 103 N. Y., 218, 219; 4 N. Y. Cr., 559.

**Common-law rule.**—This section has not changed the rule of the common law in favor of one charged with crime. *People v. McCallam*, 8 N. Y. Cr., 196.

The rule, established by this section, is founded upon the common-law rule on the subject of confessions, but is much more definite and stringent. *People v. Mondon*, 2 St. Rep., 793; 103 N. Y., 219; 4 N. Y. Cr., 559.

This provision was not intended to apply to any but voluntary confessions, or to change the statutory rules relating to the examination of prisoners charged with crime. *Id*.

**Before Code.**—The following propositions were, prior to the adoption of this Code, well settled by law in this state: First. All confessions material to the issue, voluntarily made by a party, whether oral or written, and however authenticated, were admissible as evidence against him on a trial for a criminal offense. *People v. Wentz*, 37 N. Y., 303. Second. It was no objection to the admissibility of such confessions, that they had been taken under oath from a person attending before a coroner, in obedience to a subpoena, upon an inquiry conducted pursuant to law, into the causes of a homicide. *Hendrickson v. People*, 10 N. Y., 13. Third. That the confession or declaration sought to be given in evidence was in writing and purported to be sworn to, was no objection to its admissibility, unless it also appeared that it was taken before a magistrate upon a judi-



cial investigation against the person accused of the commission of the crime. *People v. McGloin*, 91 N. Y., 247 ; 1 N. Y. Cr., 154.

**What is not.**—A statement by the defendant, denying any criminal act and explaining to his own advantage a suspicious circumstance, is not to be deemed a confession under this section. *People v. McCallam*, 3 N. Y. Cr., 197.

**Voluntary.**—The object of this section is to declare what confessions shall be deemed voluntary, and, therefore, admissible, whether made out of court to a private person, or in court, or in the course of any judicial proceeding between any parties. *People v. Mondon*, 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 559.

The test of admissibility of the statements of a party accused of the commission of the crime, whether made in the course of judicial proceedings or not, is whether they were voluntary. *People v. Chapleau*, 30 St. Rep., 989 ; 121 N. Y., 274. This can be determined by their nature and the circumstances under which made. *Id.* If in all respects, and however viewed, they could only have been the voluntary and uninfluenced statements of the individual, no principle of law warrants their exclusion and the Code expressly authorizes their being given in evidence upon the trial. *Id.*

A voluntary confession is one proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause. *People v. McMahon*, 15 N. Y., 384 ; *People v. Chapleau, ante.*

Where the evidence does not disclose any threats, nor authorize an inference that the confession was made under the influence of fear, the statement, though sworn to by the accused, is in no respects compulsory, and is admissible in evidence under this section. *People v. McGloin*, 91 N. Y., 241 ; 1 N. Y. Cr., 154 ; 12 Abb. N. C., 172 ; 16 W. Dig., 255.

In *People v. Kurtz*, 3 St. Rep., 715 ; 42 Hun, 335, it was held that the confession was not shown to be so clearly voluntary, under this section, that it was admissible.

Voluntary statements by defendant, on his arrest, as to the offense with which he is charged, made to the officers having him in custody, are admissible against him. *People v. Chacon*, 3 N. Y. Cr., 425.

Voluntary statements of a prisoner, made after his arrest, are properly admitted in evidence upon his trial. *Willett v. People*, 27 Hun, 469.

**Examination.**—An examination of a person, arrested on a criminal charge, which is conducted in violation of the provisions of this section, is not admissible against him on his trial for the offense. *People v. Mondon*, 2 St. Rep., 713 ; 103 N. Y., 220 ; 4 N. Y. Cr., 559.

A statement not taken under or in reference to the provisions of sections 198, 199 and 200, *ante*, is entirely extra-judicial, and is governed and controlled in its value and effect as evidence, by this section. *People v. McGloin*, 28 Hun, 150 ; 1 N. Y. Cr., 110 ; 16 W. Dig., 138.

Voluntary confessions, when fairly proven, constitute evidence of a high character. *People v. Bishop*, 53 St. Rep., 61 ; 69 Hun, 105.

**Before coroner.**—The statement of a prisoner before the coroner and jury, if made at his own election and request, and without the operation of the influences of fear, produced by threats, or of hope, under a stipulation that he would not be prosecuted, is admissible, under the provisions of this section, on a trial against him to prove the homicide. *People v. Chapleau*, 30 St. Rep., 989 ; 121 N. Y., 272.

A mere consciousness of being suspected of a crime does not so disqualify a person that his testimony, in other respects freely and voluntarily given, before the coroner, cannot be used against him on his trial on a charge, subsequently made, of such crime. *Teachout v. People*, 41 N. Y., 7.

When a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with a crime, the testimony of a witness, who is called and sworn before such jury, may be used against him on his trial, in case he shall afterwards be charged with the crime. *People v. Mondon*, 2 St. Rep., 713 ; 103 N. Y., 221 ; 4 N. Y. Cr., 559. The mere fact that, at the time of his examination, he was aware that a crime was suspected, and that he was suspected of being

the criminal, will not prevent his being regarded as a mere witness, whose testimony may be afterwards given in evidence against himself. *Id.*

A declaration or statement, made before the accused was conscious of being charged with, or suspected of, the crime, is admissible in all cases, whether made under, or without, oath, upon a judicial proceeding or otherwise. *People v. McMahon*, 15 N. Y., 384.

Statements made by the defendant, as a witness at the coroner's inquest, before the witness has been charged with the murder, and before it was ascertained that a murder had been committed, are admissible in evidence against him upon a trial for murder. *Hendrickson v. People*, 10 N. Y., 18.

But, where it appears, at the time of a witness' examination before a coroner's jury, that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded merely as a witness, but as an accused party, to be treated in the same manner as though brought before a committing magistrate, and his examination, if not taken in conformity with the provisions of sections 196 to 200 inclusive of this Code, cannot be used against him on his trial for the offense. *People v. Mondon*, *ante*.

From the time that the prisoner occupies the position, before the coroner's inquest, of a person accused of crime, his situation is similar to that of such a person before an examining magistrate. *Id.*

Where a constable arrested, without warrant, the prisoner on suspicion of being the murderer of his wife, and took him before the coroner, who was holding an inquest upon her body, and who swore and examined him as a witness, such evidence is not admissible on his trial for the murder. *People v. McMahon*, 15 N. Y., 384.

Declarations, made under the influence of a charge of guilt, under actual arrest or under examination with such a charge impending, should be excluded, except where a careful obedience to the statutory precautions is observed. *Teachout v. People*, 41 N. Y., 12.

There is no error in proving defendant's declarations before the coroner. *People v. Wright*, 49 St. Rep., 71.

In *People v. Wright*, 49 St. Rep., 75, it was held that defendant's declarations, when examined before the coroner, were properly proved. See *People v. Chapleau*, 30 St. Rep., 989; 121 N. Y., 267.

In *People v. Mondon*, 103 N. Y., 211, there was no confession, but an examination before the magistrate. *People v. Chapleau*, 30 St. Rep., 989; 121 N. Y., 274.

**Threats, etc.**—The fear, which is required to exclude the confession, must be a fear produced by threats, and the hope must be based upon the stipulation of the district attorney promising immunity from prosecution for the crime confessed. *People v. Mondon*, 2 St. Rep., 713; 103 N. Y., 219; 4 N. Y. Cr., 559.

Admissions made to a police officer in response to questions may be received in evidence, unless they were made under the influence of fear produced by threats. *People v. Cassidy*, 39 St. Rep., 28; 14 N. Y. Supp., 350.

The question as to whether they were so made is one proper for the jury to pass upon. *Id.*

The statement of an officer that the defendant might as well own up, as he had enough to convict her, and that she might consider herself under arrest, cannot be regarded as a threat sufficient to render subsequent declarations incompetent, even though such declarations are considered a confession. *People v. McCallam*, 4 St. Rep., 291; 103 N. Y., 598; 5 N. Y. Cr., 152; *aff'd* 3 N. Y. Cr., 196.

Confessions of defendant, made to officers, having him in charge, to the public prosecutor, and to the reporters of newspapers, where no threats were used to extort them, are admissible in evidence. *People v. Deacons*, 15 St. Rep., 526; 109 N. Y., 377.

A confession, not made under the influence of fear produced by threats, nor upon any promise of immunity from prosecution, is admissible. *People v. Druse*, 3 St. Rep., 617; 103 N. Y., 656; 5 N. Y. Cr., 27; 1 Silv. (Ct. App.) 186.

This section means that if, by assurance from the district attorney that the prisoner shall not be prosecuted for his crime, the latter has been induced to make a confession thereof, such confession shall not be used as evidence against him. *People v. Kurtz*, 3 St. Rep., 715; 42 Hun, 342.

**Under arrest.**—That the defendant was under arrest and that the confession was made to an officer, are circumstances which do not exclude it. *People v. Fox*, 80 N. Y., 500; *People v. Wentz*, 37 id., 303.

A voluntary confession, otherwise admissible, is not rendered inadmissible by the fact that it was made by a person under arrest at the time it was made. *People v. Druse*, 3 St. Rep., 617; 5 N. Y. Cr., 20; 1 Silv. (Ct. App.) 86.

Where the defendant, while under arrest, made to the police inspector, in the presence of several persons, confessions, which they testified were voluntary, but which he testified, were made under the influence of fear, produced by threats, they are competent, in case, on submission, the jury find that they were voluntarily made. *People v. Cassidy*, 44 St. Rep., 870; 133 N. Y., 612; 4 Silv. (Ct. App.), 259.

**When question of fact.**—Where the defendant testified that the confession was made by reason of threats, the persons to whom it was made, testified that no threats were employed, the charge of the judge correctly stated the rules of law relating to confessions which should govern the deliberations of the jury, and the jury found the defendant guilty, the appellate court must assume that the jury found the confessions to have been voluntarily made. *People v. Bishop*, 53 St. Rep., 60; 69 Hun, 105.

**When questions of law.**—Where there is no conflict in the evidence as to the circumstances under which the statements were made, their admissibility should be decided by the court and not be left to the jury. *Villett v. People*, 27 Hun, 469.

Where there is no conflict in the evidence as to what occurred at the time the confession was made, or as to the conversation held with the defendant, it is a question of law as to whether the confession is or is not receivable. *People v. Druse*, 3 St. Rep., 617; 5 N. Y. Cr., 20; 1 Silv. (Ct. App.), 186; *Villett v. People*, 27 Hun, 469; *People v. Mondon*, 38 id., 188; 4 N. Y. Cr., 112; *Murphy v. People*, 63 N. Y., 591.

When a written confession of guilt is offered against a person on trial for a criminal offense and he objects to the same and offers to prove to the court that it was procured from him by threats, or promises, or under such circumstances as would render it incompetent as evidence, it is error to receive the paper without first hearing the proof offered, and deciding upon the competency of the confession as evidence against the party making it. *People v. Fox*, 31 St. Rep., 570; 121 N. Y., 453.

**Additional proof.**—The defendant cannot be convicted upon his confession alone. *People v. Kelly*, 37 Hun, 160; 3 N. Y. Cr., 414; 22 W. Dig., 19.

In the case of a confession, there must be additional proof that the crime has been committed. *People v. O'Neill*, 10 St. Rep., 1; 48 Hun, 47; 5 N. Y. Cr., 334.

The *corpus delicti* cannot be entirely established by a confession. Id.

The proof which, in addition to a defendant's confession, must be given, under this section, in order to convict, may be either direct or circumstantial. *People v. Carr*, 3 N. Y. Cr., 581.

This section, *it seems*, is satisfied, when there is, in addition to the confession, proof of circumstances which, though capable of an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key. *People v. Jaehne*, 3 St. Rep. 11; 103 N. Y. 199.

Proof of the finding of the body of the murdered person, with unmistakable marks thereon of a murder committed, is sufficient additional proof, to meet the requirements of the latter clause of this section. *People v. Deacons*, 15 St. Rep., 526; 109 N. Y., 377.

Upon the trial of an indictment under section 325 of the Penal Code, it was held that the additional proof that the offense was committed, other than defendant's confession, required by this section, was to be found in the purchase and in the production of the contrivance before the jury. *People v. Runge*, 3 N. Y. Cr., 87.

The confession is to be treated as competent proof of the body of the crime, though insufficient without corroboration to warrant a conviction. *People v. Jaehne*, 3 St. Rep., 11; 103 N. Y., 199.

In a case where the body is not found, and there is no proof of violence

or of death except by the confession of the accused, such confession will not suffice. *People v. Deacons*, 15 St. Rep., 526 ; 109 N. Y., 378.

See *People v. Kief*, 34 St. Rep., 532 ; 58 Hun, 343 ; 11 N.Y. Supp., 980 ; *People v. Runge*, 3 N.Y. Cr., 87 ; *People v. Beckwith*, 12 St. Rep., 795 ; 108 N. Y., 74.

§ 396. **Evidence on trial for treason.**—Upon a trial for treason the defendant cannot be convicted, except upon the testimony of two witnesses to the same overt act, or of one witness to one overt act, and another witness to a different overt act of the same treason. But if two or more distinct treasons, of different kinds, be alleged in the indictment, two witnesses to prove different treasons are not sufficient to warrant a conviction.

§ 397. **Evidence on trial for treason.**—Upon a trial for treason, evidence cannot be admitted, of an overt act not expressly charged in the indictment ; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

§ 398. **Evidence on trial for conspiracy.**—Upon a trial for a conspiracy, in a case where an overt act is necessary to constitute the crime, the defendant cannot be convicted, unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved ; but any other overt act, not alleged in the indictment, may be given in evidence.

§ 399. **Conviction cannot be had on testimony of accomplice, unless corroborated.**—A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

This section was amended by chap. 360, of 1882.

This amendment dropped the latter portion of the original section as to the sufficiency of the corroboration.

See section 142 of Penal Code.

See note on Corroborative Evidence in 2 Silv. (Ct. App.), 512.

**New Rule.**—This section introduces a new rule as to an accomplice's evidence. *People v. Thomsen*, 3 N. Y. Cr., 563 ; 21 W. Dig., 846.

This section has changed the rule of the common law in regard to the corroboration of the testimony of an accomplice. *People v. Ryland*, 97 N. Y., 131 ; aff'g 28 Hun, 568 ; 16 W. Dig., 232.

*People v. Courtney*, 28 Hun, 589 ; 1 N. Y. Cr., 64.

This section has changed the former rule of law, and requires that there should be simply corroborative evidence, which tends to connect the defendant with the commission of the crime. *People v. Everhardt*, 5 St. Rep., 793 ; 104 N. Y., 594 ; 2 Silv. (Ct. App.), 506.

**Application.**—The rule requiring corroboration is one that, in the exercise of that caution and tenderness which the common law always entertains for the rights of persons accused of crime, should be applied in all cases when the witness is in any way culpably implicated in the commission of the crime. *People v. Vedder*, 98 N. Y., 631.

**Who an accomplice.**—An accomplice is a person involved, either directly or indirectly, in the commission of the crime. *People v. Smith*, 1 N. Y. Cr., 75 ; 28 Hun, 627.

A person who innocently assists in secreting stolen property, is not an accomplice within the meaning of this section. *People v. Ricker*, 23 St. Rep., 653 ; 7 N. Y. Cr., 22.

A witness who has acted as a detective and informer is not an accomplice. *Berry v. People*, 1 N. Y. Cr., 43, 57.

A person, who purchases a lottery ticket with the intent of informing against the seller, is not an accomplice within the meaning of this section. *People v. Noelke*, 29 Hun, 465.

The purchaser of a lottery ticket is not an accomplice. *People v. Emerson*, 6 N. Y. Cr., 158 ; 20 St. Rep. 18 ; 5 N. Y. Supp., 374 ; *People v. Noelke*, 29 Hun, 461.

One who purchases a lottery ticket for the purpose of detecting and punishing the vendor, and not with intent to aid in the commission of the offense, is not, *it seems*, an accomplice within the meaning of the provisions of this section. *People v. Noelke*, 94 N. Y., 142.

The purchaser, under the former excise law, was held not to be an accomplice within the meaning of this section. *People v. Smith*, 28 Hun, 626 ; 1 N. Y. Cr., 74.

The woman, who submits to an abortion, is not an accomplice in the commission of the offense defined in section 294 of the Penal Code, and no corroboration of her testimony is required by this section of the Criminal Code. *People v. Meyers*, 5 N. Y. Cr., 126 ; 7 St. Rep., 221 ; *People v. Vedder*, 98 N. Y. 630 ; 3 N. Y. Cr., 32.

The woman, upon whose body the crime of abortion is committed, cannot, under the provisions of section 294 of the Penal Code, be an accomplice within the meaning of the Code, requiring corroboration as matter of law. *People v. Vedder*, 98 N. Y., 631 ; *People v. Dunn*, 29 id. 528.

Upon the question of accomplice, see *People v. McGonegal*, 48 St. Rep. 14 ; 136 N. Y., 75.

**Rule.**—In case of an accomplice, there must be other evidence tending to connect the defendant with the commission of the crime. *People v. Neill*, 5 N. Y. Cr., 334.

The *corpus delicti* may be established by the testimony of an accomplice. *Id.*

It was held, in this case, that there was sufficient corroborative evidence. *People v. O'Neill*, 14 St. Rep., 829 ; 109 N. Y., 251, 267.

**Nature of such evidence.**—The law is complied with if there is some other evidence fairly tending to connect the defendant with the commission of the crime so that his conviction will not rest entirely upon the evidence of the accomplice. *People v. Everhardt*, 5 St. Rep., 793 ; 2 Silv. (Ct. App.), 16 ; 104 N. Y., 594 ; 6 N. Y., Cr., 231.

The corroboration of an accomplice is sufficient, if it confirms material parts of the testimony relating to the *corpus* of the offense in such a way that the jury are justified thereby in accepting the evidence of the accomplice as true. *People v. Everhardt*, 5 N. Y. Cr., 91 ; *aff'd*, 14 St. Rep., 829 ; 2 Silv. (Ct. App.), 506 ; 104 N. Y. 594 ; 6 N. Y., Cr., 231.

In establishing the defendant's connection with the crime, it is incumbent upon the people to give such evidence as legitimately and naturally carries conviction to the minds of the jury that the defendant was connected with, and was guilty of, the offense charged ; and such evidence as merely raises the suspicion of guilt is insufficient to satisfy the requirements of this section. *People v. Williams*, 29 Hun, 520 ; 1 N. Y. Cr., 336 ; 17 W. Dig. 356.

This section does not require that the whole case should be proved outside of the testimony of the accomplice. *People v. Hooghkerk*, 96 N. Y. 62 ; 2 N. Y. Cr., 204 ; 67 How., 256. It simply requires evidence, from an independent source, of some material fact tending to show not only that the crime has been committed, but that the defendant was implicated in it. *Id.*

The acts necessary for the corroboration of an accomplice need not be inconsistent with the innocence of the defendant nor exclude every hypothesis but that of guilt. *People v. Ogle*, 5 St. Rep., 740 ; 104 N. Y., 511 ; 6 N. Y. Cr., 168 ; *aff'g*, 4 N. Y. Cr., 349.

Evidence of corroboration may consist of a series of facts having no force unless in combination, and may be shown by more than one witness, or as occurring on more than one occasion. *People v. Ogle*, 4 N. Y. Cr., 354.

The court is bound to receive any fact or circumstance tending to sustain the probability of the truth of an accomplice's evidence. *People v. Sharp*, N. Y. Cr., 388.

The corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime, to be of any avail. *People v. Ryland*, 28 Hun, 570 ; 16 W. Dig., 232.



Evidence that the prisoner, who was charged with uttering a forged check, was frequently in the company of the accomplice under circumstances of a suspicious character, is not a sufficient compliance with the requirements of this section. *People v. Courtney*, 28 Hun, 589 ; 1 N. Y. Cr., 64 ; *aff'd*, 94 N. Y., 490.

This section will not be satisfied unless the accomplice is corroborated by evidence which tends to show the participation or immediate connection of the accused with the acts which constitute the crime. *Id.*

Under an indictment for forging a note, corroboration of an accomplice is not afforded by his testimony as to other forged notes. *People v. White*, 41 St. Rep., 832 ; 62 Hun, 114 ; 16 N. Y. Supp., 571.

The corroborative evidence, required under this section, must be such as tends to connect the accused with the commission of the crime. *People v. Wayman*, 3 Silv. (Ct. App.), 493.

It is necessary to conviction, that the testimony of the accomplice should be corroborated by such other evidence as tends to connect the defendant with the commission of the crime. *People v. Wiley*, 48 St. Rep., 498.

It is not necessary that the corroborating evidence should in itself be sufficient to show the commission of the crime, or the connection of the defendant with it, but it is sufficient if it tends to connect him with such commission. *People v. Bosworth*, 45 St. Rep., 514 ; 64 Hun, 75 ; 19 N. Y. Supp., 115.

The corroborative evidence need not be wholly inconsistent with the theory of the defendant's innocence. *People v. Elliott*, 8 St. Rep., 223 ; 7 N. Y. Cr., 129.

Nor be in itself sufficient to show the commission of the crime, or to connect the defendant with it. *Id.*

It is sufficient if it tends to connect the defendant with the commission of the crime. *Id.*

Though each circumstance, taken by itself, is quite inconclusive, it is sufficient if, when considered together, they furnish some corroborative evidence. *Id.*

The corroboration of an accomplice must be something more than suspicious circumstances. *People v. Kerr*, 6 N. Y. Cr., 406. It must be legal evidence which, independently of the testimony of the accomplice, tends legitimately to prove the commission of the offense. *Id.*

Since the enactment of this section, the courts have uniformly held that there must be some evidence, other than that of the accomplice, fairly tending to connect the defendant with the commission of the crime. *People v. White*, 41 St. Rep., 833 ; 62 Hun, 115 ; 16 N. Y. Supp., 571 ; *People v. Elliott*, 8 St. Rep., 703 ; 106 N. Y., 288 ; *People v. Everhardt*, 5 St. Rep., 793 ; 2 Silv. (Ct. App.), 506 ; 104 N. Y., 591 ; 6 N. Y. Cr., 231 ; *People v. Ryland*, 97 N. Y., 126 ; *People v. Jaehne*, 3 St. Rep., 11 ; 103 N. Y., 182 ; *People v. O'Neill*, 14 St. Rep., 829 ; 109 N. Y., 251 ; *People v. Plath*, 100 N. Y., 590.

The defendant is entitled to have the jury instructed that no conviction can be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the crime, even though there is other evidence besides that of the accomplice which, if believed, tends to so connect him. *People v. Thomsen*, 3 N. Y. Cr., 563 ; 21 W. Dig., 346.

Where, upon a trial for bribery, an accomplice testified that he had received, as a bribe, a large sum in bills of large denomination, testimony of other witnesses that he had, at the time specified, in his possession bills of those denominations, is admissible in order to corroborate him. *People v. Sharp*, 10 St. Rep., 522 ; 5 N. Y. Cr., 439 ; *rev'd* upon another point, in 12 St. Rep., 217 ; 107 N. Y., 439 ; 5 N. Y. Cr., 569.

**Sufficient corroboration.**—The accomplice was held, in this case, to have been corroborated by other evidence that tended to connect the defendant with the commission of the crime. *People v. Christy*, 47 St. Rep., 926 ; 65 Hun, 349 ; 8 N. Y. Cr., 483 ; 20 N. Y. Supp., 279.

It was held, in *People v. Ryland*, 97 N. Y., 131 ; *aff'g* 28 Hun, 568 ; 16 W. Dig., 232, on the trial of an indictment for forgery, that there was other testimony tending to connect the defendant with the commission of the crime, sufficient to meet the requirements of this section.

**Conspiracy.**—Where the existence of a conspiracy rests upon the unsupported testimony of the accomplice, this section forbids the admission of

dence of such acts in furtherance thereof as depend solely upon its existence and their admissibility, unless the testimony of the accomplice is corroborated by other evidence. *People v. White*, 41 St. Rep., 837 ; 62 Hun, 120 ; 16 N. Y. Supp., 571.

**Question of law.**—Whether the corroborating evidence meets the requirements of this section, is a question of law to be disposed of by the court, independently of any other evidence, which simply conflicts with its truth. *People v. Courtney*, 28 Hun, 594 ; 1 N. Y. Cr., 71.

**Question of fact.**—Where the supporting evidence tends to connect the defendant with the commission of the crime, the question whether it is sufficient corroboration of the accomplice is for the determination of the jury. *People v. Everhardt*, 5 St. Rep., 793 ; 2 Silv. (Ct. App.), 506 ; 104 N. Y., 594 ; 6 N. Y. Cr., 231.

The court, before it submits the case to the jury, should be satisfied that there is some corroborative evidence fairly tending to connect the defendant with the commission of the crime. *People v. Elliott*, 8 St. Rep., 223 ; 7 N. Y., 129.

In case there is such evidence, then it is for the jury to determine whether the corroboration is sufficient to satisfy them of the defendant's guilt. *Id.*

Whether or not the testimony of the accomplice is corroborated, or is to be rejected, with or without corroboration, is a question of fact for the jury to determine. *People v. Kerr*, 6 N. Y. Cr., 406.

See *People v. Friedlander*, 43 St. Rep., 448 ; 63 Hun, 259 ; 18 N. Y. Supp., 8 ; *People v. Emerson*, 20 St. Rep., 18 ; 5 N. Y. Supp., 375 ; *People v. Drown*, St. Rep., 986 ; 14 N. Y. Supp., 742 ; *People v. Ricker*, 22 St. Rep., 652 ; Hun, 643 ; 4 N. Y. Supp., 72 ; *Crary v. Crary*, 46 St. Rep., 308 ; *People v. Sanborn*, 14 id., 123 ; *People v. Bliven*, id., 495.

§ 400. If testimony show higher offense than that charged, court may discharge jury, and hold defendant to answer a new indictment.—If it appear by the testimony, that the facts proved constitute a crime of a higher nature than that charged in the indictment, the court may direct the jury to be discharged, and the proceedings on the indictment to be suspended, and may order the defendant to be committed, or continued on or admitted to bail, to answer any new indictment which may be found against him for the higher offense.

See *People v. Dartmore*, 15 St. Rep., 839 ; 48 Hun, 323 ; 2 N. Y. Supp., 311.

§ 401. If new indictment not found, to be tried on the original indictment.—If an indictment for the higher crime be dismissed by the grand jury, or be not found at or before the next term, the court must again proceed to try the defendant on the original indictment.

§ 402. Court may discharge jury, where it has not jurisdiction of the offense, or the facts do not constitute an offense.—The court may also direct the jury to be discharged, where it appears that the court has not jurisdiction of the crime, or that the facts, as charged in the indictment, do not constitute a crime.

§ 403. Proceedings, if jury discharged for want of jurisdiction of the offense, when committed out of the state.—If the jury be discharged, because the court has not jurisdiction of the crime charged in the indictment, and it appear that it was committed out of the jurisdiction of this state, the court may order the defendant to be discharged, or to be detained for a reasonable time specified in the order, until a communication can be sent by the



district attorney to the chief executive officer of the state, territory or district where the crime was committed.

Consent will not give the court jurisdiction nor authorize a substantial change in its fundamental mode of proceeding. This cannot be enlarged or restricted. *People v. Guidici*, 100 N. Y., 503 ; 3 N. Y. Cr., 559.

**§ 404. Proceedings in such case, when offense committed in the state.**—If the crime were committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the crime be a misdemeanor only, it may admit him to bail, in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, appear in such court to await a warrant from the proper county for his arrest.

**§ 405. Proceedings in such case, when offense committed in the state.**—In the case provided for in the last section, the clerk must forthwith give notice to the district attorney of the proper county, that the defendant has been so committed or held to bail.

**§ 406. Proceedings in such case, when offense committed in the state.**—If the defendant be not arrested, as provided in section 404, on a warrant from the proper county, he must be discharged from custody, or his bail in the action be exonerated, or money deposited instead of bail refunded, as the case may be; and the sureties in the undertaking mentioned in that section must be discharged.

**§ 407. Proceedings in such case, when offense committed in the state.**—If the defendant be arrested, the same proceedings must be had thereupon, as upon the arrest of a defendant in another county, on a warrant of arrest issued by a magistrate.

**§ 408. Proceedings, if jury discharged because the facts do not constitute an offense.**—If the jury be discharged, because the facts as charged do not constitute a crime, the court must order the defendant, if in custody, to be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he have deposited money instead of bail, that the money deposited be refunded to him, unless in its opinion a new indictment can be framed, upon which the defendant can be legally convicted; in which case, it may direct that the case be re-submitted to the same or another grand jury.

**§ 409. Proceedings, if jury discharged because the facts do not constitute an offense.**—If the court direct that the case be submitted anew, the same proceedings must be had thereon as are prescribed in sections 318 and 319.

**§ 410. When evidence on either side is closed, court may advise acquittal. Effect of the advice.**—If, at any time after the evidence on either side is closed, the court deem it insufficient

to warrant a conviction, it may advise the jury to acquit the defendant and they must follow the advice.

Amended by chap. 360 of 1882.

This amendment struck out of the original section the latter portion, and substituted the words "and they must follow the advice."

**Direction of acquittal.**—This section permits the court, when it deems the evidence insufficient to warrant a conviction, to so advise the jury, who are required to decide accordingly. *People v. Trimble*, 42 St. Rep., 717; 181 N. Y., 120.

If the prosecution fails in some element of proof necessary to constitute the crime, it is a clear case for the interposition of the court. *Sullivan v. People*, 27 Hun, 87; *People v. Bennett*, 49 N. Y., 137.

Where the evidence entirely fails to show an essential fact in the crime, it is the duty of the court to direct an acquittal. *People v. Livingston*, 27 Hun, 107.

See *People v. Fanshawe*, 47 St. Rep., 832; 8 N. Y. Cr., 830; 65 Hun, 77; *People v. Brickner*, 8 N. Y. Cr., 223; 15 N. Y. Supp., 531.

**§ 411. View of premises, when ordered, and how conducted.**—When, in the opinion of the court, it is proper that the jury should view the place in which the crime is charged to have been committed, or in which any material fact occurred, it may order the jury to be conducted, in a body, under charge of proper officers, to the place, which must be shown to them by a judge of the court, or by a person appointed by the court for that purpose.

**Duty of court.**—This section provides for a view when, in the opinion of the court, it is proper. *People v. Johnson*, 13 St. Rep., 48; 46 Hun, 672; 7 N. Y. Cr., 404; 27 W. Dig., 519.

The court has an undoubted authority to permit the jury to view the scene of the crime under this section. *People v. Johnson*, 16 St. Rep., 846; 110 N. Y., 143.

A juror has no right to proceed to view the premises without the permission of the court. *People ex rel. Munsell v. Court, etc.*, 36 Hun, 279; 3 N. Y. Cr., 215; *aff'd*, 101 N. Y., 245.

The court, in its discretion, may, but is not bound to, allow the jury to view the premises. *People v. Buddensieck*, 3 St. Rep., 664; 103 N. Y., 501.

**Show premises.**—This section seems to intend that a judge of the court, or a person appointed for that purpose, should show the place. *People v. Palmer*, 6 St. Rep., 341; 43 Hun, 403; 5 N. Y. Cr., 106.

The judge must convey to the jury, probably by words, his conviction that the place shown to the jury is that where the crime is charged to have been committed. *Id.*

Section 412 probably is not to be so construed as to prevent this communication with the jury. *Id.*

**Error.**—The refusal by the court to permit the defendant or his counsel to accompany the jury on their being conducted to the place where the crime is charged to have been committed, is error sufficient to cause the reversal of the judgment against him. *Id.*

**Remedy.**—Where a juror clandestinely, during the trial, visits the place where the offense was committed, and holds some conversation with the defendant, it amounts to such misconduct as will require the granting of a new trial. *People v. Tyrrell*, 3 N. Y. Cr., 148.

The defendant does not waive his rights by failure to disclose the misconduct of the juror. *Id.*

**Punishment.**—This section prescribes no punishment whatever for violating its implied prohibition. *People ex rel. Munsell v. Court, etc.*, 36 Hun, 279; 3 N. Y. Cr., 215.

A violation, by a juror, of the restraints provided for in this section is not declared to constitute a contempt of the court in which he is, at the time, serving. *Id.*

A juror who, during the progress of the trial of an indictment, goes to the scene of the alleged offense for the purpose of acquainting himself with the locality, is not guilty of a contempt, where no order of the court is disobeyed by such act. *People ex rel. Munsell v. Court, etc.*, 101 N. Y., 345; *aff'g* 36 Hun, 277.

**§ 412. Duty of officer as to jury.**—The officers, mentioned in the last section, must be sworn to suffer no person to speak to or communicate with the jury, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

**Oath.**—The omission to administer the oath to the officers, as prescribed by this section, is waived by the consent of the defendant's counsel that such view should be taken, and his failure to object or call the attention of the court to the want of such oath. *People v. Johnson*, 16 St. Rep., 846; 110 N. Y., 144. Such omission is a mere irregularity. *Id.*

The failure to take the oath, under this section, does not require or justify a new trial, unless there is some opportunity to conclude that the defendant was prejudiced. *People v. Johnson*, 13 St. Rep., 48; 46 Hun, 673; 7 N. Y. Cr., 404; 27 W. Dig., 519; *People v. Draper*, 1 N. Y. Cr., 138.

The oath, required by section 414, *post*, embraces in terms substantially the requirements of this section. *People v. Johnson*, 13 St. Rep., 48; 46 Hun, 672; 7 N. Y. Cr., 404; 27 W. Dig., 519.

But whether the prior administration of such oath in reference to another purpose, which had been accomplished, is a sufficient compliance with this section, was not decided. *Id.*

See *People v. Palmer*, 6 St. Rep., 841; 43 Hun, 403; 5 N. Y. Cr., 106, 111.

**§ 413. Knowledge of juror to be declared in court, and juror to be sworn as witness.**—If a juror have any personal knowledge, respecting a fact in controversy in a cause, he must declare it in open court, during the trial. If, during the retirement of the jury, a juror declare a fact, which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness, and examined in the presence of the parties.

**§ 414. Jurors may be permitted to separate during the trial. If kept together, oath of the officers.**—The jurors sworn to try an indictment may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or be kept in charge of proper officers. Such officers must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to or communicate with them, nor to do so themselves, on any subject connected with the trial, and to return them into court at the next meeting thereof.

See *People v. Johnson*, 13 St. Rep., 48; 46 Hun, 672; 7 N. Y. Cr., 404.

**§ 415. Jurors not to converse together on the subject of the trial, nor form an opinion until the cause is submitted.**—The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court, that it is their duty not to converse among themselves on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them.

**Application.**—This section, *it seems*, refers to an adjournment from day to day, or for a longer time, and not to a recess taken during a single day's session. *People v. Draper*, 28 Hun, 3 ; 1 N. Y. Cr., 141 ; 15 W. Dig., 384.

**New trial.**—An omission to admonish the jury, as directed in this section, is not one of the cases specified in section 465, *post*, in which a new trial may be granted. *Id.*

Especially, where a mere inadvertent omission to give the direction is not shown to have worked injury to the defendant. *Id.*

**Contempt.**—This section does not declare that jurors, who may contravene its provisions, shall be liable to be punished in proceedings by way of criminal contempt. *People ex rel. Munsell v. Court, etc.*, 36 Hun, 279 ; 3 N. Y. Cr., 211.

**Presumption.**—A failure, on the part of the trial judge, to admonish the jury at each adjournment, as required by this section, will not be presumed. *People v. Reavey*, 38 Hun, 424 ; 4 N. Y. Cr., 17.

**Appeal.**—A claim that the trial court omitted to admonish the jurors, as required by this section, cannot be considered on appeal, where there is no part of the record showing distinctly that this was not done, and no question appears to have been raised, or exception taken in regard to the matter. *People v. Rugg*, 98 N. Y., 537 ; 3 N. Y. Cr., 183.

§ 416. **Proceedings, where juror becomes unable to perform his duty before conclusion of trial.**—If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged, and another jury to be then or afterward impaneled.

See *People v. Nowak*, 24 St. Rep., 274 ; 1 Silv. (Sup. Ct.), 412.

§ 417. **Court to decide questions of law arising during trial.**—The court must decide all questions of law which arise in the course of the trial.

On the trial of an indictment for murder, it is the duty of the court to decide all questions of law which arise on the trial, and instruct the jury within what crimes the evidence and inferences which the jury were authorized to draw, might bring the case. *People v. Rego*, 36 Hun, 181 ; 3 N. Y. Cr., 277.

A judgment will not be reversed merely because the judge submits to the jury a question which he ought to determine himself, where it is clear that he ought to decide it in the same way the jury find. *People v. O'Neil*, 17 St. Rep., 956 ; 49 Hun, 422.

§ 418. **On indictment for libel, jury to determine law and fact.**—On the trial of an indictment for libel, the jury have the right to determine the law and the fact.

See section 8, art. 1, of State Constitution.

§ 419. **In all other cases, court to decide questions of law, subject to right of defendant to except.**—On the trial of an indictment for any other crime than libel, questions of law are to be decided by the court, saving the right of the defendant to except ; questions of fact by the jury. And although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

**Law.**—Upon the trial of a criminal case, the court has the right to reserve its decision upon questions of law until the entire testimony is in. *People v. McCallam*, 4 St. Rep., 291 ; 103 N. Y., 587.

The court, in the trial of criminal cases, must, with the exception specified in this section, adjudicate upon all questions of law, and the jury, upon all questions of fact. *People v. Upton*, 38 Hun, 109 ; 4 N. Y. Cr., 468.

**Facts.**—It is provided by this section that, on the trial of an indictment, all questions of fact are to be decided by the jury. *Id.*

The question of intention is one for the jury under proper instructions as to the law. *People v. Dishler*, 38 Hun, 179; 4 N. Y. Cr., 193.

The jury are, by the law, the sole judges of the facts. *Id.*

The intention, deliberation and premeditation are operations of the mind and necessary elements of the crime of murder in the first degree, and their existence must be determined from the facts and circumstances of the case, and can only be determined by the jury. *People v. Kelly*, 35 Hun, 302; 3 N. Y. Cr., 35.

§ 420. **Charge to jury.**—In charging the jury, the court must state to them, all matters of law which it thinks necessary for their information in giving their verdict; and must, if requested, in addition to what it may deem its duty to say, inform the jury that they are the exclusive judges of all questions of fact.

See notes under preceding section.

**Exclusive judges of facts.**—The court must, if requested by the defendant, specially inform the jury that they are the exclusive judges of all questions of fact. *People v. Upton*, 38 Hun, 109; 4 N. Y. Cr., 468.

**Material issue presented.**—The defendant, in cases of great gravity, is entitled, upon his request, to have every material issue, which may arise out of the evidence, presented to the jury, and affirmatively considered by them. *People v. Rego*, 36 Hun, 132.

**Comments.**—Comments by the trial judge on the testimony, so long as the judge leaves all the questions of fact to the jury and instructs them that they are the sole judges of matters of fact, are not the subject of legal exception. *People v. Carpenter*, 38 Hun, 490; 4 N. Y. Cr., 39.

A statement by the trial judge in his charge, in speaking of the assault which no one denied had been committed by somebody, "that such a crime as this could be perpetrated in any civilized community, much less in a great city like this, is a matter," etc., is not in excess of legitimate comment by the court upon undisputed facts of the case, provided he expresses no opinion upon the guilt of the defendant but leaves all the facts to the jury under proper instructions. *People v. McInnery*, 4 St. Rep., 598; 5 N. Y. Cr., 47.

The comments of the trial judge, in his charge, upon the testimony are not ordinarily the subject of legal exception, so long as the questions of fact are left with the jury with instruction that they are the sole judges thereof. *People v. O'Neil*, 17 St. Rep., 959; 6 N. Y. Cr., 283; 4 N. Y. Supp., 123; *Sindram v. People*, 88 N. Y., 196; *People v. O'Neil*, 20 St. Rep., 754; 112 N. Y., 363; 6 N. Y. Cr., 291.

A charge, which brings to the attention of the jury evidence relevant to a material fact in the case, and stating that, if such evidence is true it tends to prove such fact, etc., and in no way controlling or directing the jury as to the force and effect of such evidence, is not error. *People v. Wiggins*, 1 N. Y. Cr., 290.

**Repeat in different words.**—After the case has been properly submitted to the jury, the court cannot be called upon to repeat in different words, or to pass upon abstract or theoretical questions. *People v. McCallam*, 4 St. Rep., 291; 103 N. Y., 587; 3 N. Y. Cr., 189.

The court is not bound, after having clearly and fully submitted the case, to repeat the directions given. *People v. Elmore*, 3 N. Y. Cr., 271.

When the judge charges in the language of the statute on a point, it is not error to refuse to adopt in his charge the phraseology of counsel on the same point. *Walker v. People*, 1 N. Y. Cr., 22.

**Abstract principle.**—Where a judge has given to the jury the true rule applicable to a case when it comes to be considered on all the evidence, it is no error to refuse to submit to the jury a proposition which, even though correct in itself, is only calculated to confuse them. *Walker v. People*, 1 N. Y. Cr., 7.

**Punishment.**—The jury is entitled to know the punishment prescribed for the crime. *People v. Cassiano*, 30 Hun, 389; 1 N. Y. Cr., 505.



It is proper to instruct the jury that, when a crime is proven, the extent of the punishment therefor is no sufficient reason why a verdict according to the facts found should not be rendered. *Id.* See *People v. Ryan*, 27 St. Rep., 916 ; 55 Hun, 217.

**Whole charge considered.**—Even though a single phrase of a charge in a criminal action, isolated from the rest, is found to be erroneous, the judgment should not, on that account, be reversed, if the whole charge properly instructed the jury, and it can be seen, with reasonable certainty, that the erroneous portion did not mislead the jury or influence the verdict. *People v. Dimick*, 11 St. Rep., 739 ; 107 N. Y., 13.  
See *People v. Davis*, 46 St. Rep., 214 ; 19 N. Y. Supp., 782.

§ 421. **Jury may decide in court, or retire in the custody of officers. Oath of the officers.**—After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn, to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, when ordered by the court.

See notes under section 415, *ante*.

It was not until the enactment of this section, that the officers or constables were absolutely forbidden by statute from speaking to the jury or being present during their deliberations. *People v. Flack*, 8 N. Y. Cr., 35 ; 9 N. Y. Supp., 280.

**Oath.**—Where the oath actually administered is not given, nor is there anything before the appellate court to show that the regulation of law in regard to it was not observed, there is nothing in the record to sustain the proposition that the officers, charged to keep the jury while deliberating upon their verdict, were not properly sworn. *People v. Beckwith*, 12 St. Rep., 795 ; 108 N. Y., 67 ; 7 N. Y. Cr., 160.

The conduct of an officer in taking the jury to dinner without leave of the court and permitting two of the jurors to separate from their fellows, is a violation of his oath as prescribed by this section. *People v. Schad*, 35 St. Rep., 148 ; 58 Hun, 572.

**Keeping jury.**—This section expressly requires the jury, in criminal cases, while deliberating, to be kept together in some private and convenient place. *Matter of Choate*, 30 St. Rep., 729 ; 24 Abb. N. C., 432 ; 56 Hun, 51 ; 8 N. Y. Cr., 5.

Any attempt to invade such seclusion is illegal, and a palpable violation of judicial authority. *Id.*

**Communication from judge.**—After a jury retires for deliberation, it is an error for the trial judge to send a communication to them. *Plunkett v. Appleton*, 51 How., 469. Such communication, however, may be sent by consent of counsel. *Id.* But the better practice is to have all such communications made, and instructions given, in open court. *Id.*

**From sheriff.**—The verdict is not vitiated by the fact that a juror asked a question of, and was answered by the sheriff, where the defendant was in no way prejudiced thereby. *People v. Riley*, 3 N. Y. Cr., 374.

**Prejudice.**—Prejudice, as matter of fact, must be shown. *People v. Mack*, 8 N. Y. Cr., 38 ; 9 N. Y. Supp., 280.

In *People v. Druse*, 5 N. Y. Cr., 23, one of the jurors separated from his fellows, in company with an officer, and it was held that, as it was clear that the defendant was not prejudiced thereby, this circumstance furnished no ground for disturbing the verdict.

In *People v. Draper*, 28 Hun, 1 ; 1 N. Y. Cr., 138, the officers, sworn to attend the jury, were in the same room with them during their deliberation, and it was held that the act, though irregular, would not vitiate the verdict, unless it appeared that it prejudiced the defendant. To the same effect is *People v. Menken*, 3 N. Y. Cr., 233.

**New trial.**—In *People v. Carnal*, 1 Park., 256, the constable communicated with the jury, and one of the jurors swore that he never should have convicted the prisoner, but for what the constable communicated to them; nevertheless, a new trial was denied.

Proof by affidavit that the jury, on trial of a criminal action, after retiring to their room, sent a written communication to the presiding judge, and that he answered the same in writing, in the absence of proof as to the nature of the communication, is not sufficient to sustain a motion for a new trial. *People v. Kelly*, 94 N. Y., 526.

§ 422. **When defendant on bail appears for trial, he may be committed.**—When a defendant, who has given bail appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court; and he must be committed and held in custody accordingly.

## CHAPTER II.

### CONDUCT OF THE JURY, AFTER THE CAUSE IS SUBMITTED TO THEM.

**SECTION 423.** Room and accommodations for the jury after retirement, how provided.

424. Accommodations for the jury, when kept together during the trial, or after retirement.

425, 426. What papers the jury may take with them.

427. May return into court, for information.

428. When jury to be discharged before agreement.

429. Reason for discharge.

430. When jury discharged or prevented from giving a verdict, cause to be again tried.

431. Court may adjourn during absence of jury, as to other business, but deemed open till verdict rendered or jury discharged.

432. Final adjournment of court discharges jury.

§ 423. **Room and accommodations for the jury after retirement, how provided.**—A room must be provided by the supervisors of the county (or if the trial be in a city court, by the corporate authorities of the city), for the use of the jury, upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery. If the supervisors or corporate authorities neglect this duty, the court may order the sheriff to perform it; and the expenses incurred by him in carrying the order into effect, when certified by the court, are a county charge.

See *People v. Draper*, 28 Hun, 1; 1 N. Y. Cr., 138; notes under section 321, *ante*.

§ 424. **Accommodations for the jury, when kept together during the trial, or after retirement.**—While the jury are kept together either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, upon the order of the court, at the expense of the county (or if the trial be in a city court, at the expense of the city), with suitable and sufficient food and lodging.



**§ 425. What papers the jury may take with them.**—The court may permit the jury, upon retiring for deliberation, to take with them any paper or article which has been received as evidence in the cause, but only upon the consent of the defendant and the counsel for the people.

**Before Code.**—Before the Code, irregularity in the conduct of a jury, when it was shown that no injury resulted to the defendant, was not ground for a new trial. *People v. Draper*, 28 Hun, 5 ; 1 N. Y. Cr., 144.

**Effect of.**—In *People v. Seeley*, 3 N. Y., Cr., 226, the jury, while engaged in their declarations, obtained possession of a book containing statements of law as to the crime set forth in the indictment. The motion for a new trial on this ground was denied. The court, in reaching such conclusion followed the case of *People v. Draper*, 28 Hun, 1 ; 1 N. Y. Cr., 138.

The jury, during their deliberations, consulted certain books on the subject matter of the crime charged, which had been inadvertently left on the table, without any design that they should come to the hands of the jury. It was held that, in the absence of proof that they influenced the jury to the prejudice of the defendant, such act, though irregular, did not invalidate the verdict. *People v. Draper*, *ante*.

In *People v. Hartung*, 17 How., 85 ; S. C. on appeal, 4 Park., 319, the jury improperly, during their deliberations, obtained a copy of the Revised Statutes and consulted the same, and it was held to be a mere irregularity which, not having resulted in any actual prejudice to the prisoner, did not vitiate the verdict.

In *Mitchell v. Carter*, 14 Hun, 448, the jury possessed themselves of the minutes kept by the trial judge, which contained partial and imperfect notes of the testimony. In reading them, the jurors could scarcely avoid obtaining false impressions of the facts of the case.

**§ 426. What papers the jury may take with them.**—The jury may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

See notes under section 421, *ante*.

The jury cannot use notes of the trial judge. *Mitchell v. Carter*, 14 Hun, 448.

When a verdict should not be set aside because the jury have had an unauthorized paper before them. *Dolan v. Aetna Ins. Co.*, 22 Hun, 896.

**§ 427. May return into court for information.**—After the jury have retired for deliberation, if there be a disagreement between them, as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given after notice to the district attorney and to the counsel for the defendant, and in cases of felony, in the presence of the defendant.

See notes under section 421, *ante*.

**Under Revised Statutes.**—Under the Revised Statutes, which entitled the defendant to be personally present in such case, where correct instructions were given in his absence, though in the presence of his counsel, the court of appeals reversed the judgment. *People v. Maurer*, 43 N. Y., 1.

**Instructions, how given.**—The instruction of the judge to the jury should be openly and publicly imparted. *Mahoney v. Decker*, 18 Hun, 365.

After the jury have retired for deliberation, it is a violation of this section for the magistrate, at their request, to enter their room alone, and give them instructions as to the form of their verdict. *People v. Moore*, 20 St. Rep., 4 ; 50 Hun, 359 ; 3 N. Y. Supp., 161.

When communication between judge and jury, in the absence of counsel,

is not ground for a new trial. *Mahoney v. Decker*, 18 Hun, 365. What is a waiver of such irregularity. *Id.*

**Notice.**—The defendant's counsel must be notified before instructions are given to a jury which has once retired. *People v. Cassiano*, 30 Hun, 389; 1 N. Y. Cr., 507.

The words of this section are imperative. *Id.*

An express notice that the court would attend during the evening to answer the jury, is a sufficient notice to the counsel for the defendant, to justify instructions to the jury, in a criminal case, in the absence of such counsel. *People v. Kennedy*, 33 St. Rep., 109; 57 Hun, 534; 11 N. Y. Supp., 245.

It is an absolute right of the prisoner to have his counsel notified after the jury return into court and before they are instructed. *People v. Cassiano*, 30 Hun, 388; 1 N. Y. Cr., 507. It is, therefore, a fatal error not to notify the defendant's counsel when the jury ask for further instructions. *Id.*

This section must have a reasonable construction, and it would be unreasonable to confer upon counsel power to deprive the court of the right to instruct the jury, and to deprive the jury and the defendant of the benefit of such instructions by his deliberate absence after sufficient notice. *People v. Kennedy*, 33 St. Rep., 109; 57 Hun, 534; 11 N. Y. Supp., 245.

See *Cornish v. Graff*, 36 Hun, 164.

§ 428. **When jury to be discharged before agreement.**—After the jury have retired to consider of their verdict, they can be discharged before they shall have agreed thereon only in the following cases :

1. Upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together; or

2. When after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or

3. When, with the leave of the court, the public prosecutor and the counsel for the defendant consent to such discharge.

**Coercion.**—A conviction should be reversed, where the tendency of the treatment of a juror by the judge was to dominate his free-will, and terrify him into a verdict for the people. *People ex rel. Flaherty v. Neilson*, 23 Hun, 1.

Where the court, upon the failure of a jury to agree, addresses to them remarks claimed to be improper, a general exception presents no question for review, unless it appears that no portion of such remarks is proper. *Berry v. People*, 1 N. Y. Cr., 43. See same case on appeal, 1 N. Y. Cr., 57.

As to effect of coercion of jury by court, see *Cranston v. N. Y. C. & H. R. R. Co.*, 4 St. Rep., 300; 10 N. Y., 614; *Erwin v. Hamilton*, 50 How., 32; *Huntoon v. Russell*, *id.*, 154; *Green v. Telfair*, 11 *id.*, 260; *Slater v. Mead*, 53 *id.*, 57.

§ 429. **Reason for discharge.**—Whenever the jury is discharged without a verdict, the reason for the discharge must be entered on the minutes.

§ 430. **When jury discharged or prevented from giving a verdict cause to be re-tried.**—In all cases where a jury are discharged, or prevented from giving a verdict, by reason of an accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term.

The court may discharge a jury in a case of necessity, in a criminal case, without furnishing a bar to a new trial. *People v. Reagle*, 60 Barb., 527. In this case, the jury, after the cause was tried and submitted to them, separated without authority, and without having agreed upon any verdict. It was held that this constituted no bar to another trial upon the same indictment.

See *People v. Goodwin*, 18 John., 187; *People v. McKay*, id., 212; *People v. Cancemi*, 18 N. Y., 128; *People v. Shepherd*, 25 id., 406.

§ 431. Court may adjourn during absence of jury, as to the other business, but deemed open till verdict rendered or jury discharged.—While the jury are absent, the court may adjourn from time to time, as to other business; but it is nevertheless deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged.

See section 34 of Code of Civil Procedure.

**Adjournment.**—A justice of the Supreme Court cannot adjourn a court, appointed to be held on a certain day, by sending a letter ordering such adjournment and not attending such court himself. *People v. Clews*, 4 Abb. N. C., 256.

Where the court is held at a place provided for by statute, a judge has no authority to adjourn such court to be held at any other place within the district. *Northrup v. People*, 37 N. Y., 203.

Where the term of the court has been regularly opened, an adjournment is simply a suspension of proceedings, and a non-attendance on the adjourned day does not deprive the court of jurisdiction to proceed, as soon as it is possible for it to attend. *People v. Sullivan*, 24 St. Rep., 579; 115 N. Y., 185; rev'g 17 St. Rep., 669; 49 Hun, 333.

**No organization.**—The failure of the judge to appear upon the day appointed for the commencement of a term will prevent the organization of a legal court. *People v. Bradwell*, 2 Cow., 445. See *People v. Sullivan*, 24 St. Rep., 579; 115 N. Y., 190.

**Postponement of trial.**—The granting or refusal of a motion to postpone the trial of a criminal action is, *it seems*, in the discretion of the court, and its decision thereon, where there is no abuse of discretion, is not reviewable upon appeal. *People v. Jackson*, 19 St. Rep., 506; 111 N. Y., 362.

§ 432. Final adjournment of court discharges jury.—A final adjournment of the court discharges the jury, but any term of a court may be continued for the purpose of finishing a trial or receiving a verdict.

See notes under section 472, *post*.

## CHAPTER III.

### THE VERDICT.

**SECTION 433.** When the jury have agreed, to be brought into court and their names called. If all do not appear, jury to be discharged and cause again tried.

434. In felony, defendant must be present. In misdemeanor, verdict may be rendered in his absence.

435. Manner of taking the verdict.

436. Verdict may be general or special.

437. General verdict.

438. Special verdict.

439, 440. Special verdict, how rendered.

441. Special verdict, how brought to argument.

442. Judgment thereon.

**SECTION 443. When special verdict defective, new trial to be ordered.**

444. Upon indictment for crime, consisting of different degrees, jury may convict of any degree, or of any attempt to commit the crime.
445. In other cases, jury may convict of any offense necessarily included in that charge.
446. On indictment against several, jury may render a verdict as to some, and the cause be again tried as to the others.
- 447, 448. In what cases court may direct a reconsideration of the verdict.
449. When judgment may be given upon an informal verdict.
450. Polling the jury.
451. Recording the verdict.
452. Defendant, when to be discharged or detained after acquittal.
453. Proceedings upon general verdict of conviction, or a special verdict.
454. When defendant acquitted on the ground of insanity, the fact to be stated with the verdict. Commitment of defendant to state lunatic asylum.

§ 433. **When the jury have agreed to be brought into court and their names called. If all do not appear, jury to be discharged and cause again tried.**—When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that event, the cause may be again tried, at the same or another term.

§ 434. **In felony, defendant must be present. In misdemeanor, verdict may be rendered in his absence.**—If the indictment be for a felony, the defendant must, before the verdict is received, appear in person. If it be for a misdemeanor, the verdict may be rendered in his absence.

See sections 297 and 427, *ante*.

The reception of the verdict, upon the trial of an indictment for a felony, when the defendant's counsel is not present, is not an error requiring a reversal, in the absence of anything indicating that the defendant is prejudiced thereby. *People v. Wilson*, 15 St. Rep., 503; 109 N. Y., 358.

See *Safford v. People*, 1 Park., 474; *Son v. People*, 12 Wend., 344; *People v. Perkins*, 1 id., 91; *People v. Wilkes*, 5 How., 105.

§ 435. **Manner of taking the verdict.**—If the jury appear, they must be asked by the court or the clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, they must, on being required, declare the same.

§ 436. **Verdict may be general or special.**—The jury may either render a general verdict, or when they are in doubt as to the legal effect of the facts proved, they may, except upon an indictment for libel, find a special verdict.

See notes under sections 437 and 438, *ante*.

See section 10 of Penal Code.

The provisions of section 10 of the Penal Code must be construed with, and is qualified and restricted by, the provisions of this and the following section of the Code of Criminal Procedure. *People v. Rugg*, 98 N. Y., 537, 551; aff'g 21 W. Dig., 84.

Upon the trial of an indictment charging murder in the first degree, a general verdict of guilty is proper. *Id.*

The jury are to render a general verdict, except when they are in doubt

o the legal effect of the facts proved, in which case they may render a special verdict. *People v. Taylor*, 3 N. Y. Cr., 302.

§ 437. **General verdict.**—A general verdict upon a plea of not guilty is either “guilty” or “not guilty;” which imports a conviction or acquittal of the offense charged in the indictment. Upon a plea of a former conviction or acquittal of the same offense, it is either “for the people,” or “for the defendant.”

**General verdict.**—A verdict “for the people,” rendered on the sole issue of former conviction, is a general verdict. *People v. Trimble*, 38 St. Rep., 998; 60 Hun, 365; 15 N. Y. Supp., 60.

A general verdict of guilty is a finding of the truth of all the material averments in the indictment. *People v. Bork*, 1 N. Y. Cr., 393.

**What sentence proper.**—Where, under proper instructions, a general verdict of guilty under the whole indictment is rendered, a sentence for the highest offense charged is proper. *Hawker v. People*, 75 N. Y., 487.

**Verdict on one count.**—The finding specifically of a verdict of guilty on one count is equivalent to a verdict of not guilty of the crime charged on the other counts of the indictment. *People v. McCarthy*, 18 St. Rep., 7; 110 N. Y., 314; *People v. Dowling*, 84 id., 478; *Guenther v. People*, 24 id., 100.

**Good count.**—An indictment containing one good count will sustain a general verdict of guilty, though there may be other defective counts therein. *People v. Davis*, 56 N. Y., 95.

If one of several counts in an indictment is good, it is sufficient to sustain a conviction under a general verdict of guilty. *People v. Dimick*, 11 St. Rep., 739; 107 N. Y., 13, 30; *People v. Willett*, 1 St. Rep. 384; 102 id., 251; *People v. People*, 83 id., 418; *Phelps v. People*, 72 id., 335; *People v. Davis*, id., 95.

A general verdict of guilty under an indictment will be sustained if some of the counts are good, though others are defective. *People v. Willett*, id.

Upon a general verdict of guilty, or upon a plea of guilty of all the counts in an indictment, the court may give a general judgment, which will be held as valid, if applicable to any good count of the indictment. *Polcy v. People*, 11 Hun, 392.

**Continuance.**—A general verdict of guilty, upon a trial of an indictment, containing averments of continuance, for a nuisance in obstructing a public highway, is error if there is no evidence of continuance. *People v. Livingston*, 27 Hun, 105; 63 How., 242.

**Former conviction, etc.**—Upon the latter verdict, prescribed by this section, the only appropriate judgment is *respondeat ouster*. *People v. Trimble*, 42 St. Rep., 718; 131 N. Y., 122; aff'g 38 St. Rep., 998; 60 Hun, 3; 15 N. Y. Supp., 60.

See *People v. Rugg*, 98 N. Y., 537, 551; *People v. Burch*, 1 St. Rep., 751; 1 N. Y. Cr., 32; *People v. Taylor*, 3 id., 302.

§ 438. **Special verdict.**—A special verdict is that by which a jury find the facts only, leaving the judgment to the court. The jury must present the conclusions of fact, as established by the evidence, and not the evidence to prove them; and these conclusions of fact must be so presented, as that nothing remains to the court, but to draw from them conclusions of law.

**Special.**—A verdict, which is a finding of the facts and presents the conclusions of facts, as established by the evidence as construed by the jury, is special. *People v. Hale*, 1 N. Y. Cr., 535.

Upon the trial of a charge of assault and battery, a verdict that the defendant was “not guilty of a criminal assault or intent to injure,” is a special verdict. *Id.*

**Insufficient.**—A special verdict cannot be enlarged by intendment. *People v. People*, 25 Hun, 473.

Where, upon the trial of an indictment for feloniously receiving stolen

property, the special verdict does not find that the defendant received the goods feloniously, it is not sufficient to sustain a conviction. *Id.*

**Effect of.**—Where, on the trial of an indictment containing different counts, there is a specific verdict of guilty on one count and the verdict is silent as to the other counts, it is equivalent to an acquittal on the latter counts. *People v. Dowling*, 84 N. Y., 478.

See *People v. Taylor*, 3 N. Y. Cr., 302.

§ 439. **Special verdict, how rendered.**—The special verdict must be reduced to writing, by the jury or in their presence, entered upon the minutes of the court, read to the jury, and agreed to by them, before they are discharged.

See *People v. Taylor*, 3 N. Y. Cr., 302.

§ 440. **Special verdict, how rendered.**—The special verdict need not be in any particular form, but is sufficient, if it present intelligibly the facts found by the jury.

See *People v. Hale*, 1 N. Y. Cr., 535.

§ 441. **Special verdict, how brought to argument.**—The special verdict may be brought to argument by either party, upon five days' notice to the other, at the same or another term of the court; and upon the hearing thereof, the counsel for the defendant may conclude the argument.

§ 442. **Judgment thereon.**—The court must give judgment upon the special verdict as follows:

1. If the plea be not guilty, and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted, under that indictment, as provided in sections 444 and 445, judgment must be given accordingly; but if otherwise, judgment of acquittal must be given;

2. If the plea be a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal, according as the facts prove or fail to prove the former conviction or acquittal.

**Application.**—This section applies only to a judgment in case of a special verdict. *People v. Connor*, 48 St. Rep., 30; 65 Hun, 392; 8 N. Y. Cr., 447.

Subd. 2 of this section relates wholly to the case of a special verdict in which the jury merely find the facts, and does not refer to the case of a general verdict. *People v. Trimble*, 42 St. Rep., 718; 131 N. Y., 122.

**Effect of verdict.**—Where the defendant interposed the pleas of not guilty and of former acquittal to the indictment, a verdict of "guilty as charged in the indictment," does not show that the latter plea was passed upon by the jury. *People v. Burch*, 1 St. Rep., 751; 5 N. Y. Cr., 82.

§ 443. **When special verdict defective, new trial to be ordered.**—If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence, as established to their satisfaction, the court must order a new trial.

§ 444. **Upon indictment for crime consisting of different degrees, jury may convict of any degree, or of any attempt to commit the offense.**—Upon an indictment for a crime consisting of



different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime. Upon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence. A conviction upon a charge of assault is not a bar to subsequent prosecution for manslaughter or murder, if the person assaulted dies after the conviction, in case death results from the injury caused by the assault.

Added by ch. 625 of 1900.

See section 890, *ante*; section 35 of Penal Code.

**Before Code.**—At the time of the adoption of this Code, the rule of the common law, in this state, was that the prosecution was never allowed to fail, because all the alleged facts and circumstances were not proved, if such were proved made out a crime, though of an inferior degree. *People v. McDonald*, 17 St. Rep., 494; 49 Hun, 69; 1 N. Y. Supp., 704.

This section continues and preserves the provisions of the Revised Statutes. (R. S. [3d. Ed.], 789, section 80.) *Id.*

**Inferior degree.**—The charge of the crime in the first, permits conviction in the second, degree. *People v. Sullivan*, 4 N. Y. Cr., 197.

The jury may find the defendant guilty of one of the inferior degrees of the crime charged in the indictment. *People v. Taylor*, 8 N. Y. Cr., 802.

The accused may be convicted of an inferior grade of the same offense charged, growing out of the same transaction counted on, accordingly as the case may be disclosed by the proof. *People v. Palmer*, 6 St. Rep., 341; 49 Hun, 404.

The elements, which constitute the less degree must themselves be proved. *People v. Downs*, 29 St. Rep., 117; 56 Hun, 11.

**Homicide.**—Where the defendant is charged in the indictment with murder in the first degree and pleads to such charge, it is the duty of the jury first to determine whether he is guilty of that charge. *People v. Wilson*, 109 N. Y., 357; 15 St. Rep., 503.

It is only after they have found him not guilty upon this charge, that they are authorized, under this section, to find him guilty of any inferior degree of homicide. *Id.*

An indictment for murder in the first degree, in the common-law form, permits a conviction of manslaughter in the first degree upon a plea of guilty to the latter offense. *People v. McDonnell*, 92 N. Y., 657; 1 N. Y. Cr., 366. It is not necessary to aver in the indictment the facts and circumstances which, if proven, would constitute the less crime. *Id.* These are matters of evidence for the benefit of the accused. *Id.*

**Larceny.**—This section allows a conviction for grand larceny in the second degree, under an indictment for grand larceny in the first degree. *People v. McCallam*, 3 N. Y. Cr., 199.

A prisoner, indicted for grand larceny, may be convicted of petit larceny. *People v. McTameney*, 30 Hun, 505; 1 N. Y. Cr., 437; 17 W. Dig., 492; 13 Abb. N. C., 55; 66 How., 70.

**Allegation and proof.**—The accused cannot be convicted of any other character of offense than that charged against him in the indictment. *People v. Palmer*, 6 St. Rep., 341; 43 Hun, 404; *Dedim v. People*, 22 N. Y., 178; *Leefe v. People*, 40 *id.*, 348.

Where the proof establishes conclusively all the elements of burglary in the first degree, the defendant is not entitled to a charge that the jury may convict of a misdemeanor under section 505 of the Penal Code. *People v. Leegan*, 5 St. Rep., 743; 104 N. Y., 531; 5 N. Y. Cr., 523.

**Acquittal on certain counts.**—The omission of the jury to render a verdict upon certain counts of an indictment is equivalent to an acquittal on those counts. *People v. McDonald*, 17 St. Rep., 494; 49 Hun, 69; 1 N. Y. Supp., 704.

**Guilty on all the counts.**—Effect of jury finding prisoner guilty on all the counts of an indictment. *People v. Emerson*, 20 St. Rep., 19; 6 N. Y. Cr., 158; 5 N. Y. Supp., 374.

See *People v. Cooper*, 3 N. Y. Cr., 119.

§ 445. In other cases, jury may convict of any offense necessarily included in that charge.—In all other cases the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment.



See notes under preceding section.

**Common-law.**—This section is new and is the codification of that portion of the common law upon this subject, which was not embraced in section 80 of 2 R. S., 789. *People v. McDonald*, 17 St. Rep., 494; 49 Hun, 69; 1 N. Y. Supp., 704. It, in no sense, narrows the common-law rule, and its language is very broad and comprehensive. *Id.*

**Allegation and proof.**—Under this rule, an accused party cannot be surprised upon the trial, for the people cannot prove any fact not alleged, nor can he be convicted of any crime which the facts proved do not establish. *Id.*

**Homicide.**—Under this section, the defendant, under an indictment for murder, may be convicted of manslaughter, though such indictment is not found within the time prescribed for the latter crime. *People v. Dowling*, 1 N. Y. Cr., 532.

Under an indictment for murder, a person cannot be convicted of the crime of train wrecking under chap. 160 of 1838. *Id.*

**Larceny.**—A verdict of grand larceny in the first degree is properly rendered under an indictment charging robbery in the second degree. *People v. Kennedy*, 33 St. Rep., 110; 57 Hun, 534; 11 N. Y. Supp., 245, 246.

§ 446. On indictment against several, jury may render a verdict as to some, and the cause be again tried as to the others.—On an indictment against one or more, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly; and the case, as to the rest, may be tried by another jury.

§ 447. In what cases court may direct a reconsideration of the verdict.—When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider their verdict; and if, after the reconsideration, they return the same verdict, it must be entered. But when there is a verdict of acquittal, the court cannot require the jury to reconsider it.

If the finding on several issues is inconsistent, the court, before recording it, may send the jury out for further consideration. *Hegeman v. Cantrell*, 40 Supr., 381.

See *Root v. Sherwood*, 6 John., 68; *Blackley v. Sheldon*, 7 id., 84.

§ 448. In what cases court may direct a reconsideration of the verdict.—If the jury render a verdict which is neither a general nor a special verdict, as defined in sections 437 and 438, the court may, with proper instructions as to the law, direct them to reconsider it; and it cannot be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict, or to find the facts specially, and leave the judgment to the court.

§ 449. When judgment may be given upon an informal verdict.—If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant, upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction

be given unless the jury expressly find against the defendant, upon the issue, or judgment be given against him on a special verdict.

Where the record does not show that the jury passed and rendered judgment, upon a plea of former acquittal interposed by the defendant, a judgment of conviction will be reversed. *People v. Burch*, 1 St. Rep., 751; 5 Y. Cr., 32.

§ 450. **Polling the jury.**—When a verdict is rendered, and before it is recorded, the jury may be polled, on the requirement of either party; in which case they must be severally asked whether it is their verdict; and if any one answer in the negative, the jury must be sent out for further deliberation.

§ 451. **Recording the verdict.**—When the verdict is given, and such as the court may receive, the clerk must immediately record it in full upon the minutes, and must read it to the jury and inquire of them whether it is their verdict. If any juror disagrees, the fact must be entered upon the minutes, and the jury again sent out; but if no disagreement be expressed the verdict is complete, and the jury must be discharged from the case.

§ 452. **Defendant, when to be discharged or detained after acquittal.**—If judgment of acquittal be given on a general verdict, and the defendant be not detained for any other legal cause, he must be discharged as soon as the judgment is given; except when the acquittal is for a variance between the proof and the indictment, which may be obviated by a new indictment, the court may order his detention, to the end that a new indictment may be preferred, in the same manner and with the like effect provided in sections 408 and 409.

The case of *People v. Cruger*, 38 Hun, 500, was reversed in 2 St. Rep., 468; N. Y., 510.

§ 453. **Proceedings upon general verdict of conviction or a special verdict.**—If a general verdict be rendered against the defendant, or a special verdict be given, he must be remanded, in custody, or if on bail, he may be committed to the proper officer of the county, to await the judgment of the court upon the verdict. When committed, his bail is exonerated, or if money be deposited instead of bail, it must be refunded to the defendant.

See *People v. Trimble*, 38 St. Rep., 998; 60 Hun, 365; 15 N. Y. Supp.,

§ 454. **When defendant acquitted on the ground of insanity, fact to be stated with the verdict. Commitment of defendant to state lunatic asylum.**—When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem him dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane.

## TITLE VIII.

## OF THE PROCEEDINGS AFTER TRIAL AND BEFORE JUDGMENT

- CHAPTER I. Bill of exceptions.  
 II. New trials.  
 III. Arrest of judgment.

## CHAPTER I.

## BILL OF EXCEPTIONS.

SECTION 455. In what cases.

456. By whom settled, and how filed.

457. To be settled at the trial, or the point noted in writing

458, 459. When and how settled, after the trial.

460. Enlarging the time therefor.

461. Effect of not serving exceptions or amendments, within the time prescribed.

§ 455. In what cases.—On the trial of an indictment, exceptions may be taken by the defendant, to a decision of the court, upon a matter of law, by which his substantial rights are prejudiced and not otherwise, in any of the following cases:

1. In disallowing a challenge to the panel of the jury;
2. In admitting or rejecting testimony on the trial of a challenge for actual bias to any juror who participated in the verdict, or in allowing or disallowing such challenge;

3. In admitting or rejecting witnesses or testimony, or in deciding any question of law, not a matter of discretion, or in charging or instructing the jury upon the law, on the trial of the issue.

See notes under section 385, *ante*.

§ 456. \*Where the defendant is convicted of a crime punishable by death, the stenographer, within ten days after the judgment has been pronounced, shall furnish to the attorney for the defendant, at his request, a copy of the stenographic minutes of the entire proceedings upon the trial. The expense of such copy shall be a county charge, payable to the stenographer out of the court fund upon the certificate of the judge presiding at the trial.

Amended by chap. 427, 1897.

See cases under section 517, *post*.

**Matter of law.**—This section preserves to the defendant his right, which previously existed, to take exceptions to a decision of the court upon a matter of law, by which his substantial rights are prejudiced. *People v. Palmer*, 15 St. Rep., 78; 109 N. Y., 419.

Errors, upon criminal trials, can be made available in the court of appeals only by exceptions duly taken on the trial. *People v. Guidici*, 100 N. Y., 507; 3 N. Y. Cr., 551.

But see section 528, *post*.

No right is given, by this section, to except to the decision of a judge on the facts. *People v. McQuade*, 18 St. Rep., 288; 21 Abb. N. C., 440; 110 N. Y., 284; 6 N. Y. Cr., 33.

This Code explicitly confines exceptions, which may be taken by a defendant, on the trial of indictments, to those made to the decision of the court on matter of law, and not otherwise, to the cases enumerated in this section. *Id*.

**Challenge.**—A limitation is put by this section to the right to except to

\* See § 830, *post*.

uling made upon the trial of a challenge. *People v. Petmecky*, 2 N. Y. Cr., 458.

It is expressly provided in this section that an exception may be taken to a decision in admitting or rejecting testimony on the trial of a challenge to a juror for actual bias. *People v. Welch*, 1 N. Y. Cr., 488.

An exception lies to the improper admission or exclusion of evidence on the trial of a challenge to a juror, who participated in the verdict, or where, as a matter of law, the court erred in allowing or disallowing a challenge. *People v. McQuade*, 18 St. Rep., 288; 21 Abb. N. C., 440; 110 N. Y., 284; 6 N. Y. Cr., 33.

The decision of the trial judge on the question of indifference is not reviewable, except in the absence of any evidence to support it, in which case it is an error of law to which an exception lies. *Id.*; *People v. Fanshawe*, 3 St. Rep., 343; 8 N. Y. Cr., 349; 65 Hun. 77, 94.

The right to review, under subd. 2 of this section, is limited to a decision of the trial court upon a matter of law, by which the substantial rights of the defendant are prejudiced, and not otherwise in allowing or disallowing a challenge to a juror for actual bias. *People v. McGonegal*, 48 St. Rep., 900; 110 N. Y., 68.

The last clause of this section permits an exception as well when the challenge is sustained as when it is overruled. *People v. McQuade*, 18 St. Rep., 288; 21 Abb. N. C., 477; 110 N. Y., 284; 6 N. Y. Cr., 33. If the juror, whose facts proved, is a competent and legal juror, an exception lies to his rejection. *Id.*

The act of 1878, authorizing a review of the findings of fact of the trial court upon a challenge for bias was repealed when this Code took effect. *People v. McGonegal*, 48 St. Rep., 903. The right to review in such cases is now controlled by this section, and is limited to a decision of the trial court on a matter of law by which the substantial rights of the defendant are prejudiced and not otherwise in allowing or disallowing a challenge to a juror for actual bias. *Id.*

**Stipulation.**—A stipulation by counsel to the effect that a general exception should give the defendant the benefit of a particular exception to any part of the charge, is of no avail. *People v. Buddensieck*, 3 St. Rep., 664; 110 N. Y., 501; 5 N. Y. Cr., 71; *Biggs v. Waldron*, 83 N. Y., 582.

**Bill of exceptions.**—The provisions of this section prohibit the appearance of the proceedings on a motion to set aside an indictment in the bill of exceptions, and hence in the judgment-roll. *People v. Petrea*, 30 Hun, 102; 110 N. Y. Cr., 198.

The bill of exceptions must contain all exceptions which come before the court on appeal. *People v. Petrea*, 30 Hun, 128; 1 N. Y. Cr., 198.

See *People v. Willett*, 36 Hun, 504; 3 N. Y. Cr., 327; *People v. Tyrrell*, *Id.*

If the defendant desires a review of his exceptions where the challenge to a juror is sustained, he must incorporate them in a bill of exceptions to be settled and annexed to the roll. *People v. McQuade*, 18 St. Rep., 288; 110 N. Y., 305; 21 Abb. N. C., 418; 6 N. Y. Cr., 33.

All exceptions may be incorporated in the bill of exceptions. *Id.*

Under the former practice, the proceedings on challenges for principal and array were entered in the record, but it was otherwise as to proceedings on challenges to the polls for favor, though questions of law arising on such challenges could be reviewed on exceptions. *Id.*

The case cannot be settled by the stipulation of the attorneys. *People v. Gardner*, 7 St. Rep., 846; 44 Hun, 235.

It must be settled by the judge and filed with the clerk. *Id.*

The minutes of the stenographer, not made a part of the bill of exceptions, and not signed or settled by the presiding judge, have no business in the trial book, even upon the stipulation of the attorneys. *Id.*

§ 457. To be settled at the trial, or the point noted in writing.—The bill of exceptions must be settled at the trial unless the court otherwise direct. If no such direction be given, the point on which the exception must be particularly stated in writing, and

delivered to the court and must immediately be corrected or added to, until it is made conformable to the truth.

§ 458. \* **Case when necessary, how made and settled.**—When a party intends to appeal from a judgment rendered after the trial of an issue of fact he must, except as otherwise prescribed by law, make a case and procure the same to be settled and signed, by the judge or justice, by or before whom the action was tried, as prescribed in the general rules of practice; or, in case of the death or disability of such judge or justice, in such manner as the appellate court directs. The case must contain so much of the evidence, and other proceedings upon the trial, as is material to the questions to be raised thereby, and also the exceptions taken by the party making the case; and in a case where a special question is submitted to the jury, such exceptions taken by any party to the action as shall be necessary to determine whether there should be a new trial, if the judgment be reversed. If it afterwards becomes necessary to separate the exceptions, the separation may be made and the exceptions may be stated with so much of the evidence, and other proceedings, as is material to the questions raised by them, in a case prepared and settled as directed by the general rules of practice, or in the absence of directions therein, by the court, upon motion.

Amended by chap. 427, 1897.

§ 459. **When and how settled, after the trial.**—At the time appointed, the judge must settle and sign the bill of exceptions.

See notes under section 456, *ante*.

Minutes of the stenographer, not signed or settled by the trial judge, have no business in the appeal book. *People v. Bradner*, 7 St. Rep. 846; 44 Hun, 234.

§ 460. \* **Enlarging the time therefor.**—The time for preparing the case, or the amendments thereto, or for settling the same, may be enlarged by the consent of the parties, or by the presiding judge or by a justice of the supreme court, but no other officer. Only one order extending the time shall be granted, except upon notice of at least two days to the adverse party.

Amended by chap. 427, 1897.

§ 461. **Effect of not serving exceptions or amendments, within the time prescribed.**—If the bill of exceptions be not served within the time prescribed in section 458, or within the enlarged time therefor, as prescribed in the last section, the exceptions are deemed abandoned. If it be served, and the parties omit, within the time limited by section 458, the one to prepare amendments, and the other to give notice of appearance before the judge, they are respectively deemed, the one to have agreed to the bill of exceptions, and the other to the amendments.

## CHAPTER II.

### NEW TRIALS.

#### SECTION 462. New trial.

463. When granted.

464. Effect of granting new trial.

465. In what cases granted.

466. Applications for new trials, when made.

§ 462. **New trial.**—A new trial is a re-examination of the issue, in the same court, before another jury, after a verdict has been given.

See section 544, *post*.

This section states what a new trial is. *People v. Beckwith*, 3 St. Rep., 759; 42 Hun, 367; 5 N. Y. Cr., 233.

The right of the prosecution to try a prisoner separately is fixed by statute, and no error is committed in directing him to be tried separately from the others indicted with him. *People v. Clark*, 2 St. Rep., 543; 1 Silv. (Ct. App.) 166; 102 N. Y., 736.

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\* See § 830, *post*.

§ 463. **When granted.**—A new trial can be granted by the court in which the former trial was had, only in the cases provided in section 465.

See notes under section 465, *post*.

The case of *People v. Flack*, 24 Abb. N. C., 444; 9 N.Y. Supp., 279; 8 N.Y. Cr., 33, was affirmed in 32 St. Rep., 215, but the latter case was reversed in 34 St. Rep., 722.

The power of a trial court to grant a new trial, given by this section, is qualified by section 466, *post*. *People v. Bradner*, 10 St. Rep., 667; 107 N.Y., 10.

The application must be made before judgment, except when made under the seventh subdivision of section 465, *post*. *Id*.

Under this section, a new trial can only be granted in the cases specified in section 465, *post*. *People v. Flack*, 8 N. Y. Cr., 33; 24 Abb. N. C., 444; 9 N. Y. Supp., 279. See 34 St. Rep., 722.

See *People v. Draper*, 28 Hun, 3; 1 N. Y. Cr., 142; 15 W. Dig., 384; *People v. Trezza*, 40 St. Rep., 482; 128 N. Y., 532.

§ 464. **Effect of granting new trial.**—The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew; and the former verdict cannot be used or referred to, either in evidence or in argument.

The reference to this section in *People v. Upton*, 38 Hun, 110; 4 N.Y. Cr., 469, should be to section 467, *post*.

The Code has not subverted the constitutional inhibition against subjecting a person to be twice put in jeopardy for the same offense. (N.Y. Const., art. 1, section 6.) *People v. Palmer*, 15 St. Rep., 78; 109 N. Y., 416.

**Same position.**—The granting of a new trial places the parties in the same position as though no trial had been had. *Id*.

The fact that a new trial has been ordered does not affect the validity or effect of the former plea. *People v. McElvaine*, 36 St. Rep., 180; 1 N. Y., 52605.

Such plea stands as the statement of the defendant's defense, until it is permitted to be withdrawn, or otherwise disposed of by the court. *Id*.

If reversal of the judgment of conviction follows, such judgment, as well as the record of the former trial, are annulled and expunged by the judgment of the appellate court, and they are as though they had never been. *People v. Palmer*, *ante*.

The indictment, in such case, is left to stand as to the crime, of which the accused had been charged and convicted, as though there had been no trial. *Id*.

Where the result of the former trial is, in effect, an acquittal of another crime charged in the indictment, he may plead that result in bar of further prosecution of that crime. *Id*.

Where a defendant is convicted of a lower degree of the crime charged in the indictment, and, on his appeal upon exceptions, the judgment is reversed and a new trial ordered, he must be tried again, without regard to the former trial and conviction, under the indictment for the offense charged therein, and not simply for the lower grade of the crime of which he was convicted. *Id*.

**Reference to former verdict.**—The reference by the district attorney, in the course of the trial of an indictment for murder, to a former conviction of the defendant under the same indictment, and, in his argument, to the fact that a witness called for the defendant on the former, was not called on the present trial, is a technical violation of this section. *People v. Greenwall*, 26 St. Rep., 229; 115 N. Y., 526; 8 N. Y. Cr., 313.

The presiding judge can control the intemperate language of the prosecuting attorney in criminal cases, or so guide the minds of the jury that it may not have any injurious effect. *Id*.

See *People v. Cignarale*, 16 St. Rep., 155; 6 N. Y. Cr., 98.

§ 465. **In what cases granted.**—The court in which a trial has



been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases :

1. When the trial has been had in his absence, if the indictment be for a felony ;

2. When the jury has received any evidence out of court, other than that resulting from a view, as provided in section 411 ;

3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct by which a fair and due consideration of the case has been prevented ;

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors ;

5. When the court has misdirected the jury in a matter of law, or has refused to instruct them as prescribed in section 420 ; and the defendant has, at the trial, excepted to such misdirection or refusal ;

6. When the verdict is contrary to law or clearly against evidence :

7. Where it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict ; if such evidence has been discovered since the trial, is not cumulative ; and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed.

See notes under section 463, *ante*.

See sections 527 and 528, *post*.

Prior to the Code, there was no power in the trial court or general term to grant a new trial upon the merits. *People v. Mangano*, 29 Hun, 263.

**What is.**—An application to withdraw a plea of guilty and substitute a former plea of not guilty is not a motion for a new trial. *People v. Joyce*, 4 N. Y. Cr., 348.

**Grounds.**—The grounds, upon which a motion for a new trial may be made, are enumerated in this section. *People v. Wentworth*, 4 N. Y. Cr., 209.

The grounds for a new trial are seven in number, upon all or either of which a motion for a new trial can be made under the next section. *People v. Hovey*, 30 Hun, 358; 1 N. Y. Cr., 332.

The trial court can grant a new trial for the reasons stated in this section. *People v. Osterhout*, 34 Hun, 262.

The causes, for which the trial court may grant a new trial to a defendant in a criminal case, are specifically pointed out in this section. *People v. Johnson*, 16 St. Rep., 846; 110 N. Y., 144.

A motion for a new trial, not brought within the provisions of either of the subdivisions of this section, which regulate motions of this character, cannot be entertained. *People v. Kelly*, 94 N. Y., 526; 2 N. Y. Cr., 24; *aff'd* 31 Hun, 226; 2 N. Y. Cr., 18.

This section confers upon the court the power to grant a new trial when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, in the cases specified in the seven subdivisions which follow. *People v. Flack*, 8 N. Y. Cr., 33; 24 Abb., N. C., 444; 9 N. Y. Supp., 279. See 34 St. Rep., 722.



**substantial rights of defendant.**—A verdict is only to be set aside on a motion for that purpose, where the substantial rights of the accused have been prejudiced by it. *People v. Kelly*, 31 Hun, 226; 2 N. Y. Cr., 21. In cases under this section, the trial court is authorized to grant a new trial provided it can see that the substantial rights of the defendant have been prejudiced, and not otherwise. *People v. Johnson*, 16 St. Rep., 846; N. Y., 144.

**discretion.**—Motions for a new trial are addressed to the discretion of the court, and each application must depend upon its distinct characteristics and cannot be said to furnish a precedent. *People v. Lane*, 1 N. Y. Cr., 31 Hun, 15.

A motion for a new trial is addressed to the sound discretion of the trial court. *People v. Johnson*, 16 St. Rep., 846; 110 N. Y., 184.

The exercise of such discretion is not reviewable in the court of appeals, unless it appears that it has been abused to the prejudice of defendant. *Id.*

**subd. 3.**—Within the limitations prescribed by this section and section 415, *ante*, misconduct on the part of the jury is not cause for granting a new trial, unless it is such as to have prevented a fair and due consideration of the case. *People v. Draper*, 28 Hun, 5; 1 N. Y. Cr., 143; 15 W. Dig., 884.

Any irregular or improper conduct on the part of the jurors furnishes no ground for setting aside the verdict, unless it is shown that the defendant is prejudiced thereby. *People v. Menken*, 36 Hun, 90, 100; 8 N. Y. Cr., 243; *People v. Draper*, 28 Hun, 2; *Ostrander v. People*, *id.*, 48.

This section confers power upon the trial court to set aside a verdict for the sole cause of the separation of the jury without its leave. *People v. Brad*, 35 St. Rep., 149; 58 Hun, 573; 12 N. Y. Supp., 695, 696.

The concluding clause of subdivision 3 of this section is disjunctive in effect as it is in form, and relates to acts of misconduct other than that particularly specified. *Id.*

This clause must be regarded as including all acts of misconduct on the part of the jury or of a juror, which either are shown or may be presumed to have interfered with the due and proper consideration of the case submitted to them. *Id.*

The unauthorized use of intoxicating liquor by one or more jurors, while the jury are deliberating on their verdict, furnishes ground for setting aside the verdict in a case of felony. *Id.*

If the defendant thinks that such irregularities have been committed in the proceedings of the jury as may imperil his rights, he cannot lie still and submit to the chances of a verdict, but must, at the proper time, and when fully advised of the facts, insist upon a discharge of the jury. *People v. Lack*, *ante*. See 34 St. Rep., 722.

By the language of this section, the verdict is only to be set aside on a motion for that purpose, where the substantial rights of the defendant have been prejudiced by the official misbehavior or the irregularities of the jurors. *People v. Kelly*, 2 N. Y. Cr., 18; 31 Hun, 225.

In criminal cases, involving the life of the accused, no irregularity on the part of the jury, which can possibly prejudice him, can be permitted. In such a case, a new trial will ordinarily be granted, unless it clearly appears that it did not affect the verdict. *People v. Johnson*, 13 St. Rep., 48; 46 N. Y., 674; *Eastwood v. People*, 3 Park., 25.

A failure to admonish the jury, as directed in section 415, *ante*, is not one of the cases, specified in this section, in which a new trial may be granted. *People v. Draper*, 28 Hun, 3; 1 N. Y. Cr., 142; 15 W. Dig., 384.

**subd. 6.**—This section provides for the granting of a new trial, where the verdict is contrary to law, or clearly against evidence, only by the court in which the trial took place. *Sawyer v. People*, 27 Hun, 287; 14 W. Dig.,

but it does not confer upon the appellate court any such power. *Id.* See section 527, *post*.

A new trial was granted under subdivision 6 of this section, on the ground that the verdict was clearly against the evidence in *People v. Stokes*, 2 N. Y. Cr., 384.

A new trial may be granted when the verdict is unsupported by the evidence. *People v. Mangano*, 29 Hun, 263.

The denial by the trial court of a motion for a new trial upon the ground

that the verdict is contrary to law or against the weight of evidence, is an intermediate order or proceeding forming part of the judgment roll, and may be reviewed by the general term in like manner as a bill of exceptions. *Id.*

**Subd. 7.**—When the motion for a new trial is founded upon the seventh subdivision of this section, the Code expressly prescribes what must be made to appear as sufficient grounds for granting such motion. *People v. Hovey*, 30 Hun, 358 ; 1 N. Y. Cr., 332.

The court, in which the trial of an indictment is had, has power to entertain a motion for a new trial on the ground of newly discovered evidence, and may grant or refuse it. *People v. Trezza*, 40 St. Rep., 482 ; 128 N. Y., 532 ; 8 N. Y. Cr., 295.

Motions for a new trial in bastardy proceedings, on the ground of newly discovered evidence, are governed by this section. *People v. Colegrove*, 45 St. Rep., 101 ; 18 N. Y. Supp., 370.

This section provides for a case, where a defendant can produce evidence such as, if before received, would probably have changed the verdict. *People v. Lane*, 1 N. Y. Cr., 554 ; 31 Hun, 15.

And, though known to defendant's counsel, his omission to produce the evidence on the trial should not prejudice the defendant. *Id.*

Evidence is cumulative when it is of the same nature as that previously produced to establish the same fact or facts. *People v. Leighton*, 1 N. Y. Cr., 469.

A case, where the evidence given upon the trial has been elicited from the party accused, as a witness on his own behalf, forms no exception to the rule. *Id.*

The evidence as to the occurrence itself must be regarded as cumulative, and not one of the elements indicated in subdivision 7 of this section. *People v. Lane*, 1 N. Y. Cr., 554 ; 31 Hun, 14.

Newly discovered evidence, improbable and cumulative, furnishes no ground for a new trial. *People v. Noonan*, 38 St. Rep., 857.

The element of good character, where no evidence in regard thereto is given on behalf of the defendant, is not cumulative. *People v. Lane*, 1 N. Y. Cr., 554 ; 31 Hun, 14.

**When granted.**—Where upon the whole case there is a serious doubt of the defendant's guilt, a new trial should be ordered. *People v. Lane*, 1 N. Y. Cr., 555 ; 31 Hun, 15.

See *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 256 ; 8 N. Y. Cr., 358 ; 19 N. Y. Supp., 509 ; *People v. Davis*, 46 St. Rep., 214 ; 19 N. Y. Supp., 782 ; *People v. O'Neil*, 13 St. Rep., 231 ; 47 Hun, 155 ; *Matter of Choate*, 30 St. Rep., 732 ; 24 Abb. N. C., 437 ; 8 N. Y. Cr., 10.

**§ 466. Applications for new trials, when to be made.**—The application for a new trial must be made before judgment, except an application made under subdivision of section four hundred and sixty-five, which may be made at any time within one year, and except in case of a sentence of death, when the application may be made at any time before execution, and in case the court before which the trial was had is not in session, so that the application can be made and determined before the execution, then the application may be made to any justice of the supreme court or special term thereof, within the judicial department where the conviction was had.

Amended by chap. 65 of 1882.

This amendment added to the original section the exception in case of death sentence.

Am'd by chap. 534 of 1887.

This amendment inserted in the section, as amended in 1882, the words "except an application made under subd. 7 of section 465, which may be made at any time within one year, and."

Sections 463 down to and including this section declare when, and for

what causes, a new trial can be granted. *People v. Beckwith*, 3 St. Rep., 759 ; 42 Hun, 367 ; 5 N. Y. Cr., 233.

**Time.**—This section requires that a motion for a new trial in all cases, with the exceptions therein specified, must be made before judgment. *People v. Wentworth*, 4 N. Y. Cr., 210.

The first exception was inserted by the amendment of 1887, subsequent to the decision of the above cited case.

**Newly discovered evidence.**—A motion for a new trial, in a criminal action, on the ground of newly discovered evidence, can be granted only, where the motion is made before judgment. *People v. Bradner*, 10 St. Rep., 667 ; 107 N. Y., 1, 10. See the above section. The amendment of 1887 has extended the time to one year.

On a motion for a new trial on the ground of newly discovered evidence, the court or judge is to act not only upon the affidavit presented, but also upon the testimony and proceedings had and taken upon the trial at which the conviction occurred. *People v. Hovey*, 30 Hun, 358 ; 1 N. Y. Cr., 332.

A motion for a new trial in bastardy proceedings, on the ground of newly discovered evidence, must be made within one year. *People v. Colegrove*, 45 St. Rep., 101 ; 18 N. Y. Supp., 370.

**Death sentence.**—By the amendment of 1882 to this section, the application, in case of a sentence of death, may be made before execution and to any justice of the Supreme Court, or special term, of the judicial department where the conviction was had. *People v. Beckwith*, 3 St. Rep., 759 ; 42 Hun, 367 ; 5 N. Y. Cr., 233.

This section allows in capital cases, at any time before the sentence is executed, an application to be made to the court before which the trial was had, or, if that court is not in session, to any justice of the Supreme Court or any special term thereof, etc., for a new trial upon the several grounds enumerated in the preceding section. *People v. Hovey*, 30 Hun, 358 ; 1. N. Y. Cr., 332.

The amendment of 1882 to this section was not intended to enlarge or qualify the grounds of a motion for a new trial in a criminal case, but only to provide that, in case of a sentence of death, the motion may be made after judgment. *People v. Leighton*, 1 N. Y. Cr., 469.

See *People v. O'Neil*, 13 St. Rep., 231 ; 47 Hun, 155.

## CHAPTER III.

### ARREST OF JUDGMENT.

**SECTION 467.** Motion in arrest of judgment, defined, and upon what defects founded.

468. Court may arrest judgment without motion.

469. Motion, when and how made.

470. Defendant when to be held or discharged.

470a, 470b. Suspension of judgment.

§ 467. **Motion in arrest of judgment, defined, and upon what defects founded.**—A motion in arrest of judgment is an application, on the part of the defendant, that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant upon the plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment, mentioned in section 331.

Amended by chap. 360 of 1882.

This amendment substituted, the figure “ 331 ” in place of the words “ three hundred and thirty-one ” in the original section.

See notes under section 331, *ante*.

The case of *People v. Sullivan*, 17 St. Rep., 669 ; 49 Hun, 333, was reversed in 24 St. Rep., 579 ; 115 N. Y., 185.

**Definition.**—The phrase “ a motion in arrest of judgment ” is defined, in

this section, in accordance with its old, familiar meaning. *People v. Beckwith*, 13 St. Rep., 231 ; 42 Hun, 368 ; 5 N. Y. Cr., 285.

An application by the defendant to the trial court that he be allowed to withdraw his plea of guilty, and substitute in place thereof his former plea of not guilty, is not a motion in arrest of judgment. *People v. Joyce*, 4 N. Y. Cr., 348.

**Imperative.**—The provisions of this section are imperative and cannot be disregarded by the court. *People v. Upton*, 38 Hun, 107 ; 4 N. Y. Cr., 469.

**Questions of law.**—A motion in arrest raises only questions of law. *People v. Beckwith*, 13 St. Rep., 231 ; 42 Hun, 367 ; 5 N. Y. Cr., 283.

**Defects in indictment.**—The grounds of a motion in arrest of judgment are defects in the indictment. *People v. Osterhout*, 34 Hun, 262.

Where the indictment, under section 511 of the Penal Code, does not contain the allegation of intent to defraud, the objection may be taken by a motion in arrest of judgment. *People v. D'Argencour*, 32 Hun, 179.

**Defect upon face.**—This application must be made for some defect which appears on the face of the record. *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 256 ; 8 N. Y. Cr., 358 ; 19 N. Y. Supp., 509 : *People v. Kelly*, 94 N. Y., 526.

A motion in arrest of judgment must be made for some defect which appears on the face of the record, and cannot be made upon a mere affidavit, showing the existence of facts outside of the record, and which do not constitute a part of the same. *People v. Kelly*, 94 N. Y., 526 ; 2 N. Y. Cr., 24.

A motion in arrest of a judgment though it shows upon its face that the statute of limitations had run against the offense when the indictment was found, cannot, *it seems*, avail to reverse the conviction. *People v. Durrin*, 2 N. Y. Cr., 331.

An application, not made upon anything appearing in the indictment or in the record of the proceedings in the case, is not a motion in arrest of judgment. *People v. Kelly*, 31 Hun, 226 ; 2 N. Y. Cr., 18.

**Grounds in section 331.**—The enumeration of the grounds, upon which an arrest of judgment may be made, in section 331 of this Code, is probably intended to exclude any other grounds. *People v. Menken*, 36 Hun, 99.

A motion in arrest of judgment can only be founded on defects in the indictment mentioned in section 331, *ante*. *People v. Buddensieck*, 4 N. Y. Cr., 252.

Under this section, a motion in arrest of judgment may be founded upon any defects in the indictment which are mentioned in section 331, *ante*. *People v. Kelly*, 94 N. Y., 526 ; 2 N. Y. Cr., 24.

A motion in arrest of judgment in either of the cases mentioned in this section or section 331, *ante*, cannot be regularly entertained as such. *People v. Kelly*, 31 Hun, 226 ; 2 N. Y. Cr., 18.

Upon a motion in arrest of judgment, the only objections which a defendant can take are to the jurisdiction of the court over the subject of the indictment and that the facts stated do not constitute a crime. *People v. Meakim*, 44 St. Rep., 749 ; 8 N. Y. Cr., 407 ; 133 N. Y., 219 ; *aff'g* 40 St. Rep., 686 ; 61 Hun, 327.

Where a demurrable indictment is not demurred to, the objection does not constitute one of the grounds for which judgment can be arrested, unless it is one of the two exceptions specified in section 331, *ante*. *People v. Tower*, 48 St. Rep., 439 ; 135 N. Y., 459.

**No ground.**—The omission to arraign or to ask the defendant to plead is not, and cannot be, one of the defects in the indictment. *People v. Osterhout*, 34 Hun, 262.

The fact that a written communication was received by the recorder from the jury, after retiring to their room, and answered by him, constitutes no ground on which to base a motion in arrest of judgment. *People v. Kelly*, 94 N. Y., 526 ; 2 N. Y. Cr., 24.

§ 468. Court may arrest judgment without motion.—The court may also, on its own view of any of these defects, arrest the judgment without motion.

§ 469. **Motion when and how made.**—The motion must be made before or at the time when the defendant is called for judgment. If made before, it must be on notice to the district attorney, or in his presence.

This section requires a motion in arrest of judgment to be made before, or at the time when, the defendant is called for judgment. *People v. D'Argencour*, 82 Hun, 179.

§ 470. **Defendant, when to be held or discharged.**—When judgment is arrested, and it appears that there is not evidence sufficient to convict the defendant of any crime, he must, if in custody, be discharged; or, if under bail, his bail must be exonerated; or, if money has been deposited instead of bail, it must be refunded; and in such case the arrest of judgment operates as an acquittal of the charge upon which the indictment was found; but, if there is reasonable ground to believe the defendant guilty, and a new indictment can be framed upon which he may be convicted, the court may order him to be re-committed or admitted to bail anew to answer the new indictment; if there is reasonable ground to believe him guilty of another crime, he must be committed or held to answer therefor; and in no case, when re-committed or held to answer, is the former verdict a bar to a new indictment.

§ 470a. **Suspension of judgment.**—If the judgment be suspended, after a plea or verdict of guilty or after a verdict against the defendant upon a plea of former conviction or acquittal, the court may pronounce judgment at any time thereafter within the longest period for which the defendant might have been sentenced; but not after the expiration of such period, unless the defendant shall have been convicted of another crime committed during such period.

This section was added by chap. 651 of 1898.

§ 470b. **Same.**—If judgment be not pronounced as in the last section provided, nevertheless;

1. For the purpose of indictment and conviction of a second offense, the plea or verdict and suspension of judgment shall be regarded as a conviction, and shall be pleaded according to the fact;

2. The said plea or verdict and suspension of judgment may be proved in like manner as a conviction for the purpose of effecting \* the weight of the defendant's testimony in any action or proceeding, civil or criminal.

(This chapter repealed all acts and parts of acts inconsistent, with the latter two sections, in so far as inconsistent therewith.)

This section was added by chap., 651 of 1898.

\* So in original.

## TITLE IX.

## OF THE JUDGMENT AND EXECUTION.

## CHAPTER I. The judgment.

## II. The execution.

## CHAPTER I.

## THE JUDGMENT.

- SECTION 471, 472.** Time for pronouncing judgment, to be appointed by the court.
473. In felony, defendant must be present. In misdemeanor, judgment may be pronounced in his absence.
474. When defendant is in custody, how brought before the court for judgment.
475. How brought before the court, when he is on bail.
476. Bench warrant to issue.
477. Form of bench warrant.
- 478, 479. Service of the bench warrant.
480. Arraignment of defendant for judgment.
481. What cause may be shown against the judgment.
482. If no sufficient cause shown, judgment to be pronounced.
483. Court may summarily inquire into circumstances in aggravation or mitigation of punishment.
484. Power to remit fines, how exercised by courts. Imprisonment in case of failure to pay fine, limited.
485. Judgment roll, in criminal convictions. Clerk to enter judgment upon conviction. Judgment roll, how constituted. In judgments of death. Copies of judgment roll and stenographer's minutes in, how printed. How distributed. Expenses, how paid.

§ 471. Time for pronouncing judgment, to be appointed by the court.—After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal, if the judgment be not arrested, or a new trial granted, the court must appoint a time for pronouncing judgment.

There is no constitutional principle, which requires that judgment, on a conviction of crime, must be pronounced by the judges before whom the trial was had. *People v. Bork*, 96 N. Y., 198 ; 2 N. Y. Cr., 177.

**No power to suspend sentence.**—The provisions of this section and sections 482 and 483 require the criminal courts, after a conviction of the accused person upon a verdict or upon a plea of guilty, to fix and prescribe the punishment and pronounce judgment at a time to be named by the court. *People ex rel. Benton v. Court, etc.*, 50 St. Rep., 236 ; 66 Hun, 552 ; 21 N. Y. Supp., 661 ; aff'g 46 St. Rep., 255 ; 19 N. Y. Supp., 509 ; 8 N. Y. Cr., 358.

But see sections 470a and 470b, *ante*, which have modified the principles enunciated in these cases.

**Time.**—After a verdict against the defendant on the sole plea of former conviction, it is the duty of the court thereupon to appoint a time for pronouncing, and at that time, to pronounce judgment upon him. *People v. Trimble*, 38 St. Rep., 998 ; 60 Hun, 365 ; 15 N. Y. Supp., 60.

What judgment is to be pronounced in such case is not expressly provided. *Id.* The judgment, *it seems*, should be that the defendant plead anew to the indictment. *Id.*

The law, requiring judges to impose sentence upon persons legally con-



dicted of a crime, is mandatory. *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 255 ; 19 N. Y. Supp., 509 ; 8 N. Y. Cr., 358.

They may be compelled, if they refuse, to perform this duty by mandamus. *Id.* They have no power to suspend sentence after plea of guilty. *Id.*

Court of sessions has power to suspend sentence during good behavior, and may impose the sentence upon the re-arrest of the defendant. *People v. Graves*, 31 Hun, 382. See cases just above cited.

Superior criminal courts have power to suspend sentence. *People v. Harrington*, 3 N. Y. Cr., 141 ; 15 Abb. N. C., 161 ; 1 How. N. S., 87. But no sentence greater than that, to which the defendant was liable at his conviction, can be imposed. *Id.*

**Exceptions.**—This section does not contemplate a case where “no sufficient cause can be alleged” why the court should not pronounce judgment, except such cause or causes as have a legal bearing upon the guilt of the accused, or such as may first be brought to the attention of the court after such conviction, as, for instance, arresting the judgment for the various causes stated in the Code, or an order granting a new trial. *People ex rel. Benton v. Court, etc.*, 66 Hun, 552 ; 50 St. Rep., 236 ; 21 N. Y. Supp., 61 ; aff’d 46 St. Rep., 255 ; 19 N. Y. Supp., 509 ; 8 N. Y. Cr., 358. It is not sufficient cause to show that the prisoner had borne a good character before his accusation was made against him ; that he was sorry for his offense and had made money restitution, or that his punishment would be a sore affliction to himself and to the members of his family. *Id.*

§ 472. **Time for pronouncing judgment to be appointed by the court.**—The time appointed must be at least two days after the verdict, if the court intend to remain in session so long, or if not as remote a time as can reasonably be allowed ; but any delay may be waived by the defendant.

Amended by chap. 360 of 1882.

This amendment added the clause as to waiver.

Where a plea of former judgment is pleaded without the plea of not guilty, and the issue determined for the people, two days should intervene between the rendition of the verdict and judgment thereon, and the latter should precede the trial of the new issue formed by pleading anew to the indictment. *People v. Trimble*, 38 St. Rep., 998 ; 60 Hun, 366 ; 15 N. Y. Supp., 60. 1.

**Waiver.**—The defendant, in *People v. Everhardt*, 5 St. Rep., 793 ; 2 Silv. Ct. App.), 511 ; 104 N. Y., 598 ; 6 N. Y. Cr., 236, was deemed to have waived the delay in the time for pronouncing judgment after verdict of guilty.

See *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 256, 8 N. Y. Cr., 358 ; 9 N. Y. Supp., 509.

§ 473. **In felony, defendant must be present. In misdemeanor, judgment may be pronounced in his absence.**—For the purpose of judgment, if the conviction be for a felony, the defendant must be personally present ; if it be for a misdemeanor, judgment may be pronounced in his absence.

§ 474. **When defendant is in custody, how brought before the court for judgment.**—When the defendant is in custody, the court may direct the officer in whose custody he is, to bring him before it for judgment ; and the officer must do so accordingly.

§ 475. **How brought before the court, when he is on bail.**—If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear for judgment, when his personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail or of the money deposited, may direct the clerk to issue a bench warrant for his arrest.



§ 476. **Bench warrant to issue.**—The clerk, on the application of the district attorney, may accordingly, at any time after the order, whether the court be sitting or not, issue a bench warrant into one or more counties.

§ 477. **Form of bench warrant.**—The bench warrant must be substantially in the following form:

“County of *Albany*, [or as the case may be.]

“In the name of the people of the State of New York—To any sheriff, constable, marshal or policeman in this state.

A. B. having been on the                      day of

[SEAL.]                      18   , duly convicted in the *county court of the county of Albany* [or as the case may be], of the crime of [designating it generally.]

Am'd by chap. 880 of 1895. In effect January 1, 1896.

“You are therefore commanded, forthwith to arrest the above named A. B., and bring him before that court for judgment; or if the court have adjourned for the term, you are to deliver him into the custody of the sheriff of the county of *Albany*, [or as the case may be, or in the city and county of New York “to the keeper of the city prison of the city of New York.”]

“City of *Albany*, [or as the case may be] the                      day of                     , 18   .

“By order of the court.

“E. F., Clerk.”

§ 478. **Service of the bench warrant.**—The bench warrant may be served in any county, in the same manner as a warrant of arrest; except that when served in another county it need not be indorsed by a magistrate of that county.

§ 479. **Service of the bench warrant.**—Whether the bench warrant be served in the county in which it was issued, or in another county, the officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant, according to the command thereof.

§ 480. **Arraignment of defendant for judgment.**—When the defendant appears for judgment, he must be asked by the clerk whether he have any legal cause to show why judgment should not be pronounced against him.

**Question to defendant.**—In capital cases, this fact must appear upon the record. *Graham v. People*, 6 Lans., 149; 63 Barb., 468. Such omission from the record is fatal to the conviction. *Id.*

The record should show in capital cases that the prisoner was required to show cause, if any, why judgment should not be awarded against him. *Messner v. People*, 45 N. Y., 7. It is the duty of the court to hear and determine the sufficiency of such cases. *Id.*

Where the record failed to show that the prisoner was asked by the court after the verdict was rendered and before judgment was pronounced thereon, what he had to say why judgment should not be pronounced against him, or that any opportunity was given him by the court at this stage of the proceedings for that purpose, this omission was held in *Messner v. People*, 45 N. Y., 1, to be error, for which there must be a new trial.

The clerk's entry of the judgment pronounced is not required to state what succeeded the verdict and preceded the sentence, and it need not ap-

ear from it that the question, required by this section, was put to the prisoner. *Hildebrand v. People*, 1 Hun, 19.

Where it does not appear from the record made, signed and filed as the statute prescribed, that this inquiry was made of the defendant before he was sentenced, it may be necessary, for that reason, to reverse the judgment pronounced, but not the conviction. *Id.*

**§ 481. What cause may be shown against the judgment.—**He may show for cause, against the judgment,

1. That he is insane; and if, in the opinion of the court, there be reasonable ground for believing him to be insane, the question of his insanity must be tried as provided by this Code. If, upon the trial of that question, it is found that he is sane, judgment must be pronounced; but if found insane, he must be committed to the state lunatic asylum until he becomes sane; and when notice is given of that fact, he must be brought before the court for judgment;

2. That he has good cause to offer, either in arrest of judgment, or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.

**What causes.**—Cause against the judgment may be shown before sentence: first, insanity; second, good cause in arrest of judgment. *People v. Osterhout*, 34 Hun, 262; 3 N. Y. Cr., 445.

**Insanity.**—Persons cannot be lawfully punished for an act committed by them while in a state of insanity, or when they have become insane during or after a trial or conviction. *People v. McElvaine*, 36 St. Rep. 181; 25 N. Y., 600; 8 N. Y. Cr., 159.

**Arrest of judgment.**—For the causes in arrest of judgment, reference must be made to section 467, *ante*. *People v. Osterhout*, 3 N. Y. Cr., 446; 4 Hun, 262.

See *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 256; 8 N. Y. Cr., 358; 9 N. Y. Supp., 509.

**§ 482. If no sufficient cause shown, judgment, to be pronounced.**—If no sufficient cause be alleged, or appear to the court why judgment should not be pronounced, it must thereupon be rendered.

See notes under section 471, *ante*.

A judgment in a criminal court upon conviction or a plea of guilty is the sentence of the court. *People ex rel. Benton v. Court, etc.*, 46 St. Rep., 56; 8 N. Y. Cr., 358; 19 N. Y. Supp., 509; *aff'd*, 50 St. Rep., 236; 66 Hun, 553; 21 N. Y. Supp., 661.

**§ 483. Court may summarily inquire into circumstances in aggravation or mitigation of punishment.**—After a plea or verdict of guilty, in a case where a discretion is conferred upon the court as to the extent of the punishment, the court may, in its discretion, hear the same summarily at a specified time, and upon such notice to the adverse party as it may direct. At such specified times, if it shall appear by the record and the circumstances of any person convicted of crime, that there are circumstances in mitigation of the punishment, the court shall have power, in its discretion, to place the defendant on probation in the manner following:

1. The court upon suspending sentence, may place such person on probation during such suspension under the charge and supervision of the probation officer appointed by said court. When practicable, any child under the age of sixteen years, placed on probation, shall be placed with a probation officer of the same religious faith as that of the child's parents. The

parents, guardian or master of such child, if the child has any, shall be summoned by the magistrate to attend any examination or trial of such child and to be present in court when the child is placed on probation and informed by the court of the action taken in such case.

2. If the judgment is to pay a fine and that the defendant be imprisoned until it is paid, the court upon imposing sentence may direct that the execution of the sentence of imprisonment be suspended for such period of time, and on such terms and conditions as it shall determine, and shall place such defendant on probation under the charge and supervision of a probation officer during such suspension, provided, however, that upon payment of the fine being made, the judgment shall be satisfied and the probation cease.

3. At any time during the probationary term of a person convicted and released on probation in accordance with the provisions of this section, the court before which, or the justice before whom, the person so convicted was convicted, or his successor, may in its or his discretion, revoke and terminate such probation. Upon such revocation and termination, the court may, if the sentence has been suspended, pronounce judgment at any time thereafter within the longest period for which the defendant might have been sentenced, or, if judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect for its unexpired term.

Am'd by chap. 656, Laws 1905. Takes effect Sept. 1, 1905.

As amended by L. 1903, chap. 613. In effect Sept. 1, 1903.

See chap. 274, L. 1903, which seems to be superseded by chap. 613.

**§ 484. Power to remit fines, how exercised by courts. Imprisonment in case of failure to pay fine, limited.**—The power to remit a fine imposed by any court, whether of record or not of record, imposed for any criminal offense whatever, shall only be exercised as in this section provided. Any court of record, except an inferior court of local jurisdiction, which has imposed a fine for any criminal offense, or the presiding judge thereof, or any judge authorized to preside therein, shall have power in his discretion, on five days' notice to the district attorney of the county in which such fine was imposed, to remit such fine, or any portion thereof. In case of a fine imposed by a court not of record or by any inferior court of local jurisdiction for any criminal offense whatever, the county judge of the county in which the fine was imposed, and in case of a fine imposed by such a court in the city of New York, the court of general sessions, or any judge thereof, upon five days' notice to the district attorney of the county in which such fine was imposed, shall have the same power. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every dollar of the fine.

Amended by chap. 434 of 1886.

This amendment prefixed to the original all of the present section except the last provision.

See sections 717 and 718, *post*, and notes under them.

**Failure to pay fine.**—The Code requires, if a fine is the punishment inflicted, that the sentence and commitment shall so state, and the right to imprison shall only exist if such fine is not paid. *Matter of Hoffman*, 1 N. Y. Cr., 484.

The law authorizes the imposition of a fine, and of imprisonment, until it is paid, for a specified time, not exceeding the statutory limit. *Matter of Bray*, 34 St. Rep., 641, 643; 12 N. Y. Supp., 367.

A sentence, which plainly imposes a fine and imprisonment in the alternative, is, *it seems*, not good. *Id.*

A commitment, which recites that the defendant has been adjudged to pay a fine of \$100, and, in default, to be imprisoned for three months, fully complies with the last clause of this section. *Id.*

**§ 485. \*The judgment roll.**—When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction has been had; and must, upon the service upon him of notice of appeal, immediately annex together and file the following papers, which constitute the judgment-roll:

1. A copy of the minutes of a challenge interposed by the defendant to a grand juror, and the proceedings and decision thereon;

2. The indictment and a copy of the minutes of the plea or demurrer;

3. A copy of the minutes of a challenge which may have been interposed to the panel of the trial jury, or to a juror who participated in the verdict, and the proceedings and decision thereon;

4. A copy of the minutes of the trial;

5. A copy of the minutes of the judgment;

6. A copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment;

7. The case, if there be one.

8. When the judgment is of death, the clerk, upon the settling and filing of the case, must forthwith cause to be prepared and printed, and forwarded to the clerk of the court of appeals, the number of copies of the judgment roll which are required by the rules of the court of appeals, and three copies shall also be furnished to the defendant's attorney, three to the district attorney, and one to the governor of the state, and the remainder shall be distributed according to the rules of the court of appeals. The expense of preparing and printing the judgment roll in such case shall be county charge payable out of the court fund upon the certificate of the county clerk, approved by the county judge or a justice of the supreme court residing in the county in which the conviction was had.

Am'd ch. 427 of 1897.

\* See § 830, *post*.

Amended by chap. 520 of 1885.

This amendment struck the letter "s" from the word "proceedings" in subd. 6 of the original section and inserted therein the words "to set aside the indictment," after the word "either."

Am'd by chap. 493 of 1887.

This amendment added subd. 8 to the section as amended in 1885.

Am'd by chap. 379 of 1889.

This amendment added to subd. 8 of the section, as amended in 1887, the last clause of said subdivision.

See notes under section 517, *post*.

The case of *People v. Bork*, 31 Hun, 367; 2 N. Y. Cr., 78, was reversed in N. Y., 188; 2 N. Y. Cr., 177.

The case of *People v. Sharp*, 10 St. Rep., 522; 45 Hun, 504, was reversed in 31 St. Rep., 217; 107 N. Y., 427.

**Judgment.**—The judgment, in a criminal case, upon conviction is the sentence of the court. *People v. Bradner*, 10 St. Rep., 667; 107 N. Y., 1, 11. A judgment upon conviction can only be rendered against a person

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\* See § 830, *post*.

charged with the commission of a criminal offense, or the defendant in a criminal prosecution. *People v. Norton*, 33 Hun, 278; 2 N. Y. Cr., 824.

Where the appeal book shows that the defendant was permitted to withdraw his plea of not guilty, and that he demurred to the indictment, that his demurrer was overruled, and that he was convicted and sentenced to pay a fine of seventy-five dollars and stand committed to the county jail, not exceeding seventy-five days, until paid, it is a sufficient judgment within the provisions of this section. *People v. O'Donnell*, 15 St. Rep., 141; 46 Hun, 361; 7 N. Y. Cr., 348; 10 N. Y. Supp., 251.

**Judgment-roll.**—This section provides for the form and contents of the judgment roll. *People v. Mangano*, 29 Hun, 263.

As to what a judgment roll must state and contain, see *People v. O'Neil*, 13 St. Rep., 231; 47 Hun, 155.

This section does not contemplate the making up of a formal judgment record. *People v. Bradner*, 107 N. Y., 1, 11; 10 St. Rep., 667; aff'g 7 St. Rep., 846; 44 Hun, 234.

The final record must in some way show a criminal act. *People ex rel. Baker v. Beatty*, 39 Hun, 477.

A decision, overruling a demurrer to an indictment, and directing that judgment be given for the people, unless the accused pleads over, does not constitute a judgment within the meaning of this section. *People v. Beman*, 22 Hun, 283; *People v. O'Donnell*, 15 St. Rep., 141; 46 id., 361; 7 N. Y. Cr., 348; 10 N. Y. Supp., 251.

**Who to make up.**—The district attorney should see to it that a formal and sufficient judgment is entered in every case, and that a formal and sufficient roll is made up when an appeal is taken. *People v. O'Neil*, 13 St. Rep., 231; 47 Hun, 157.

**Subd. 2.**—In case of the substitution of plea under section 337, *ante*, the judgment-roll must contain the original plea of not guilty, the subsequent withdrawal thereof, the plea of guilty in its stead, and the application to withdraw the latter and the reinstatement of the original plea, and, if denied, the denial of such motion. *People v. Joyce*, 4 N. Y. Cr., 348.

As to whether, in order to justify the detention of a defendant under this section, it is necessary that the entry in the minutes, with which he is to be furnished, should show the offense, *quære*. *People v. Bradner*, 107 N. Y., 1, 12; 10 St. Rep., 667; aff'g 7 St. Rep., 846; 44 Hun, 234.

The omission of the clerk in his entry of judgment to state the offense, of which the defendant was convicted, where the fact appears from an inspection of the whole record, does not render the sentence void. *Id.*

The defect is amendable, and the court may conform the entry to the fact. *Id.*

**Subd. 3.**—The judgment-roll is to contain no copy of the minutes of a challenge, except such as may have been interposed to the panel of the trial jury, or to a juror who participated in the verdict. *People v. Petmecky*, 2 N. Y. Cr., 458.

Under this section, proceedings on challenges to juror, who participated in the verdict, must be incorporated in the judgment-roll. *People v. McQuade*, 18 St. Rep., 288; 21 Abb. N. C., 448; 110 N. Y., 284; 6 N. Y. Cr., 35.

**Subd. 6.**—Subdivision 6 of this section makes a copy of the minutes of any proceeding upon a motion for a new trial, or in arrest of judgment, a necessary part of the judgment-roll. *People v. Joyce*, 4 N. Y. Cr., 348.

This section authorizes the clerk to include in the judgment-roll a copy of the minutes upon a motion for a new trial. *People v. Beckwith*, 3 St. Rep., 759; 42 Hun, 367; 5 N. Y. Cr., 234.

This section makes provision for the inclusion, in the judgment-roll which may be brought up by the appeal under section 517, *post*, of a copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment. *People v. Hovey*, 30 Hun, 357; 1 N. Y. Cr., 331.

By this section, a copy of the minutes of any proceedings upon a motion for a new trial is required to be annexed to, and forms part of, the judgment-roll. *People v. Trezza*, 40 St. Rep., 482; 128 N. Y., 532; 8 N. Y. Cr., 295.

The sixth subdivision states that the roll shall contain, among other mat-

copy of the minutes of any proceedings upon a motion either for a trial or in arrest of judgment. *People v. Mangano*, 29 Hun, 268; *v. Hovey*, 30 Hun, 357.

Judgment-roll is not required to contain the proceedings on a motion aside an indictment. *People v. Petrea*, 30 Hun, 102. But see section ended in 1885.

There seems to have been no other object for making the proceedings for trial apart of the judgment-roll, than to give the defendant a right to review them by way of an appeal from the judgment. *People v. Noonan*, Rep., 857.

Doubt was expressed in *People v. Hovey*, 1 N. Y. Cr., as to whether this entitled the denial of the motion to be reviewed, but it probably was held to secure by it this right of review. *Id.*

§ 7.—The judgment-roll may contain the bill of exceptions. *People v. Perhout*, 34 Hun, 262.

Bill of exceptions, if there is one, must be annexed to, and made part of judgment-roll. *People v. McQuade*, 18 St. Rep., 288; 21 Abb. N. C., 10 N. Y., 284; 6 N. Y. Cr., 35.

Exceptions, a part from the bill of exceptions if there is one, are to be noted in the judgment-roll. *People v. Petrea*, 30 Hun, 128; 1 N. Y. Cr., All exceptions, which come before the court on appeal, must be contained in the bill of exceptions. *Id.*

§ 8.—It is too late when the defendant appears atoyer and terminer after a day fixed for the execution of the sentence, after an appeal and variance of the conviction by the general term, to move to amend the bill in regard to what took place atoyer and terminer before the trial. *People v. People*, 29 Hun, 513; 1 N. Y. Cr., 281; 17 W. Dig., 373. The bill is then conclusive on the trial court. *Id.*

*People v. Schad*, 35 St. Rep., 148; 58 Hun, 572; 12 N. Y. Supp., 695; *v. Noonan*, 38 St. Rep., 854; 14 N. Y. Supp., 521; *People v. Trezza*, Rep., 879; 15 N. Y. Supp., 513; *People v. Lopy*, 40 St. Rep., 410; 128 129; *People v. Havens*, 3 N. Y. Cr., 287; 21 W. Dig., 365; *People v. ...*, 17 id., 192; 29 Hun, 581; *People v. Bradner*, 7 St. Rep., 846; 44 234; *aff'd*, 107 N. Y., 1; *People v. Bork*, 1 N. Y. Cr., 394; 2 id., 148.

## CHAPTER II.

### THE EXECUTION.

§ 486. Authority for the execution of a judgment, except of death.

487. Commitment of the defendant.

488. Judgment of imprisonment, by whom and how executed.

489. Duty of sheriff.

490. Same.

§ 86. Authority for the execution of a judgment, except of death.

—When a judgment, except of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment; and no other warrant or authority is necessary to justify or require its execution.

A certified copy of the entry of judgment upon the minutes, except in case of death, is a sufficient warrant or authority to justify or require its execution. *People v. Bradner*, 10 St. Rep., 667; 107 N. Y., 1, 12.

§ 87. Commitment of the defendant.—If the judgment be imprisonment, or a fine and imprisonment until it is paid, the defendant must forthwith be committed to the custody of the sheriff or officer, and by him detained, until the judgment be com-



plied with. Where, however, the court has suspended sentence or where after imposing sentence, the court has suspended the execution thereof and placed the defendant on probation, as provided in section four hundred and eighty-three of the code of criminal procedure, the defendant must forthwith be placed under the care and supervision of the probation officer of the court committing him, until the expiration of the period of probation and the compliance with the terms and conditions of the sentence or of the suspension thereof. Where, however, the probation has been terminated, as provided in paragraph four of section four hundred and eighty-three of the code of criminal procedure, and the suspension of the sentence or of the execution revoked and the judgment pronounced, the defendant must forthwith be committed to the custody of the proper officer and by him detained until the judgment be complied with.

Am'd by L. 1901, chap. 372, again am'd by chap. 613, L. 1903. In effect Sept. 1, 1903.

**Commitment.**—The judgment, not the mittimus, holds the prisoner *People ex rel. Trainor v. Baker*, 89 N. Y., 460 ; 2 N. Y. Cr., 307.

This section and section 489, *post*, provide that the sheriff, upon receiving a certified copy of the judgment, must deliver it and the defendant to the keeper of the prison in which he is to be detained. *People v. O'Neil*, 13 St. Rep., 231 ; 47 Hun, 156.

Where the certified copy of the minutes, furnished the keeper, imperfectly describes the crime of which the prisoner was convicted, the keeper can, upon return to a writ of *habeas corpus*, show by the records of the court what the precise crime was. *People ex rel. Trainor v. Baker*, 89 N. Y., 460 ; 2 N. Y. Cr., 307.

**When sentence begins to run.**—Sentence of imprisonment after conviction of a misdemeanor begins to run from the day it is pronounced. *People v. Lincoln*, 35 Hun, 307. In *People ex rel. Stokes v. Warden*, etc., 66 N. Y., 342, the imprisonment which the court refused to credit on the sentence was such as the prisoner had suffered before trial, conviction and sentence.

A defendant, who has been detained pending appeals taken by him from a judgment of conviction, upon which he has obtained continuous stays of proceedings, has not begun to serve his term under the judgment. *People ex rel. Reavey v. Walsh*, 5 N. Y. Cr., 527.

**Execution of valid portion.**—The valid portion of a sentence, if separate and complete in itself, can be enforced, and the void part disregarded. *People ex rel. Trainor v. Baker*, 89 N. Y., 460 ; 2 N. Y. Cr., 307.

**§ 488. Judgment of imprisonment, by whom and how executed.**—When the judgment is imprisonment in a county jail, or a fine, and that the defendant be imprisoned until it be paid, the judgment must be executed by the sheriff of the county. In all other cases, when the sentence is imprisonment, the sheriff of the county must deliver the defendant to the proper officer, in execution of the judgment.

See notes under preceding section.

**§ 489. Duty of sheriff.**—If the judgment be imprisonment, except in a county jail, the sheriff must deliver a copy of the entry of the judgment, upon the minutes of the court, together with the body of the defendant, to the keeper of the prison, in which the defendant is to be imprisoned.

See note under section 487, *ante*.

**§ 490. Duty of sheriff.**—The sheriff or his deputy, while conveying the defendant to the proper prison, in execution of a judgment of imprisonment, has the same authority to require the assistance of any citizen of this state, in securing the defendant, and in retaking him if he escape, as if the sheriff were in his own county; and every person who refuses or neglects to assist the sheriff, when so required, is punishable, as if the sheriff were in his own county.



## TITLE X.

## GENERAL PROVISIONS IN RELATION TO THE PUNISHMENT OF CRIMES.

## CHAPTER I. Death penalty.

## II. Second offenses, habitual criminals, and special penal discipline.

## CHAPTER I.

## THE DEATH PENALTY.

- SECTION 491.** Warrant for execution of death sentence. Warrant, to whom directed. Delivery of person under death sentence to agent and warden of prison. His duties, as to confinement and custody.
492. Time of execution. Provisions as to.
493. Judge must transmit certain papers to governor.
494. Governor may consult judges, etc.
495. Governor only to reprieve, etc., except as provided in the following sections.
496. If convict becomes insane, sheriff to impanel jury.
497. Duty of district attorney.
498. Inquisition. Suspension of execution.
499. Sheriff to transmit inquisition to governor; governor's duty.
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§ 491. Warrant for execution of death sentence. Warrant, to whom directed. Delivery of person under death sentence to agent and warden of prison. His duties, as to confinement and custody.—When a defendant is sentenced to the punishment of death, the judge or judges holding the court at which the conviction takes place, or a majority of them, of whom the judge presiding must be one, must make out, sign and deliver to the sheriff of the county, a warrant stating the conviction and sentence, and appointing the week within which sentence must be executed. Said warrant must be directed to the agent and warden of the state prison of this state designated by law as the place of confinement for convicts sentenced to imprison-

ment in a state prison in the judicial district wherein such conviction has taken place, commanding such agent and warden to do execution of the sentence upon some day within the week thus appointed. Within ten days after the issuing of such warrant the said sheriff must deliver the defendant, together with the warrant, to the agent and warden of the state prison therein named. From the time of said delivery to the said agent and warden, until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the defendant shall be kept in solitary confinement at said state prison, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

Amended by chap. 489 of 1888.

This amendment substituted the words "week within which the sentence must be executed" for the words "day upon which the sentence must be executed," and added the subsequent portion of the present section.

**Constitutional.**—The provisions of sections 491, 492, 503 to 509 inclusive of the Code of Criminal Procedure, as amended by chap. 489 of 1888, do not upon their face, nor in their general purpose and intent, violate any provision of the state constitution. *People ex rel. Kemmler v. Durston*, 119 N. Y., 575.

**Power of legislature.**—The legislature has power to change the manner of inflicting the death penalty; this is not a change of punishment, but simply of the mode. *People ex rel. Kemmler v. Brush*, 119 N. Y., 577.

**Application.**—By the saving clause of section 10, chap. 489 of 1888, amending this and following section, the act has no application to the case of a person indicted for crime before the time when it took effect, but such crime must be punished according to the provisions of the law existing when it was committed, in the same manner as though the statute had never taken effect. *People v. Nolan*, 24 St. Rep., 588; 7 N. Y. Cr., 138; 2 Silv. (Ct. App.), 395; 115 N. Y., 660.

A person, convicted after January 1, 1889, of murder in the first degree, committed before that day, but after the passage of the amendment of 1888 to this section, is properly sentenced to death by hanging. *Id.*

**Form of sentence.**—The mode of inflicting death upon the prisoner is minutely provided for by this and the following sections of this chapter. *People ex rel. Trezza v. Brush*, 39 St. Rep., 878; 60 Hun, 401; 15 N. Y. Supp., 513; see same case, 8 N. Y. Cr., 293.

A sentence requiring the warden of a state prison to put the prisoner to death during the week beginning on a certain day, "in the mode, manner and way, and at the place prescribed and provided," is proper. *Id.*

A warrant, which directs the execution to be done by putting the defendant to death "in the mode, manner and way, and at the place by law prescribed and provided," is sufficiently definite and specific. *Id.*; *aff'd*, 40 St. Rep., 481; 128 N. Y., 532.

§ 492. **Time of execution. Provisions as to.**—The week so appointed must begin not less than four weeks and not more than eight weeks after the sentence. The time of the execution within said week shall be left to the discretion of the agent and warden to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided.

Amended by chap. 489 of 1888.

This amendment substituted the words "week" and "begin" for the words "day" and "be," and added all after the first sentence in the present section.

See notes under preceding section.

See *McElvaine v. Brush*, 8 N. Y. Cr., 303.

§ 493. Judge must transmit certain papers to governor.—The judge, presiding at the term at which the conviction took place, must immediately thereupon transmit to the governor a statement of the conviction and sentence, with the notes of testimony taken upon the trial by him, or the notes written out, taken by stenographer or assistant stenographer, attending the court or term pursuant to law.

§ 494. Governor may consult judges, etc.—The governor is authorized to require the opinion of the judges of the court of appeals, justices of the supreme court, and the attorney-general, or any of them, upon a statement so furnished.

§ 495. Governor only to reprieve, etc., except as provided in following sections.—No judge, court, or officer, other than the governor, can reprieve or suspend the execution of a defendant sentenced to the punishment of death, except where a sheriff is authorized so to do, in a case and in the manner prescribed in the following sections of this chapter. This section does not apply to a stay of proceedings upon an appeal or writ of error.

§ 496. If convict becomes insane, sheriff to impanel jury.—If after a defendant has been sentenced to the punishment of death, there is reasonable ground to believe that he has become insane, the sheriff of the county in which the conviction took place, with the concurrence of a justice of the supreme court, the county judge of the county, who may make an order to that effect, must impanel a jury of twelve persons of that county, qualified to serve as jurors in a court of record, to examine the question of the sanity of the defendant. The sheriff must give at least seven days' notice of the time and place of the meeting of the jury to the district-attorney of the county. Section 108 of the Code of Civil Procedure regulates the impaneling of such a jury, and the proceedings upon the inquisition so far as it is applicable.

§ 497. Duty of district attorney.—The district attorney must conduct the inquiry. He may produce witnesses before the jury; for which purpose he has the same power to issue subpoenas, as the court has to produce witnesses to attend a grand jury, and disobedience thereto may be punished by the supreme court, at any term thereof, in the same manner as disobedience to process issued by that court.

Amended by chap. 880 of 1895. In effect January 1, 1896.

§ 498. Inquisition; suspension of execution.—The inquisition by the jury must be signed by the jurors and the sheriff. If it is found by the inquisition that the defendant is insane, the

sheriff must suspend execution of the warrant directing the defendant's death, until he receives a warrant from the governor, directing that the defendant be executed.

§ 499. **Sheriff to transmit inquisition to governor ; governor's duty.**—The sheriff must immediately transmit the inquisition to the governor ; who, as soon as he is satisfied of the sanity of the defendant, or of his restoration to sanity, must issue his warrant, appointing a time and place for the execution of the latter, pursuant to his sentence, unless the sentence is commuted or the convict pardoned, and may in the meantime give directions for the disposition and custody of the defendant.

§ 500. **If female convict is pregnant, sheriff to impanel jury of physicians.**—If there is reasonable ground to believe that a female defendant, sentenced to the punishment of death, is pregnant, the sheriff of the county where the conviction took place must impanel a jury of six physicians to inquire into her pregnancy. Sections 497 and 498 of this Code apply to the proceedings upon the inquisition, except that the sheriff may, in his discretion, require one or more of the physicians composing the jury to attend from an adjoining county. A physician, acting as a juror upon such an inquisition, need not be qualified to serve as a juror in a court of record.

§ 501. **Inquisition ; suspension of execution.**—The inquisition of the jury must be signed by the jurors and the sheriff. If it is found by the inquisition that the defendant is quick with child, the sheriff must suspend the execution of the warrant directing her execution, until he receives a warrant from the governor, directing that the convict be executed.

§ 502. **Sheriff to transmit inquisition to governor ; governor's duty.**—The sheriff must immediately transmit the inquisition to the governor, who, as soon as he is satisfied that the defendant is no longer quick with child, may issue his warrant, appointing a time and place for her execution, pursuant to her sentence, or may commute her punishment to imprisonment for life.

§ 503. **When day of execution passed, etc.**—Whenever, for any reason other than insanity or pregnancy, a defendant sentenced to the punishment of death has not been executed pursuant to the sentence, at the time specified thereby, and the sentence or judgment inflicting the punishment stands in full force, the court of appeals or a judge thereof or the supreme court or a justice thereof, upon application by the attorney-general or of the district attorney of the county where the conviction was had, must make an order directed to the agent and warden or other officer in whose custody said defendant may be, commanding him to bring the convict before the court of appeals or a term of the appellate division of the supreme court in the department, or a term of the supreme court in the county where the conviction was had. If the

defendant be at large, a warrant may be issued by the court of appeals or a judge thereof, or by the supreme court or a justice thereof, directing any sheriff or other officer to bring the defendant before the court of appeals or a term of the appellate division of the supreme court thereof, or before a term of the supreme court in that county.

Am'd by chap. 880 of 1895. In effect January 1, 1895.

Amended by chap. 493 of 1887.

This amendment inserted twice in the original section the words "the court of appeals or a judge thereof, or," and "the court of appeals, or."

Amended by chap. 489 of 1888.

This amendment substituted in the section, as amended in 1887, the words "agent and warden or other officer in whose custody said defendant may be," for the word "sheriff."

See notes under section 491, *ante*.

See notes under section 549, *post*.

This and the following section were intended to enact a general rule to prevent a failure in carrying out the sentence of the court in capital cases, where the day of execution has for any reason whatever passed. *People v. Lyons*, 17 St. Rep., 769; 6 N. Y. Cr., 134; 2 N. Y. Supp., 605, 606.

The provisions of this and the next section apply only to cases where the application for the re-sentencing of the prisoners is made by the attorney general or district attorney. *Id*.

This section requires the appellate court to correct an erroneous judgment, but makes no provision for remitting the case to the trial court. *People v. Griffin*, 15 W. Dig., 294. The appellate court is required to pass the proper sentence. *Id*.

**§ 504. Court to inquire, and may issue warrant for execution. Duty of agent and warden.**—Upon the defendant being brought before the court, it must inquire into the circumstances, and if no legal reason exists against the execution of the sentence, it must issue its warrant to the agent and warden of the state prison mentioned in the original warrant and sentence, under the hands of the judge or judges, or a majority of them, of whom the judge presiding must be one, commanding the said agent and warden to do execution of the sentence during the week appointed therein. The warrant must be obeyed by the agent and warden accordingly. The time of the execution within said week shall be left to the discretion of the agent and warden, to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided.

Amended by chap. 489 of 1888.

This amendment substituted the agent or warden of the state prison for the sheriff, and added the last part of the present section.

See notes under the preceding section.

See notes under section 491, *ante*.

**§ 505. Death penalty, infliction by current of electricity.**—The punishment of death must in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

Amended by chap. 489 of 1888.

This amendment changed the mode of inflicting the death penalty from hanging to current of electricity.

See notes under section 491, *ante*.

**Constitutional.**—The provisions of chap. 489 of 1888 are not, upon their face, repugnant to the state constitution. *People ex rel. Kemmler v. Durston*, 27 St. Rep., 967 ; 55 Hun, 65 ; 7 N. Y. Cr., 864 ; 7 N. Y. Supp., 813 ; aff'g 7 N. Y. Cr., 355 ; and aff'd 30 St. Rep., 203 ; 119 N. Y., 575.

**Effect of amendment.**—Chap. 489 of 1888 amended the Code of Criminal Procedure in respect to the time, mode and place of inflicting the death penalty. *Id.*

**Warrant.**—A warrant which directs that execution be done by putting defendant to death in the mode, manner and way, and at the place by law prescribed and provided, is sufficient. *McElvaine v. Brush*, 8 N. Y. Cr., 306.

§ 506. **Punishment, where inflicted.**—The punishment of death must be inflicted within the walls of the state prison designated in the warrant, or within the yard or inclosure adjoining thereto.

Amended by chap. 489 of 1889.

This amendment changed the place of punishment from county jail to state prison.

See notes under section 491, *ante*.

§ 507. **Executions, who to be present at post-mortem examination. Disposition of body. Religious services, provision as to. Misdemeanor.**—It is the duty of the agent and warden to be present at the execution, and to invite the presence, by at least three days' previous notice, of a justice of the supreme court, the district attorney, and the sheriff of the county where the conviction was had, together with two physicians and twelve reputable citizens of full age, to be selected by said agent and warden. Such agent and warden must at the request of the criminal, permit such ministers of the gospel, priests or clergymen of any religious denomination, not exceeding two, to be present at the execution ; and in addition to the persons designated above, he shall also appoint seven assistants or deputy sheriffs who shall attend the execution. He shall permit no other person to be present at such execution except those designated in this section. Immediately after the execution a post-mortem examination of the body of the convict shall be made by the physicians present at the execution, and their report in writing stating the nature of the examination, so made by them, shall be annexed to the certificate hereinafter mentioned and filed therewith. After such post-mortem examination, the body, unless claimed by some relative or relatives of the person so executed, shall be interred in the graveyard or cemetery attached to the prison, with a sufficient quantity of quick-lime to consume such body without delay ; and no religious or other services shall be held over the remains after such execution, except within the walls of the prison where said execution took place, and only in the presence of the officers of said prison, the person conducting said services, and the immediate family and relatives of said deceased prisoner. Any person who shall violate or omit to



comply with any provision of this section shall be guilty of a misdemeanor.

Amended by chap. 81 of 1887.

This amendment substituted for what came, in the original section, after the provision for the presence of the relatives, a provision for the attendance of seven assistants or deputy sheriffs, etc.

Am'd by chap. 489 of 1888.

This amendment substituted the agent and warden for the sheriff, and added provisions for post-mortem examination, disposition of body, religious services and newspaper account of execution.

Am'd by chap. 16 of 1892.

This amendment made the appointment of seven assistants or deputy sheriffs imperative, and omitted the provision as to newspaper account of execution.

See notes under section 491, *ante*.

**§ 508. Certificate as to execution and post-mortem ; how filed.—**

The agent and warden attending the execution must prepare and sign a certificate, setting forth the time and place thereof, and that the convict was then and there executed, in conformity to the sentence of the court and the provisions of this Code, and must procure such certificate to be signed by all the persons present and witnessing the execution. He must cause the certificate, together with the certificate of the post-mortem examination mentioned in the preceding section, and annexed thereto, to be filed within ten days after the execution, in the office of the clerk of the county in which the conviction was had.

Amended by chap. 489 of 1888.

This amendment substituted the agent and warden for the sheriff, required the certificate of execution to be signed by all the persons present and witnessing the execution instead of certain named officers and persons, and the certificate of the post-mortem examination to be filed.

See notes under section 491, *ante*.

**§ 509. Principal keeper of state prison, when to execute warrant.—**In case of the disability, from illness or other sufficient cause, of the agent and warden to whom the death warrant is directed, to be present and execute said warrant, it shall be the duty of the principal keeper of said prison, or such officer of said prison as may be designated by the superintendent of state prisons, to execute the said warrant, and to perform all the other duties by this act imposed upon said agent and warden.

Amended by chap. 489 of 1888.

This amendment virtually repealed the original section requiring the warrant, in a certain case, to be executed by the sheriff of an adjoining county, and substituted the present section.

See notes under section 491, *ante*.

[§ 10. Nothing contained in any provision of this act applies to a crime committed at any time before the day when this act takes effect. Such crime must be punished according to the provisions of law existing when it is committed, in the same manner as if this act had not been passed ; and the provisions of law for the infliction of the penalty of death upon convicted criminals, in existence on the day prior to the passage of this



act, are continued in existence and applicable to all crimes punishable by death, which have been or may be committed before the time when this act takes effect. A crime punishable by death committed after the beginning of the day when this act takes effect, must be punished according to the provisions of this act, and not otherwise.

§ 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

§ 12. This act shall take effect on the first day of January one thousand eight hundred and eighty-nine, and shall apply to all convictions for crimes punishable by death, committed on or after that date.]

These sections formed part of the amendment of 1888 to the Code sections relative to the death penalty, and provided for the time of its operation, and the extent of its repealing power.

## CHAPTER II.

### SECOND OFFENSES, HABITUAL CRIMINALS AND SPECIAL PENAL DISCIPLINE.

SECTION 510. When convict may be adjudged an habitual criminal.

511. Judgment accordingly, how entered.

512. Persons so adjudged when liable to arrest and punishment.

513. Id.; evidence of character, etc.

514. Id.; always liable to search, etc.

§ 510. When convict may be adjudged an habitual criminal.—When a person is hereafter convicted of a felony, who has been before that conviction, convicted in this state of any other crime, he may be adjudged by the court in addition to other punishment inflicted upon him, to be an habitual criminal. A person convicted of a misdemeanor, who has been already five times convicted in this state of a misdemeanor, may be adjudged by the court in addition to, or instead of, other punishment, to be an habitual criminal.

See sections 690–692 of Penal Code.

The act of 1873, called “The Habitual Criminal Act,” was constitutional *People v. McCarthy*, 45 How., 97.

§ 511. Judgment accordingly, how entered, etc.—The judgment specified in the last section must be entered in a separate book kept for that purpose. A copy of the entry, duly certified by the clerk of the court is proof of the judgment, and a copy so certified must be forthwith transmitted to the police department of each city, and to the district attorney of each county in the state.

§ 512. Persons so adjudged when liable to arrest and punishment.—A person who has been adjudged an habitual criminal is liable to arrest summarily with or without warrant, and to punishment as a disorderly person, when he is found without being able to account therefor, to the satisfaction of the court or magistrate, either,

In possession of any deadly or dangerous weapon, or of tool, instrument or material, adapted to, or used by criminal, for, the commission of crime, or

In any place or situation, under circumstances giving reasonable ground to believe that he is intending or waiting the opportunity to commit some crime.

subd. 9 of section 899, *post*.

513. *Id.*; evidence of character on subsequent trial.—A person who, having been adjudged an habitual criminal, is charged with a crime, committed thereafter, may be described in the complaint, warrant or indictment therefor, as an habitual criminal; and, upon proof that he has been adjudged to be such, the prosecution may introduce, upon the trial or examination, evidence as to his previous character, in the same manner and to the same extent as if he himself had first given evidence of his character and put the same in issue.

514. *Id.*; always liable to search, etc.—The person and the premises of every one who has been convicted and adjudged an habitual criminal shall be liable at all times to search and examination by any magistrate, sheriff, constable, or other officer, with or without warrant.

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## TITLE XI.

### OF APPEALS.

CHAPTER I. Appeals, when allowed, and how taken.

II. Dismissing an appeal, for irregularity.

III. Argument of the appeal.

IV. Judgment upon appeal.

### CHAPTER I.

#### APPEALS, WHEN ALLOWED, AND HOW TAKEN.

515. Writs of error and of *certiorari* abolished, etc.

516. Parties, how designated on appeal.

517. Appeals in cases of death penalty, direct to court of appeals.

518. In what cases, by the people.

519. Appeal to the court of appeals.

520. Appeal, a matter of right.

521. Time of appeal.

522–525. Appeal how taken.

526. Appeal by the people, not to stay or affect the judgment until reversed.

527. Stay of proceedings on appeal, etc.

528. Stay upon appeal to court of appeals, etc.

529. Certificate of stay not to be granted, but on notice to district attorney.

530. Effect of the stay.

531. Same.

532. Transmitting the papers to the appellate court.

§ 515. **Writs of error and certiorari abolished, etc.**—Writs of error and of *certiorari* in criminal actions and proceedings and special proceedings of a criminal nature, as they have heretofore existed, are abolished; and hereafter the only mode of reviewing a judgment or order in a criminal action or proceeding, or special proceeding of a criminal nature, is by appeal.

Amended by chap. 372 of 1884.

This amendment inserted twice, in the original section, the words "and proceedings and special proceedings of a criminal nature."

See notes under section 962, *post*.

The case of *People v. Bork*, 31 Hun, 360; 2 N. Y. Cr., 56, was reversed in 96 N. Y., 188; 2 N. Y. Cr., 177.

**Effect of passage of Civil Code.**—Chapter 12 of the Code of Civil Procedure does not affect the statutes remaining unrepealed after the first day of September, 1877, touching the review of proceedings in a criminal cause. Section 3347, subd. 9 of Code, Civ. Pro.

**Abolished.**—The writ of *certiorari* to review in criminal cases has been abolished by this section, and the only way of reviewing is by appeal. *People ex rel. Reavey v. Walsh*, 5 N. Y. Cr., 527.

By the adoption of the Code of Criminal Procedure, writs of error and of *certiorari* in criminal actions were abolished, and thereafter the only mode of reviewing a judgment or order in a criminal action was by appeal. *People v. Palmer*, 15 St. Rep., 78; 109 N. Y., 418.

All the previous provisions for review have been abolished by this section and now the only mode of reviewing a judgment or order in a criminal action is by appeal. *People v. Dempsey*, 31 Hun, 527; 2 N. Y. Cr., 121.

**Appeal.**—An appeal under the Code of Criminal Procedure is a substitute for a writ of error under the former practice. *People v. Bork*, 96 N. Y., 188, 200.

There is no precedent for an allowance of an appeal in criminal cases outside and independent of the statute. *People v. Dempsey*, 31 Hun, 528; 66 How., 376.

The right of appeal in criminal cases is statutory only, and, in the absence of a statute authorizing an appeal in a given case, no appeal can be taken. *People v. Trezza*, 40 St. Rep., 482; 128 N. Y., 532.

When and on what grounds appeals shall be allowed, are questions for the legislature. *People v. Petrea*, 30 Hun, 102.

A conviction after the passage of the Code of Criminal Procedure, upon an indictment theretofore found, must be reviewed by appeal and not by writ of error. *McKeon v. People*, 1 N. Y. Cr., 456; 16 W. Dig., 347.

The effect of the defendant's appeal is merely to continue the trial under the indictment in the appellate court. *People v. Palmer*, 15 St. Rep., 78; 109 N. Y., 419.

**When writ of error proper.**—There is doubt whether a writ of error is not the proper proceeding where the case was pending when the Code was passed. *People v. Bork*, 96 N. Y., 188, 200.

Where the indictment was found and the proceedings were had prior to September 1, 1881, all further proceedings in the case must be conducted as though the Code had not been passed. *Willett v. People*, 27 Hun, 469, 470.

The review in such cases must be made under, and by virtue of a writ of error. *Id.*

Whether an indictment was found by a properly constituted grand jury, and whether the court of general sessions had jurisdiction over the offense, cannot be raised by a writ of *certiorari*. *People ex rel. Reavey v. Walsh*, 5 N. Y. Cr. 527.

**Habeas corpus.**—A prisoner in custody under a void sentence upon a valid judgment of conviction, should not be discharged on *habeas corpus*, but should be remanded to be sentenced according to law. *People ex rel. Devoe v. Kelly*, 2 N. Y. Cr., 430; 32 Hun, 538.

He should appeal and have his sentence corrected, if it is erroneous. *Id.*

Where the commitment shows upon its face that it was issued to enforce a judgment which the court not only had no power to render, but was ac-

tually prohibited from rendering, the defendant will not be obliged to appeal, but may be released on *habeas corpus*. *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr. 440.

There is an obvious distinction between this and the case of *People ex rel. Devoe v. Kelly*, *id.*, 428.

**Before amendment of 1884.**—Before the amendment of 1884, it was held that no appeal from a judgment rendered by a police justice would lie to the court of sessions. *People v. Trumble*, 1 N. Y. Cr., 443.

The holding, in *Matter of Killoran v. Barton*, 26 Hun, 650, that this section applied only to criminal actions, was made under the original section as it stood prior to the amendment.

So, it was held that this section did not abolish writs of error and *certiorari* as to special proceedings of a criminal nature, only as to criminal actions. *People ex rel. Fuller v. Carney*, 1 N. Y. Cr., 270.

The case of *People ex rel. Scherer v. Walsh*, 33 Hun, 345 ; 2 N. Y. Cr., 326 ; 67 How., 484, was decided in September, 1884, but it does not appear that the attention of the court was called to the amendment of that year to this section.

Before the amendment of 1884 to this section, *certiorari* was the proper mode of reviewing the decision of a magistrate in a proceeding against a disorderly person for abandoning his wife, under section 899 of this Code. *People ex rel. Sherrer v. Walsh*, 67 How., 484.

Whether an appeal is proper from an order punishing a disobedience of an order of a criminal court in a criminal action, was deemed questionable in *People ex rel. Negus v. Dwyer*, 90 N. Y., 402. But this case was decided prior to the amendment of 1884.

The case of *People v. Burleigh*, 1 N. Y. Cr., 447, was decided before the amendment of 1884.

**Amendment of 1884.**—The amendment of 1884 to this section gave the right of appeal in special proceedings of a criminal nature. *Matter of Tillotson v. Smith*, 12 St. Rep., 332.

The amendment of 1884 extended the provisions of this section to abolishing writs of error and *certiorari* in special proceedings of a criminal nature. *People ex rel. Guenther v. Murray*, 41 St. Rep., 301 ; 62 Hun, 30 ; 16 N. Y. Supp., 325.

Since the amendment of 1884 to this section, an appeal is the proper and the only method by which special proceedings of a criminal nature can be reviewed. *People ex rel. Vitan v. Vitan*, 20 Abb. N. C., 303 ; 8 N. Y. Cr., 25 ; 10 N. Y. Supp., 910 ; *People ex rel. Wright v. Ontario Co. Sessions*, 9 St. Rep., 607 ; 45 Hun, 54.

By the amendment made to this section, and section 749, *post*, it was the intention of the legislature to give a right of appeal from the lower criminal court directly to the courts of sessions of the county. *People ex rel. Com'rs, etc., v. Glaze*, 48 St. Rep., 811 ; 65 Hun, 560 ; 20 N. Y. Supp., 577.

Since the amendment of 1884 to the section, orders of the general sessions, made in bastardy proceedings, can be reviewed only on an appeal. *People ex rel. Wright v. Court, etc.*, 9 St. Rep., 607 ; 45 Hun, 55.

The conviction of a prisoner as a disorderly person before a committing magistrate cannot be reviewed by *certiorari* ; the remedy in such case is by appeal. *People ex rel. Guenther v. Murray*, 41 St. Rep., 301 ; 62 Hun, 30 ; 16 N. Y. Supp., 325.

See *People v. Havens*, 3 N. Y. Cr., 287 ; 21 W. Dig., 364.

§ 516. **Parties, how designated on appeal.**—The party appealing is known as the appellant, and the adverse party as the respondent. But the title of the action is not changed, in consequence of the appeal.

§ 517. **Appeals in case of death penalty, direct to court of appeals.**—An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death the appeal must be taken direct to the court of appeals, and, upon the appeal, any

actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred and eighty-five, may be reviewed.

Amended by chap. 493 of 1887.

This amendment introduced into the original section the words "except that when the judgment is of death, the appeal must be taken direct to the court of appeals."

The case of *People v. Bork*, 31 Hun, 360; 2 N. Y. Cr., 78, was reversed in 96 N. Y., 188; 2 N. Y. Cr., 177.

**Appeal.**—This section declares in what cases appeals may be taken by the defendant in criminal cases. *People v. Hovey*, 30 Hun, 357; 1 N. Y. Cr., 331.

This section prescribes in what cases an appeal may be taken to the general term of the Supreme Court from a judgment on conviction after indictment. *People v. Havens*, 3 N. Y. Cr., 287; 21 W. Dig., 368.

This section only gives the right of appeal after judgment. *People v. Bork*, 1 N. Y. Cr., 393.

No review can be had after conviction and before sentence. *Id.*

The appeal is to be heard upon the judgment roll. *People v. Petmecky*, 2 N. Y. Cr., 458.

An appeal, under this section, need not be from a judgment which has been entered after the denial of a motion in arrest of judgment, or after the refusal to grant a new trial. *People v. Joyce*, 4 N. Y. Cr., 348.

It is only required to be from a judgment on a conviction after indictment. *Id.*

This section does not limit the right to review to cases only, where a jury has actually rendered a verdict. *Id.*

The appellate jurisdiction of the supreme court in criminal cases is altogether statutory, and not a part of the inherent general jurisdiction of this court. *People v. Lyons*, 17 St. Rep., 769; 6 N. Y. Cr., 137.

**Intermediate order.**—To authorize a review of intermediate orders and proceedings in connection with an appeal from the judgment, they must be embodied in the judgment-roll. *People v. Trezza*, 40 St. Rep., 482; 128 N. Y., 532. See 12 N. Y. Supp., 513.

This section does not authorize an appeal in piecemeal, first from a judgment and, after it is affirmed, from any subsequent order by a separate and independent appeal. *Ostrander v. People*, 29 Hun, 513, 519.

Upon an appeal from the judgment, the court may review an intermediate order or proceeding, forming a part of the judgment-roll. *People v. Joyce*, 4 N. Y. Cr., 344, 348; *People v. Osterhout*, 34 Hun, 262.

On an appeal from a judgment of conviction, entered upon a plea of guilty, the court may review an order denying defendant's motion to withdraw such plea and substitute therefor the plea of not guilty. *People v. Joyce*, 4 N. Y. Cr., 341.

An order denying a motion in arrest of judgment is an intermediate order within the provisions of this section, from which an appeal can be taken. *People v. Bork*, 1 N. Y. Cr., 395.

A defendant cannot maintain an appeal solely from the order denying his motion to dismiss an indictment under section 313, *ante*. *People v. Havens*, 3 N. Y. Cr., 287; 21 W. Dig., 365.

Consent does not confer jurisdiction to hear an appeal. *Id.*; *People v. Beman*, 22 Hun, 283.

An appeal from the judgment, upon a criminal trial, brings up for review the denial of a motion for a new trial or in arrest of judgment. *People v. Noonan*, 38 St. Rep., 857.

The specification, in the notice of appeal, of the order denying the defendant's motion for a new trial is unnecessary. *People v. Schad*, 35 St. Rep., 148; 58 Hun, 572; 12 N. Y. Supp., 695.

This section provides that, upon an appeal from the judgment, the decision of the court on a motion for a new trial may be reviewed. *Id.*

The legislature, by prescribing the mode of review of intermediate orders in connection with a review of the judgment on conviction, has excluded other appeals from such orders. *People v. Havens*, 3 N. Y. Cr., 287; 21 W. Dig., 365.

an appeal, by the defendant, from the judgment brings before the general term for review the decision of a motion for a new trial, as well as the proceedings upon the trial. *People v. Mangano*, 29 Hun, 263.

It was held, in *People v. Petmecky*, 2 N. Y., 450, that, where a juror in a criminal case, after an examination as to his fitness, is peremptorily challenged and does not sit, the question whether there was error in said examination is not brought up by an appeal from the judgment. But this point was ruled by *People v. McQuade*, 18 St. Rep., 288; 6 N. Y. Cr., 34; 110 N. Y., 21 Abb. N. C., 418.

**Demurrer.**—An appeal from a judgment of the court of sessions, in a case sent there for trial, brings up for review the decision of the over and under court in overruling a demurrer to the indictment. *People v. Callahan*, 29 Hun, 582; 17 W. Dig., 192.

A decision, overruling a demurrer interposed to an indictment and directing a judgment for the people, cannot be reviewed before a judgment has been entered on the decision; *People v. Beman*, 22 Hun, 283; even though counsel for both parties agree that it may be so reviewed. *Id.*

A mode seems to be provided for an appeal by the defendant from a judgment adverse to him upon a demurrer to the indictment, except under section 485. *People v. Callahan*, 29 Hun, 580; 17 W. Dig., 192.

**Proceedings in judgment-roll.**—This section gives to the defendant the right of appeal from the judgment, including the proceedings forming part of the judgment-roll. *People v. Beckwith*, 3 St. Rep., 759; 42 Hun, 368; 5 N. Y. Cr., 34.

The Code has made no statutory provision for an appeal from an order denying a motion for a new trial in any case where the motion is made after a judgment in the action, unless the affidavits and order are embodied in the judgment-roll. *People v. Hovey*, 30 Hun, 357; 1 N. Y. Cr., 331.

A provision is made for the review of motions for a new trial when they are embraced in the judgment-roll as provided by section 485, *ante*. *Id.*

A decision of a challenge to a juror, who participated in the verdict, may be reviewed on exceptions as of course. *People v. McQuade*, 18 St. Rep., 288; 6 N. Y. Cr., 34; 110 N. Y., 284; 2 Abb. N. C., 448. But, if the defendant desires a review of his exceptions where the challenges are sustained, he must incorporate them in a bill of exceptions, to be settled and annexed to the judgment-roll. *Id.*

There is no statute authorizing an appeal from an order denying a new trial made after the roll is made up and the final affirmance of the judgment. *People v. Trezza*, 40 St. Rep., 482; 128 N. Y., 533; 8 N. Y. Cr., 295.

**Death judgment.**—When the judgment is of death, the appeal must be taken directly to the court of appeals. *People v. Lyons*, 17 St. Rep., 766; 6 N. Y., 137; 2 N. Y. Supp., 606.

The amendment of 1887 to this section, allowing a direct appeal to the court of appeals in capital cases, is constitutional. *Id.*

The amendment of 1887 to this section provided that, when the judgment is of death, the appeal must be taken directly to the court of appeals. *People v. Trezza*, 40 St. Rep., 482; 128 N. Y., 532.

The court is, in such case, authorized to review any intermediate order or proceeding forming part of the judgment-roll, the same as the supreme court was authorized to do by the original section. *Id.*

**When appeal does not lie.**—The Code has not provided for any review of the order setting aside, or refusing to set aside, an indictment. *People v. Petrea*, 30 Hun, 102.

An appeal lies, *it seems*, from an order denying a motion to set aside a judgment, etc., made at over and under court, when the defendant appears for the purpose of having a day fixed for the execution of the sentence, or from an appeal from the judgment of conviction and affirmance by the court at the final term. *Ostrander v. People*, 29 Hun, 513; 1 N. Y. Cr., 283; 17 W. Dig., 375.

In *People v. Petmecky*, 2 N. Y. Cr., 450, it was held that, where a juror in a criminal case, after an examination as to his fitness, is peremptorily challenged and does not sit, the question whether there was error in said examination is not brought up by an appeal from the judgment.

An appeal from a judgment of conviction on the ground that the court, which passed the sentence, was improperly constituted, does not lie, when



no such objection or exception was taken by the defendant at the time of such sentence, provided an opportunity to do so was given. *People v. Bork*, 1 N. Y. Cr., 393.

After an affirmance of the judgment upon a writ of error or appeal to review the conviction of murder, no appeal lies from an order denying an application to vacate and annul the trial, conviction and all subsequent proceedings. *Ostrander v. People*, 29 Hun, 513, 519.

No appeal lies, under this section, to the general term to review a judgment of the county court, dismissing an appeal from a judgment for costs, rendered by the special sessions against a complainant in a prosecution for petit larceny. *People v. Carr*, 28 St. Rep., 287 ; 54 Hun, 444.

No appeal will lie before the filing of a judgment-roll on conviction under section 485, *ante*, from an order denying a motion to set aside an indictment under subd. 2 of section 313, *ante*. *People v. Havens*, 3 N. Y. Cr., 286. Even though both parties consent to the hearing of such appeal. *Id.*

See *People v. Lippy*, 40 St. Rep., 410 ; 128 N. Y., 629 ; *People v. Wilson*, 15 St. Rep., 503 ; 109 *id.*, 349 ; *People v. Noonan*, 14 N. Y. Supp., 521.

§ 518. **In what cases by the people.**—An appeal to the supreme court may be taken by the people in the following cases and no other :

1. Upon a judgment for the defendant, on a demurrer to the indictment ;

2. Upon an order of the court, arresting the judgment.

Amended by chap. 360 of 1882.

This amendment changed the word “ to ” in subd. 2 of the original to the word “ of,” in the present section.

**Appeal by people.**—Formerly the people had no power to review an adverse decision. *People v. Dempsey*, 2 N. Y. Cr., 121 ; 31 Hun, 528 ; 66 How., 376 ; *People v. Corning*, 2 N. Y., 9 ; *People v. Comstock*, 8 Wend., 549. In 1852, the people were given the right to review a judgment in favor of any defendant, except in case of acquittal by a jury. *People v. Dempsey*, *ante*. In 1879 and 1880, such right of review was further extended in favor of the people. *Id.* But a writ of error at common law would not lie on behalf of the people after a judgment of acquittal. *Id.* ; *People v. Corning*, *ante* ; *People v. Bork*, 78 N. Y., 346 ; nor from an order quashing an indictment. *People v. Dempsey*, *ante* ; *People v. Stone*, 9 Wend., 191.

The right of the people to take an appeal in a criminal case is wholly dependent upon the statute. *People v. Snyder*, 7 St. Rep., 842 ; 44 Hun, 193.

This section declares in what cases the people may appeal. *People v. Beckwith*, 3 St. Rep., 759 ; 42 Hun, 367 ; 5 N. Y. Cr., 233.

But two cases are specified, and both are questions of law. *Id.*

In no other than the two cases specified in this section, has the right of the people to appeal been given. *People v. Dempsey*, 31 Hun, 528 ; 66 How., 376 ; 2 N. Y. Cr., 121. *People v. Snyder*, 7 St. Rep., 842 ; 44 Hun, 193.

**Subd. 1.**—An appeal to the general term may be taken by the people from a judgment for the defendant on a demurrer to the indictment. *People v. Callahan*, 29 Hun, 581 ; 17 W. Dig., 192.

**No appeal.**—No appeal lies by the people from an order of the oyer and terminer setting aside a panel of grand jurors, discharging them from service and quashing an indictment found by them. *People v. Dempsey*, 31 Hun, 527 ; 66 How., 376 ; 2 N. Y. Cr., 121.

The people cannot appeal from an order granting a new trial to a defendant, after his conviction, upon the ground of newly discovered evidence. *People v. Beckwith*, 3 St. Rep., 759 ; 42 Hun, 367 ; 5 N. Y. Cr., 233.

**Subd. 2.**—The second subdivision of this section refers solely to motions in arrest of judgment. *Id.*

§ 519. **Appeal to the court of appeals.**—An appeal may be taken from a judgment or order of the appellate division of the supreme court to the court of appeals in the following cases and no other :



1. From a judgment affirming or reversing a judgment of conviction;

2. From a judgment affirming or reversing a judgment for the defendant on a demurrer to the indictment, or from an order affirming, vacating, or reversing an order of the court arresting judgment;

3. From a final determination affecting a substantial right of the defendant.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 189 of 1892.

This amendment introduced into the first clause of the original section the words "or order"; into subd. 2. the words "from an order affirming, vacating or reversing"; and changed in subd. 3 "the" into "a" and "a" into "the."

**Appealable.**—The people may appeal to the court of appeals, under this section, from a judgment of the general term, reversing a judgment of conviction. *People v. Boas*, 17 W. Dig., 127; 92 N. Y., 560; 1 N. Y. Cr., 287. But such an appeal brings up for review questions of law only. *Id.*

An appeal from the judgment of the general term, affirming the conviction, brings before the court of appeals only questions of law raised by exceptions, taken upon the trial, to the rulings of the trial judge. *People v. McCormack*, 48 St. Rep., 566; 135 N. Y., 663.

**Who to appeal.**—Where, upon *habeas corpus* before a justice of the supreme court, the relator was remanded to custody, and the general term, on *certiorari* directed to said justice, reversed the order and directed the discharge of relator, the said justice was held not to be a proper person to take an appeal to the court of appeals. *People ex rel. Breslin v. Lawrence*, 13 St. Rep., 108; 107 N. Y., 609.

The appeal, *it seems*, in such case should be taken in the name of the people by the attorney-general or the district attorney. *Id.*

**Non-appealable.**—An order of the general term, granting or refusing a new trial, is not appealable. *People v. Boas*, 17 W. Dig., 127; 92 N. Y., 560; 1 N. Y. Cr., 287.

A review of questions of law in a criminal action may not be had in the court of appeals from an order of the general term, reversing a judgment of conviction and granting a new trial, where questions of fact, arising upon conflicting evidence, were tried and determined by the jury, unless the order shows that the general term considered the case upon the facts, and found no reason for granting a new trial thereon, and that the same was granted upon questions of law exclusively. *People v. Conroy*, 97 N. Y., 62.

Where an order of the general term, reversing a judgment of conviction in a criminal action, omits to show that the court exercised its discretion and refused a new trial upon the facts and granted it only for errors of law, it is not reviewable in the court of appeals. *People v. Poucher*, 99 N. Y., 610; 21 W. Dig., 410.

**Preferred.**—Such appeals are preferred. Ct. App. Rule, 11. They are first in order. *Id.*, 20.

§ 520. **Appeal, a matter of right.**—All appeals, provided for in this chapter, may be taken as a matter of right.

An appeal from the judgment of conviction may be taken by the defendant as a matter of right. *People v. Palmer*, 15 St. Rep., 78; 109 N. Y., 418, 419.

§ 521. **Time for appeal.**—An appeal must be taken within one year after the judgment was rendered or the order entered.

Amended by chap. 189 of 1892.

This amendment added to the original section the words "or the order entered."

§ 522. **Appeal, how taken.**—An appeal must be taken, by the service of a notice in writing on the clerk with whom the judg-

ment-roll is filed, stating that the appellant appeals from the judgment.

§ 523. **Appeal, how taken.**—If the appeal be taken by the defendant a similar notice must be served on the district attorney of the county in which the original judgment was rendered.

§ 524. **Appeal, how taken.**—If it be taken by the people, a similar notice must be served on the defendant, if he be a resident of, or imprisoned in the city or county; or if not, on the counsel, if any, who appeared for him on the trial, if he reside or transact his business in the county. If the service cannot, after due diligence, be made, the appellate court, upon proof thereof, may make an order for the publication of the notice, in such newspaper, and for such time as it deems proper.

The provisions of this and section 526 have application only to cases in which appeals may, pursuant to other provisions of the Code, be taken to the supreme court, and have no reference to cases arising in courts of special sessions. *People v. Snyder*, 7 St. Rep., 842 ; 44 Hun, 193.

§ 525. **Appeal, how taken.**—At the expiration of the time appointed for the publication, on filing an affidavit of the publication, the appeal becomes perfected.

§ 526. **Appeal by the people, not to stay or affect the judgment until reversed.**—An appeal taken by the people, in no case stays or affects the operation of a judgment in favor of the defendant, until the judgment is reversed.

See *People v. Snyder*, 7 St. Rep., 842 ; 44 Hun, 193.

§ 527. **Stay of proceedings on appeal, etc.**—An appeal to the appellate division of the supreme court from a judgment of conviction, or other determination from which an appeal can be taken, stays the execution of the judgment or determination upon filing, with the notice of appeal, a certificate of the judge who presided at the trial, or of a justice of the supreme court, that, in his opinion, there is reasonable doubt whether the judgment should stand, but not otherwise. And the appellate court may order a new trial if it be satisfied that the verdict against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1882.

This amendment added to the original section all subsequent to the word "otherwise."

Am'd by chap. 493 of 1887.

This amendment eliminated from the section, as amended in 1882, the provision as to the appeal operating as a stay of execution when the judgment was of death.

The dictum, in *People v. Willett*, 3 N. Y. Cr., 54 ; 1 How. N. S., 197, was written before the amendment of 1887 to this section.

**Stay.**—There is no authority to grant a stay of proceedings after conviction of a capital offense except on appeal from the judgment. *Moett v. People*, 14 W. Dig., 125.

**Certificate.**—Every convicted person has an absolute right to appeal. *People v. Sharp*, 9 St. Rep., 157.

For this purpose he needs no certificate or consent, but his appeal will not

stay the execution of his sentence, except in the case of a sentence of death, unless he obtains a certificate of a justice of the supreme court. *Id.*

The certificate, mentioned in this section, can, in a proper case, be given in any case in which an appeal can be taken. *People v. Bork*, 1 N. Y. Cr., 395.

Under this section, a certificate of a supreme court justice that, in his opinion, there is reasonable doubt whether the judgment should stand, is essential to a stay. *People v. Sharp*, 9 St. Rep., 157.

The justice, to whom such application is made, is called upon to review the entire evidence, the charge of the trial court and the law of the whole case, so as to form an opinion whether the judgment should stand. *Id.*

To entitle the defendant to a certificate staying proceedings pending an appeal, it is not necessary that the justice, to whom the application is made, shall arrive at the positive conclusion that the trial court has erred; it is enough if he has reasonable doubt as to the correctness of the law laid down by the court. *People v. Emerson*, 20 St. Rep., 15; 6 N. Y. Cr., 157; 5 N. Y. Supp., 374. But the justice ought not to interfere and interpose a stay, if only a remote doubt exists in regard to the admission of some unimportant piece of evidence. *Id.*

Upon an application for a certificate under this section, it is not necessary to reach a conclusion as to whether the judgment would be affirmed or reversed upon a full consideration of the case and the bill of exceptions. *People v. Wentworth*, 3 N. Y. Cr., 113.

The pertinent inquiry is, was there anything done on the trial which raises a reasonable doubt whether the judgment should stand? *Id.*

A doubt whether a ruling of the court upon the trial was sufficiently broad to take from the jury the consideration of clearly incompetent evidence, constitutes such reasonable doubt as to whether the judgment should stand as to authorize a stay of the execution of the judgment. *Id.*

**Filing.**—If the certificate, specified in this section, is given, it may be filed with the notice of appeal. *Id.*

**Application.**—The powers, conferred by this section, were intended to be exercised by the supreme court alone, and not by the court of appeals. *People v. Donovan*, 3 How. N. S., 356.

The provision of this section refers only to appeals to the supreme court. *People v. Brooks*, 43 St. Rep., 298; 131 N. Y., 329; *People v. Hovey*, 92 N. Y., 554; 1 N. Y. Cr., 285; *People v. Boas*, 92 N. Y., 564; 1 N. Y. Cr., 290; *People v. Guidici*, 100 N. Y., 503; *People v. Donovan*, 101 N. Y., 632.

This section, as amended by chap. 360 of 1882, applies only to the supreme court. *People v. Donovan*, 101 N. Y., 632; 4 N. Y. Cr., 87; 23 W. Dig., 10.

Before the amendment of 1887 to section 528, *post*, the court of appeals had no authority, in any case, to review a judgment in a criminal action, unless exceptions had been regularly and properly taken to the rulings of the trial court. *Id.*

It is quite doubtful whether the provisions of this section apply to the court of appeals. *People v. McGloin*, 91 N. Y., 249; 1 N. Y. Cr., 154; 12 Abb. N. C., 172; 16 W. Dig., 255; *aff'g* 28 Hun, 150; 1 N. Y. Cr., 105; 16 W. Dig., 138.

This section does not apply to appeals to the court of appeals, but only to appeals to the supreme court. *People v. Hovey*, 92 N. Y., 557; 1 N. Y. Cr., 285; *People v. Boas*, 92 N. Y., 563; 1 N. Y. Cr., 289; 17 W. Dig., 98.

This section does not empower the court of appeals to consider errors upon criminal trials in the same manner as though an objection had been made on the trial. *People v. Guidici*, 100 N. Y., 503; 3 N. Y. Cr., 557; *People v. Hovey*, 92 N. Y., 554; 1 N. Y. Cr., 283; *People v. Boas*, 92 N. Y., 560; 1 N. Y. Cr., 287; *People v. D'Argencour*, 95 N. Y., 631; 2 N. Y. Cr., 267.

Errors upon a criminal trial can be made available in the court of appeals only by exceptions duly taken on the trial. *People v. Guidici*, 100 N. Y., 507; *People v. Thompson*, 41 *id.*, 6; *People v. Casey*, 72 *id.*, 399; *Connors v. People*, 50 *id.*, 240; *Brotherton v. People*, 75 *id.*, 159. This rule is not changed by the provisions of this section. *People v. Guidici*, *ante*; *People v. Hovey*, 92 N. Y., 554; 1 N. Y. Cr., 283; *People v. Boas*, 92 N. Y., 560; 1 N. Y. Cr., 287; *People v. D'Argencour*, 95 N. Y., 631; 2 N. Y. Ct., 267. Is not this true only in case of appeals from determinations of the general

term, and not where the appeal is directly to the court of appeals under section 517, *ante* ?

**Discretionary.**—The power conferred, by this section, upon the general term to grant a new trial, when the verdict is against the weight of evidence, or against law, or when justice requires a new trial, whether any exception shall, or shall not, be taken in the court below, is a discretionary one, and where the discretion has not been abused by the general term, its decision is not reviewable in the court of appeals. *People v. D'Argencour*, 95 N. Y., 631 ; 2 N. Y. Cr., 277.

The defendant, on an appeal from a conviction by a jury in a criminal case, is entitled to a review of the facts, and the exercise of the discretionary power of the general term. *People v. Stevens*, 5 St. Rep., 720; 104 N. Y., 667; 2 Silv. (Ct. App.), 329. Where the latter court puts its reversal in such case upon a question of law, the court of appeals will not review the order, but will remit the case to the general term to enable it to consider the questions of fact, and exercise its discretion. *Id.*

When, in the exercise of its discretion, the supreme court shall, under this section, refuse or grant a new trial, its determination is not reviewable in the court of appeals. *People v. Boas*, 92 N. Y., 563; 1 N. Y. Cr., 289.

**New trial without exceptions.**—The general term may order a new trial independent of the exceptions, if it is satisfied that the verdict is against the evidence or against law, or that justice requires a new trial. *People v. Petmecky*, 2 N. Y. Cr., 453.

A conviction will be set aside and a new trial granted for a misdirection of the trial judge, which probably had weight with the jury in their decision, though an exception has not been taken by defendant to such misdirection. *People v. Sweeney*, 4 N. Y. Cr., 286.

Under this section, an exception is not indispensably necessary, if the evidence can be seen to be of any material detriment to the defendant. *People v. Meyers*, 7 St. Rep., 221; 5 N. Y. Cr., 124.

It is the duty of the general term, under this section, to look into the proceedings upon the trial in order to discover whether any error has occurred, and, if such error is found, to award a new trial, whether any proper exception was, or was not, taken in the court below. *People v. Williams*, 29 Hun, 520; 1 N. Y. Cr., 336; 17 W. Dig., 356.

This section allows the general term to order a new trial, if, in any aspect of the case, error was committed in the progress of the trial. The narrow and technical rules in respect to the exactitude of exceptions were abrogated as to this class of cases. *People v. Druse*, 5 N. Y. Cr., 15; *People v. Williams*, 29 Hun, 525; 1 N. Y. Cr., 336; *People v. McGleoin*, 91 N. Y., 249; 1 N. Y. Cr., 154.

Where the appellate court can see that the defendant has been prejudiced by any intemperate language of the prosecuting attorney, either on the trial or in his argument to the jury, it has power, under this and the following section, to grant a new trial. *People v. Greenwall*, 26 St. Rep., 230; 115 N. Y., 527; 7 N. Y. Cr., 314. But to justify a reversal on such a ground, the court should be satisfied that justice requires it. *Id.*

The absence of an objection or exception in a criminal case does not deprive the defendant of the right to have errors in the judge's charge considered and acted upon by an appellate court. *People v. Webster*, 36 St. Rep., 837; 59 Hun, 402; 13 N. Y. Supp., 414.

A new trial was ordered, under this section, in *People v. Thornton*, 12 St. Rep., 743; 46 Hun, 643, where, on cross-examination of a witness for the people, questions as to admissions made by him affecting his credibility were not allowed.

The general term may order a new trial, if satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below. *People v. Zounek*, 49 St. Rep., 643; 20 N. Y. Supp., 756. But the determination by the jury of controverted questions of fact arising upon conflicting evidence will not be disturbed. *Id.*; *People v. Cignarale*, 16 St. Rep., 155; 110 N. Y., 26; *People v. Kelly*, 22 St. Rep., 969; 113 N. Y., 647; *People v. Stone*, 27 St. Rep., 823; 117 N. Y., 483; *People v. Trezza*, 36 St. Rep., 149; 125 N. Y., 740.

**Justice requires it.**—This section permits the ordering of a new trial,

whether an exception has, or has not, been taken, only where justice requires it. *People v. Osterhout*, 34 Hun, 262.

This section has application to cases where the appellate court becomes satisfied that injustice has been done. *People v. Huntington*, 17 St. Rep., 16; 1 N. Y. Supp., 527.

A new trial will not be granted for errors occurring upon a trial where the same are not raised by an exception, unless it is apparent that the defendant has been prejudiced and that justice demands that he be given a further hearing. *Id.*

If the exception taken fails to be sufficiently specific to present distinctly the question, the general term may and should grant a new trial, if it is apparent that the defendant may have been materially prejudiced by the error. *People v. Sullivan*, 4 N. Y. Cr., 198.

The general term held, in *People v. Newton*, 3 N. Y. Cr., 407, that the verdict was against the weight of evidence, and that justice required the direction of a new trial under this section, though no exceptions had been taken.

It is declared in this section that an appellate court may order a new trial satisfied that justice requires it whether any exception was, or was not, taken in the court below. *People v. Sheppard*, 9 St. Rep., 35; 5 N. Y. Cr., 38; 44 Hun, 566.

**When reversal.**—This section does not require the reversal of conviction and the ordering of a new trial for every error committed which would be available upon exception duly taken, but for such errors only as it can be seen may have prejudiced, and, in the judgment of the court, did prejudice, the defendant. *People v. Wileman*, 8 St. Rep., 300; 44 Hun, 189.

To grant a new trial upon either of the grounds alleged in this section, the case ought to be free from any reasonable doubt; and, consequently, if there is simply a balanced case, or one where the court might have come to a different conclusion upon the facts, the verdict, especially where it is satisfactory to the trial judge, manifested by a denial of a motion for a new trial on such grounds, should stand affirmed. *People v. Jones*, 3 N. Y. Cr., 54; 34 Hun, 620; 21 W. Dig., 111.

The case ought to be exceedingly clear to authorize the general term to grant a new trial upon the general ground that justice requires it. *Id.*

Under the new rule of review given by this section, it is not enough to justify interference with the verdict that the general term, on the case before it, can see that the evidence made a conflicting or doubtful case; but it must be quite apparent that the verdict is against the substantial and reponderating weight of evidence. *People v. McInerrey*, 4 St. Rep., 598; N. Y. Cr., 49.

See note in *People v. Kelly*, 2 Silv. (Ct. App.), 242.

*People v. Brooks*, 43 St. Rep., 294; 131 N. Y., 329; *People v. Beckwith*, 12 St. Rep., 795; 108 *id.*, 67, 76; 7 N. Y. Cr., 165; *People v. Izzo*, 39 St. Rep., 66; 14 N. Y. Supp., 907; *People v. Kurtz*, 6 N. Y. Supp., 394; *People v. Joyce*, 4 N. Y. Cr., 345.

**§ 528. \*Stay upon appeal to the court of appeals, etc:—**  
An appeal to the court of appeals, from a judgment of the appellate division of the supreme court, affirming a judgment of conviction, stays the execution of the judgment appealed from, upon filing, with the notice of appeal, a certificate of a judge of the court of appeals, or of a justice of the appellate division of the supreme court, that, in his opinion, there is reasonable doubt whether the judgment should stand, but not otherwise. When the judgment is of death, an appeal to the court of appeals stays the execution, of course, until the determination of the appeal. When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight



of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.

Am'd, ch. 427 of 1897.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1882.

This amendment added to original section the provision as to stay in case of death penalty.

Amended by chap. 493 of 1887.

This amendment added to the section, as amended in 1882, the provision empowering the court of appeals to order new trial in absence of exception.

See notes under the preceding section.

See note on the extent of review by the court of appeals under section 528 of the Criminal Code, in 2 Silv. (Ct. App.), 240.

The case of *People v. Dimick*, 3 St. Rep., 398; 41 Hun, 621; 5 N. Y. Cr., 187, was reversed in 11 St. Rep., 739; 107 N. Y., 13.

**Stay.**—An appeal to the court of appeals from a judgment of the general term affirming a conviction of murder stays only the execution and not the confinement. *People ex rel. Trezza v. Brush*, 39 St. Rep., 878; 60 Hun, 401; 8 N. Y. Cr., 293; 15 N. Y. Supp., 512, 513.

An appeal to the court of appeals from a conviction in a capital case, stays the judgment of death only, and not that part of the judgment providing for the custody of the defendant, between his removal to the state prison and his execution. *People v. Trezza*, 40 St. Rep., 484; 128 N. Y., 536; 8 N. Y. Cr., 299; 4 Silv. (Ct. App.), 357.

An appeal to the court of appeals from a judgment of the general term, sentencing a defendant for murder in the first degree, operates only as a stay of execution of the death penalty, and not of the confinement of the defendant in the penitentiary pending the appeal. *McElvaine v. Brush*, 8 N. Y. Cr., 305.

**Effect of amendment of 1887.**—This provision has very much enlarged the jurisdiction and the labors of the court of appeals and requires it to review the facts in every capital case, and to determine whether, upon all the evidence, there is, in its opinion, good and sufficient reason for setting aside the verdict of the jury and granting a new trial. *People v. Driscoll*, 12 St. Rep., 253; 107 N. Y., 417.

This section vests the court of appeals with power, in its discretion, to disregard the neglect or omission of the accused to take the customary objections and exceptions on a trial, and grant a new trial when such a course will be in furtherance of justice and conduce to the humane administration of the law. *Id.*

This discretionary power arises when, upon an examination of the whole case, it appears affirmatively that injustice has been done to the defendant in the result arrived at by the trial court. *Id.* The general rule seems to be to leave it discretionary with appellate courts, whether they will give effect to claims of error or illegality in particular cases, when the error is not pointed out on the trial and objections and exceptions taken thereto in the usual manner. *Id.*

**Application.**—This section refers exclusively to the court of appeals. *People v. Hovey*, 92 N. Y., 557; 1 N. Y. Cr., 285.

This section applies to an appeal to the courts of appeals taken after, though the appeal to the general term was taken before, the enactment of the amendment of 1887. *People v. Van Brunt*, 13 St. Rep., 670; 108 N. Y., 657; 1 Silv. (Ct. App.), 587; 8 N. Y. Cr., 229.

This section declares in what cases the certificate specified should be granted, and places the granting thereof upon the opinion of the officer, to whom application is made, that reasonable doubt exists whether the judgment should stand. *People v. Bragle*, 10 Abb. N. C., 301.

The court of appeals has no jurisdiction to grant a new trial in any case, save where the judgment is of death, unless exceptions, which present questions of law, appear in the record. *People v. Brooks*, 43 St. Rep., 298; 131 N. Y., 329.

Before the amendment of 1887 to this section, the court of appeals had no power to review the case upon the facts of a criminal trial in the absence of exceptions. *People v. Hovey*, 92 N. Y., 557; 1 N. Y. Cr., 285.

The jurisdiction of the court of appeals to review directly a judgment of

conviction of murder in the first degree rests upon this section, as amended by chap. 493 of 1887. *People v. Wood*, 36 St. Rep., 952 ; 126 N. Y., 253.

**Errors on exception.**—Errors upon criminal trials can be made available in the court of appeals by exception duly taken on the trial. *People v. Guidici*, 100 N. Y., 503 ; 5 N. Y. Cr., 557 ; *People v. Hovey*, 92 N. Y., 554 ; 1 N. Y. Cr., 283 ; *People v. Boas*, 92 N. Y., 560 ; 1 N. Y. Cr., 287 ; *People v. D'Argencour*, 95 N. Y., 631 ; 2 N. Y. Cr., 267 ; *People v. Thompson*, 41 N. Y., 6 ; *People v. Casey*, 72 id., 399 ; *Connors v. People*, 50 id., 240 ; *Brother-ton v. People*, 75 id., 159.

Where the general term has affirmed a conviction of murder, the only questions cognizable in the courts of appeals are those arising upon exceptions taken in the course of the proceedings. *People v. Druse*, 3 St. Rep., 617 ; 1 Silv. (Ct. App.), 182 ; 103 N. Y. 655 ; 5 N. Y. Cr., 24.

Under section 517, *ante*, the appeal by the defendant, where the judgment is of death, must be taken direct to the court of appeals. In consequence of this provision, there can be no appeal from a judgment of the general term affirming or reversing a judgment of conviction, under subd. 1 of section 519, *ante* ; and no question can arise in respect to the power of the court of appeals, upon such an appeal, under the last provision of this section. The people cannot take an appeal from such a judgment of the general term, as it is precluded from so doing in any case by the provisions of section 518, *ante*.

**Exercised under settled rules.**—The authority conferred by this section, is to be exercised under the restraint of settled rules. *People v. Tice*, 43 St. Rep., 576 ; 131 N. Y., 654 ; 4 Silv. (Ct. App.), 102.

This section does not confer upon the court of appeals power arbitrarily to grant a new trial whenever it thinks that justice requires it. Its jurisdiction in such case is to be exercised according to settled rules of law. *People v. Fish*, 34 St. Rep., 842 ; 125 N. Y., 136 ; 8 N. Y. Cr., 134. The determination of the jury should not be interfered with, unless the court can see that it is against the clear weight of the evidence or was influenced in some way by passion, prejudice, mistake, perversion or corruption. *Id.*

These provisions do not excuse the accused party from complying with the settled rules of practice applicable to the trial of criminal cases, or exempt him from the duty of presenting the usual and ordinary questions, arising on the trial of a case, in the form and manner previously pursued in the trial of indictments. *People v. Driscoll*, 12 St. Rep., 253 ; 107 N. Y., 417. In reviewing the various incidental questions arising during the progress of the trial, and the exceptions taken to the admission or exclusion of evidence, or to the instructions of the court, regard must still be had to the established rules of law regulating such proceedings. *Id.* The omission to make the proper objections and take exceptions to alleged erroneous proceedings deprives the defendant of the privilege of claiming, as matter of right, in the court of appeals, the benefit of errors occurring on the trial, and remits him to an appeal to the discretionary powers of the appellate court. *Id.*

The authority of the court of appeals must be exercised under the restraint of settled rules, and in accordance with established principles of law regulating and defining the duties of appellate tribunals in reviewing the judgments of trial courts. *People v. Kelly*, 22 St. Rep., 969 ; 2 Silv. (Ct. App.), 231 ; 113 N. Y., 648 ; 7 N. Y. Cr., 40.

**Review of facts.**—This section simply invests the court of appeals with the jurisdiction formerly possessed by the supreme court to grant new trials on the merits. *People v. Cignarale*, 16 St. Rep., 155 ; 110 N. Y., 26.

In exercising the jurisdiction conferred by this section in capital cases, the court of appeals is governed by the practice regulating the review of questions of fact upon appeal to the supreme court. *People v. Taylor*, 52 St. Rep., 918 ; 138 N. Y., 405 ; *People v. Lopy*, 128 N. Y., 629 ; 40 St. Rep., 410 ; *People v. Trezza*, 125 N. Y., 740 ; 36 St. Rep., 149 ; *People v. Fish*, 125 N. Y., 136 ; 34 St. Rep., 840 ; *People v. Stone*, 117 N. Y., 480 ; 27 St. Rep., 823. In such cases, if there is a fair conflict in the evidence, or it is such that different inferences can be properly drawn from it, the determination of the jury will not be interfered with, unless it is clearly against the weight of evidence, or appears to have been influenced by passion, prejudice, mistake or corruption. *Id.* Even if in the judgment of the court



of appeals, there is a rational doubt of the guilt of the defendant, it will not be a sufficient ground for reversal. *Id.*

The powers conferred by this section upon the court of appeals are similar to those formerly given to this court in certain cases by chap. 337 of 1855, as amended by chap. 330 of 1858, and to the supreme court by the preceding section. *People v. Driscoll*, 12 St. Rep., 253 ; 107 N. Y., 417.

The court of appeals will be governed by the practice regulating appeals to the general term in dealing with questions of fact. *People v. Lippy*, 40 St. Rep., 410 ; 128 N. Y., 629 ; 8 N. Y. Cr., 321. It will regard the findings of the jury on disputed and conflicting evidence as conclusive, unless there are circumstances indicating some partiality, mistake, error or prejudice on their part. *Id.*

The court of appeals will not interfere with the verdict of a jury where it is supported by sufficient evidence, unless it reaches the conclusion, on the whole case, that injustice has been done, or that there is a strong probability that injustice has been done in the disposition made of the case by the jury. *People v. Tice*, 43 St. Rep., 576 ; 131 N. Y., 656 ; 4 Silv. (Ct. App.), 102.

The court must be able, upon a review of the proceedings, to reach the conclusion that injustice has probably been done on the trial, before it is justified in setting aside the verdict of the jury. *People v. Cignarale*, 16 St. Rep., 155 ; 110 N. Y., 27.

The mere fact that there is a conflict in the evidence is not alone a ground for a new trial. *Id.*

In case of serious doubt whether the fact was properly found by the jury, the court of appeals may, if in its opinion justice requires it, order a new trial. *Id.*

The amendment of 1887 to this section does not authorize the court of appeals to interfere with the finding of the jury when supported by sufficient evidence, unless it appears from the whole record that injustice has been done. *People v. Trezza*, 36 St. Rep., 149 ; 125 N. Y., 740 ; 8 N. Y. Cr., 284 ; 4 Silv. (Ct. App.), 357 ; *People v. Cignarale*, 16 St. Rep., 155 ; 110 N. Y., 23 ; *People v. Kelly*, 22 St. Rep., 969 ; 113 N. Y., 647 ; 2 Silv. (Ct. App.), 231 ; 7 N. Y. Cr., 40.

The provision of this section does not authorize a review of the findings of fact of a jury, founded on sufficient evidence, or a reversal simply because of a difference of opinion on the facts between the court and the jury. *People v. Kelly*, 22 St. Rep., 969 ; 113 N. Y., 648 ; 2 Silv. (Ct. App.), 233 ; *People v. Stone*, 27 St. Rep., 823 ; 117 N. Y., 483 ; *People v. Cignarale*, 16 St. Rep., 155 ; 110 N. Y., 23.

It simply invests the court with power to order a new trial where, upon a consideration of the whole case, it is manifest that injustice has been done, though the question has not been properly raised by exceptions. *Id.*

The duty is imposed upon the court of appeals in capital cases, to order a new trial, whether any exception shall have been taken or not in the court below, if considerations of justice, based upon the presence in the record of errors prejudicial to the substantial rights of the accused demand it. *People v. Pallister*, 51 St. Rep., 725.

It is not the province of the court of appeals, under this section, to determine controverted questions of fact arising upon conflicting evidence ; it may not lawfully usurp the appropriate functions of the jury. *People v. Stone*, 27 St. Rep., 823 ; 117 N. Y., 483.

In deciding whether a new trial should be granted under this section, the court of appeals cannot review and determine controverted questions of fact arising upon conflicting evidence. *People v. Wayman*, 38 St. Rep., 747 ; 3 Silv. (Ct. App.), 491 ; 128 N. Y., 586.

**When granted.**—The case requires the same examination on appeal, in a capital case, as though all the objections and exceptions ordinarily used to present the effect of the evidence for review were taken upon the trial. *People v. Majone*, 91 N. Y., 211 ; 12 Abb. N. C., 187.

The court of appeals, *it seems*, will, if it is made to appear that there has been a former acquittal in a capital case, take notice of the fact, though not presented by formal plea. *People v. Cignarale*, 16 St. Rep., 155 ; 110 N. Y., 29.

Where the record discloses upon its face that the court had no jurisdic-

tion, or that the constitutional method of trial by jury was disregarded, or some other defect in the proceedings which could not be waived or cured and is fundamental, it would be the duty of an appellate tribunal to reverse the proceedings and conviction, though the question had not been formally raised in the court below, and was not presented by any ruling or exception on the trial. *People v. Bradner*, 10 St. Rep., 667 ; 107 N. Y., 4.

Where the court of appeals can see that the defendant has been prejudiced by intemperate remarks of the district attorney, it has power, under this section, to order a new trial. *People v. Greenwall*, 26 St. Rep., 230 ; 7 N. Y. Cr., 314 ; 115 N. Y., 527.

Under the provisions of this section, the defendant cannot claim, as matter of right, the benefit of error, occurring on the trial, where no proper objection was made and no exception. *People v. Lyons*, 16 St. Rep., 660. 110 N. Y., 619 ; 2 Silv. (Ct. App.), 60. He can only ask the court to determine, on the whole case, the question as to whether justice requires a new trial or not, or whether the verdict was against the weight of evidence or against law. *Id.*

It was held by the court of appeals, after a review of the facts as well as the law, that the verdict, in this case, was not against the weight of evidence, or against law, and that justice did not require that a new trial should be had. *People v. Hamilton*, 50 St. Rep., 22.

To justify a consideration of an appeal to the court of appeals, the order must show affirmatively that the general term has exercised its discretion in refusing a new trial on the ground that the verdict was against the weight of evidence, and has granted it solely for error of law. *People v. Boas*, 92 N. Y., 564 ; 1 N. Y. Cr., 290.

See *People v. Wilson*, 15 St. Rep., 503 ; 109 N. Y., 349 ; *People ex rel. Trezza v. Brush*, 39 St. Rep., 878.

**§ 529. \* Certificates of stay not to be granted except on notice to the district attorney.**—The certificate mentioned in the last two sections can not, however, be granted upon an appeal on a conviction of felony or misdemeanor until such notice as the judge may prescribe has been given to the district attorney of the county where the conviction was had, of the application for the certificate, accompanied by a formal specification in writing of the grounds upon which the application is based, but the judge may stay the execution of the judgment until the determination of such application. When an application for such certificate shall have been made to and denied by the trial judge or a justice of the supreme court, or in case of an appeal, to the court of appeals, by a judge of that court or a justice of the appellate division of the supreme court, no other application for such certificate shall be made. If an appeal to the appellate division of the supreme court shall not be brought on for argument by the defendant at the next term of the appellate division begun not less than ten days after the granting of such certificate, or if an appeal to the court of appeals shall not be brought on for argument by the defendant when the court of appeals shall have been in actual session for fifteen days after the granting of such certificate, the district attorney on two days' notice to the defendant may apply to the judge or justice who granted the certificate, or to any judge or justice of the court in which the appeal is pending, for an order vacating the certificate, and upon the entry of such an order the judgment shall be executed as though a certificate had never been granted to the defendant.

Am'd by ch. 217, Laws 1902.

Am'd by chap. 830 of 1895. In effect January 1, 1896.

See notes under last section.

See notes under section 524, *ante*.

See *People v. Wentworth*, 3 N. Y. Cr. 111.

**§ 530. Effect of the stay.**—If the certificate, provided in sections 527 and 528, be given, the sheriff must, if the defendant be in his custody, upon being served with a copy of the order, keep the defendant in his custody, without executing the judgment, and detain him to abide the judgment upon the appeal.

**§ 531. Effect of stay.**—If, before the granting of the certificate, the execution of the judgment have commenced, the further execution thereof is suspended, and the defendant must be restored by the officer in whose custody he is, to his original custody.

**§ 532. Transmitting the papers to the appellate court.**—Upon the appeal being taken, the clerk, with whom the notice of appeal is filed, must, within ten days thereafter, without charge,

transmit a copy of the notice of appeal and of the judgment-roll, as follows:

1. If the appeal be to the appellate division of the supreme court, to the clerk of the department where the appeal is to be heard;

2. If it be to the court of appeals, to the clerk of that court.

Am'd by chap. 880 of 1895. In effect July 1, 1896.

See Court of Appeals rule, 8.

## CHAPTER II.

### DISMISSING AN APPEAL, FOR IRREGULARITY.

SECTION 533. For what irregularity, and how dismissed.

534. Dismissal for want of return.

§ 533. **For what irregularity, and how dismissed.**—If the appeal be irregular in a substantial particular, but not otherwise, the court may, on any day in term, on motion of the respondent, upon five days' notice, served with copies of the papers on which the motion is founded, order it to be dismissed.

§ 534. \* **Dismissal for want of return.**—The court may also, upon like motion, dismiss the appeal,

1. If the return be not made, as provided in section five hundred and thirty-two, unless for good cause, the time to make such return be enlarged.

2. If the appeal be not brought on for argument by the appellant as promptly after the return has been made as the circumstances of the case will reasonably admit.

Am'd, ch. 427 of 1897.

Where a motion to dismiss an appeal in a criminal case for want of prosecution has been denied upon appellants giving a stipulation that it may be dismissed if he is not ready for argument at the following term, a similar motion made at such term will be granted though he makes affidavit that he has been unable to procure the stenographer's notes in time to comply with his stipulation. *People v. Wilson*, 50 St. Rep., 419; 21 N. Y. Sup. 571.

## CHAPTER III.

### ARGUMENT OF THE APPEAL.

SECTION 535. Appeal to the appellate division, how and where brought to argument.

536. Appeal to court of appeals, how brought to argument.

537. Notice of argument to counsel for defendant.

538. Papers on appeal, by whom furnished, and effect of omission.

539. Judgment of affirmance may be without argument, if appellant fail to appear. Reversal, only upon argument, though respondent fail to appear.

540. Number of counsel to be heard. Defendant's counsel to close the argument.

541. Defendant need not be present.

§ 535. **Appeal to the appellate division; how and where brought to argument.**—An appeal to the appellate division of the supreme court may be brought to argument by either party on ten days' notice, on any day, at a term, held in the department in which the original judgment was given.

Am'd by chap. 880 of 1885. In effect January 1, 1896.

Am'd by chap. 884 of 1884.

This amendment substituted the word "department" for "district."

Appeals in a criminal action may be heard on any day in the term. Sup. Ct. rules, 43.

They are entitled to a preference. Section 790 of Code of Civil Procedure.

**36. Appeal to court of appeals and how brought to argument.**—An appeal to the court of appeals may in the same manner be brought to argument by either party on any day in term, and where the judgment appealed from is of death the appeal must be brought on for argument within six months from the taking of such appeal, unless the court, for good cause shown, shall enlarge the time for that purpose. Added by ch. 389, Laws 1902. To take effect September 1, 1902.

**37. Notice of argument to counsel for defendant.**—If a counsel within five days after the appeal, have given notice to the district attorney, that he appears for the defendant, notice of argument must be served on him, instead of the defendant; otherwise, notice must be served on the court may direct.

**38. Papers upon appeal, by whom furnished, and effect of failure to appear.**—When the appeal is called for argument, the appellant must furnish the court with copies of the notice of appeal and judgment-roll, and where the judgment is of death. If he fail so to do, the appeal must be dismissed, unless the court otherwise direct. Added by ch. 493 of 1887. See Sup. Ct. rule 41.

**39. Judgment of affirmance may be without argument if appellant fail to appear; refusal only upon argument, though respondent fails to appear.**—Judgment of affirmance may be given without argument, if the appellant fails to appear, or where the judgment appealed from is of death and it shall not have been brought on for argument within six months from the taking of such appeal, unless the court, for good cause shown, shall have enlarged said time. But judgment of reversal can be given upon argument though the respondent fail to appear. Added by ch. 389, Laws 1902. To take effect September 1, 1902.

Judgment of reversal can only be given upon argument which satisfies the appellate court that the judgment appealed from should be reversed, though the district attorney fails to appear in the case. *People v. Barker*, 7 St. Rep., 846; 44 Hun, 235. See Sup. Ct. rule 15.

**40. Number of counsel to be heard, Defendant's counsel to be heard on the argument.**—Upon the argument of the appeal, if the crime be punishable with death, two counsel on each side must be heard if they request it. If any other case, the court may, in its discretion, restrict the number to one counsel on each side. The counsel for the defendant is heard to the closing argument.

**41. Defendant need not be present.**—The defendant need not actually appear in the appellate court.

An escaped prisoner can take no action before the court. *People v. ...*, 59 N. Y. 80; *Matter of O'Byrne*, 29 St. Rep., 116; 55 Hun, 438.

## CHAPTER IV.

### JUDGMENT, UPON APPEAL.

**542. Court to give judgment, without regard to technical errors, defects or exceptions, not affecting substantial rights.**

**543. May reverse, affirm or modify the judgment, and order a new trial.**

**544. New trial.**

**545. Defendant to be discharged on reversal of judgment against him, where new trial is not ordered.**

**546. Judgment of affirmance, how to be carried into effect.**

**547. Judgment of appellate court, how entered and renitted.**

SECTION 548. Papers returned to be remitted.

549. Jurisdiction of appellate court ceases, after judgment remitted.

§ 542. Court to give judgment without regard to technical errors, defects or exceptions, not affecting substantial rights.—After hearing the appeal the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.

See section 285, *ante* ; section 648, *post*.

See notes under section 764 of the Code of Criminal Procedure.

The case of *People v. Sharp*, 10 St. Rep., 522 ; 45 Hun, 499, 518, was reversed in 12 St. Rep., 217 ; 107 N. Y., 427.

The case of *People v. Richards*, 7 St. Rep., 656 ; 44 Hun, 288 ; 5 N. Y. Cr., 371, was reversed in 13 St. Rep., 515 ; 108 N. Y., 137.

The case of *People v. Bork*, 31 Hun, 360 ; 2 N. Y. Cr., 56, was reversed in 96 N. Y., 188 ; 2 N. Y. Cr., 177.

See *People ex rel. Bork v. Gilbert*, 1 N. Y. Cr., 398 ; reversed.

**Duty of court.**—It is the duty of an appellate court, in a criminal action, to give with reason and discretion, full force and effect to the provisions of this section. *People v. Dimick*, 11 St. Rep., 739 ; 107 N. Y., 13, 34.

The general term does not, on appeal, regard technical errors, defects or exceptions which do not affect substantial rights. *People v. Osterhout*, 34 Hun, 261 ; 3 N. Y. Cr., 445 ; 20 W. Dig., 294.

The requirement of this section is to be reasonably and fairly applied. *People v. McQuade*, 18 St. Rep., 288 ; 21 Abb. N. C., 436 ; 110 N. Y., 284 ; 6 N. Y. Cr., 36 ; 1 N. Y. Supp., 160.

The court is no longer required to reverse a conviction because a mere technical error is disclosed by the record. *Id.* But every statutory provision intended for the benefit of the accused confers a substantial right, which cannot be disregarded without his consent. *Id.*

**Technical errors, etc.**—Mere technical errors, not affecting the substantial rights of the defendant, are required to be disregarded by this section. *People v. Meyers*, 7 St. Rep., 221 ; 5 N. Y. Cr., 125.

Under this section, technical errors or defects, or exceptions, not affecting the substantial rights of the parties, will be disregarded in giving judgment on appeal. *Millett v. People*, 27 Hun, 469, 471.

By this section, appeals are required to be determined without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. *People v. Kelly*, 31 Hun, 226 ; 2 N. Y. Cr., 21.

An irregularity, which does not prejudice the substantial rights of the defendant, will not invalidate the verdict. *People v. Menken*, 36 Hun, 91 ; 3 N. Y. Cr., 243.

In view of this section, an error, to call for the reversal of a judgment, must prejudice the rights of the defendant. *People v. Wentworth*, 4 N. Y. Cr., 214.

A mere technical error in the reception or exclusion of evidence which does not violate a substantial right of, or withhold a substantial benefit from, the defendant, must be disregarded on appeal. *People v. Sharp*, 5 N. Y. Cr., 388.

A new trial ought not to be granted where an exception is well taken, unless the jury can draw from evidence admitted under it some unfavorable inference, nor when the party excepting has, by his own course of examination, destroyed the force of his objection. *People v. Buddensieck*, 8 St. Rep., 664 ; 103 N. Y., 500 ; S. C., 4 N. Y. Cr., 262.

The charge of the judge, which is a mere "impertinence, or an abstract opinion out of the case," induced by the defendant's assertion, but founded on no evidence, and which cannot, in any reasonable view, work prejudice to the defendant, is, even though technically erroneous, no ground for a new trial. *People v. Johnson*, 5 St. Rep., 606 ; 104 N. Y., 218 ; 5 N. Y. Cr., 219.

Where no errors, that were prejudicial to the defendant, are found, the



judgment and order should be affirmed. *People v. Brooks*, 39 St. Rep., 882 ; aff'd, 43 id., 294 ; 131 N. Y., 327.

A new trial will not be granted, even in a criminal case, for an erroneous ruling of the court upon some legal proposition, where the appellate tribunal can see that, by no possibility, could the error have worked any harm to defendant. *People v. Wood*, 36 St. Rep., 954 ; 126 N. Y., 254

Where it is not apparent that any substantial right of the defendant is affected, a new trial will not be granted. *People v. Sweeney*, 36 St. Rep., 77 ; 13 N. Y. Supp., 25.

The admission of erroneous evidence must be disregarded on appeal, under this section, when the fact, sought to be proved by it, conclusively appears by the uncontradicted testimony of other witnesses. *People v. Burns*, 2 N. Y. Cr., 427.

The rule, laid down in this section, was applied in *People v. Brooks*, 43 St. Rep., 297 ; 131 N. Y., 327, to a case where the defendant was not harmed by the exclusion of further testimony from him on a particular subject.

The admission of incompetent, but wholly immaterial, testimony furnishes, in view of this section, no ground for a new trial. *People v. Fanning*, 43 St. Rep., 775 ; 4 Silv. (Ct. App.), 135 ; 131 N. Y., 664 ; 8 N. Y. Cr., 369.

Where the prosecution does more than it is obliged to do to secure the conviction of the defendant, he, if he is not injured by such action, is not entitled by reason of the provisions of this section, to complain of it. *People v. Connor*, 25 St. Rep., 141 ; 53 Hun, 352 ; 6 N. Y. Supp., 222.

The refusal of the court to strike out evidence, in a criminal action, which could not have influenced the verdict, furnishes no reason for a reversal of the conviction. *People v. Chacon*, 1 St. Rep., 386 ; 1 Silv. (Ct. App.), 41 ; 102 N. Y., 672 ; 4 N. Y. Cr., 173.

Error in requiring defendant, on his cross-examination, to answer questions, not proper nor pertinent to the issue, if it is not productive of any injurious effect, forms no ground for the reversal of the judgment. *People v. Irving*, 2 N. Y. Cr., 51 ; 31 Hun, 616.

Where the erroneous admission of evidence had no important effect upon the result of the trial, the appellate court may, under the provisions of this section, decline to grant a new trial. *People v. Wayman*, 38 St. Rep., 754 ; 3 Silv. (Ct. App.), 500 ; 128 N. Y., 588.

Where the appellate court cannot say that the admission of incompetent evidence was not prejudicial to the defendant, it cannot disregard the error under the rule enunciated in this section, and affirm the judgment. *People v. Stoddard*, 45 St. Rep., 916.

Where the time alleged in the indictment varies from that shown by the proof, and this variance was not called to the attention of the court on the trial nor presented by exception, it is not available on appeal. *People v. Formoso*, 43 St. Rep., 655 ; 131 N. Y., 481.

A variance between the indictment and proof, in the name of the complainant, where it does not affect the substantial rights of the defendant, can be of no avail on the appeal. *People v. Hagan*, 37 St. Rep., 661 ; 14 N. Y. Supp., 233.

Whether the erroneous exclusion of a single juror from the panel by mistake or inadvertence, where it can be fairly inferred that no injury resulted to the defendant, may be disregarded under this section, was not decided in *People v. McQuade*, 18 St. Rep., 288 ; 21 Abb. N. C., 449 ; 110 N. Y., 284 ; 6 N. Y. Cr., 36.

Assignments of errors are to be considered and decided in view of the provisions of this section. *Id.*

If evidence, of a kind most important and predominating, has been offered on the part of the defendant, and ruled out on the objection of the people and under the defendant's exception, such ruling is error, which demands the reversal of the judgment of conviction. *People v. Wood*, 36 St. Rep., 954 ; 126 N. Y., 254. In such case, the appellate court is not at liberty, under this section, to say that the error is merely technical, or that the substantial rights of the defendant have not been affected. *Id.* This is so, even though the court may be inclined to think that upon the whole case, with such evidence admitted, the defendant should have been convicted. *Id.*



See *People v. Hughes*, 46 St. Rep., 465 ; 8 N. Y. Cr., 451 ; 19 N. Y. Supp., 551 ; *People v. Brooks*, 39 St. Rep., 827 ; 15 N. Y. Supp., 366 ; *People v. Stoddard*, 45 St. Rep., 915 ; 19 N. Y. Supp., 937 ; *People v. Upton*, 29 St. Rep., 777 ; 9 N. Y. Supp., 686 ; *People v. Clark*, 49 St. Rep., 501 ; 20 N. Y. Supp., 731 ; *People v. Bosworth*, 45 St. Rep., 520 ; 64 Hun, 83 ; *People v. Lawrence*, 51 St. Rep., 288 ; 137 N. Y., 522 ; *People v. Kennedy*, 51 St. Rep., 814 ; 22 N. Y. Supp., 269 ; *People v. Hartley*, 51 St. Rep., 805 ; 22 N. Y. Supp., 296 ; *People v. Bradner*, 10 St. Rep., 667 ; 107 N. Y., 12 ; *People v. Ostrander*, 45 St. Rep., 555 ; 64 Hun, 83 ; *People v. Fanshawe*, 47 St. Rep., 347 ; 65 Hun, 97 ; 8 N. Y. Cr., 353 ; *People v. Webster*, 52 St. Rep., 239 ; 23 N. Y. Supp., 640.

§ 543. \* **May reverse, affirm or modify the judgment, and order a new trial and on affirmance of capital conviction fix the time for the execution of the sentence.**—Upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered upon a lawful verdict, or finding of fact, correct the judgment to conform to the judgment or finding ; in all other cases they must either reverse or affirm the judgment appealed from, and in cases of reversal, may, if necessary or proper, order a new trial. If the judgment of death is affirmed, the court of appeals, by an order under its seal, signed by a majority of the judges, shall fix the week during which the original sentence of death shall be executed, and such order shall be sufficient authority to the agent and warden of any state prison for the execution of the prisoner at the time therein specified, and the agent and warden must execute the judgment accordingly.

Am'd, ch. 427 of 1897.

See notes under preceding section.

See notes under section 484, *ante*.

See notes under section 764, *post*.

**Correction of judgment.**—The primary object of the first clause of this section was to provide for cases where an illegal sentence follows a lawful conviction. *People v. Bradner*, 10 St. Rep., 667 ; 107 N. Y., 1, 12.

By this section, it is made the duty of the appellate court, where an erroneous judgment has been entered upon a lawful verdict, to correct the judgment to conform to the verdict. *People v. Griffin*, 27 Hun, 595 ; 15 W. Dig., 294.

There is no provision for remitting the case to the trial court. *Id*.

Where an erroneous judgment has been entered, the appellate court may correct the judgment. *People ex rel. Devoe v. Kelly*, 2 N. Y. Cr., 420 ; 33 Hun, 538.

Where the conviction is unassailed, and the judgment is reversed for error in the sentence, the appellate court should remit the record to the court, in which the conviction was had, to pass such sentence as the appellate court directs. *People v. Bauer*, 3 N. Y. Cr., 434.

The court of appeals held, in *People v. Bork*, 96 N. Y., 188 ; 2 N. Y. Cr., 177, that the appellate court was not obliged to fix the time of imprisonment, or itself to exercise a discretion. The appellate court directs the sentence when it points out the law providing for the punishment and directs the court below to sentence thereunder.

The language and intent of this section fairly includes the case where, by negligence or inadvertence, the statement of the offense is omitted from the clerk's entry of judgment upon the minutes, under section 485 of the Code of Criminal Procedure. *People v. Bradner*, 10 St. Rep., 667 ; 107 N. Y., 1, 12.

**Disposition of appeal.**—This section provides that, upon hearing the appeal, the appellate court must either reverse or affirm the judgment appealed from, and, in cases of reversal, may, if necessary or proper, order a new trial. *People v. Palmer*, 15 St. Rep., 78 ; 109 N. Y., 419.

**Verdict not disturbed.**—Where a verdict of conviction is amply justified by the evidence and no exception has been taken therein, and the charge was full and fair, the verdict will not be disturbed. *People v. Miller*, 50 St. Rep., 471 ; 21 N. Y. Supp., 388.

**New trial denied.**—Upon the reversal of a judgment of conviction and the order denying a motion for a new trial, on the ground that the facts proved do not constitute the offense charged in the indictment, where it is manifest that no stronger case can be made out by the people, a new trial is unnecessary and should not be ordered. *People v. Camp*, 51 St. Rep., 25.

**Remanding case.**—Where, upon appeal from a judgment of conviction in a criminal action, the general term reversed the conviction and discharged the defendant on the ground of the insufficiency of the indictment

decision of the court of appeals that the indictment was sufficient and a reversal of the judgment on that ground do not authorize an affirmance of the conviction in the latter court. *People v. Lawrence*, 51 St. Rep., 286 ; 107 N. Y., 524. The defendant has the right to a review by the general term upon the evidence, and the case should be remanded to that court for further hearing. *Id.*

See *People v. Kellogg*, 51 St. Rep., 102, 108.

**§ 544. New trial.**—When a new trial is ordered, it shall proceed in all respects as if no trial had been had.

See section 462, *ante*.

When a new trial is ordered, it shall proceed in all respects as though no trial had been had. *People v. Palmer*, 15 St. Rep., 78 ; 109 N. Y., 419.

Upon a new trial, the defendant is to be tried in all respects as though he had not been tried previously. *People v. Webster*, 36 St. Rep., 837 ; 59 Ann., 402 ; 13 N. Y. Supp., 414.

See *People v. Cignarale*, 16 St. Rep., 155 ; 6 N. Y. Cr., 98.

**§ 545. Defendant to be discharged on reversal of judgment against him, where new trial is not ordered.**—If a judgment against the defendant be reversed, without ordering a new trial, the appellate court must direct, if he be in custody, that he be discharged therefrom, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be funded to the defendant.

**§ 546. Judgment of affirmance, how to be carried into effect.**—When a judgment of affirmance against the defendant, the original judgment must be carried into execution, as the appellate court may direct, and if the defendant be at large, a bench warrant may be issued for his arrest. If a judgment be corrected, the corrected judgment must be carried into execution as the appellate court may direct.

Amended by chap. 360 of 1882.

This amendment introduced, at the end of the first sentence of the original section, the words “ and if the defendant be at large, a bench warrant may be issued for his arrest.”

**Re-sentencing.**—Prior to the act of 1863 (chap. 226), there was no power in the court of appeals, on the reversal of a judgment of conviction in a criminal case for error in the sentence, either to re-sentence the prisoner, or to remit the case for re-sentence to the court below. *People v. Bork*, 96 N. Y., 188, 200 ; *Ratzky v. People*, 29 Id. 124. The above act was passed to remedy this defect in legislation. *Id.* It was continued in force, as a rule of procedure, by section 962 of the Code, in respect to actions pending when the Code of Criminal Procedure took effect, and was not repealed by the change in the mode of bringing up cases for review. *People v. Bork*, *ante*.

Where a prisoner has been convicted and sentenced to capital execution on a day specified, and a stay of execution granted, and the conviction was affirmed by the general term, the latter court should sign a warrant directed to the proper officer commanding him to execute the sentence. *Moett v. People*, 85 N. Y., 373, 383. It is not strictly regular for such court again to pass sentence on the prisoner. *Id.* It is not material that the court passing a sentence is differently (if legally) constituted from that which affirmed the judgment. *Id.*

**§ 547. Judgment of appellate court, how entered and remitted.**—When the judgment of the appellate court is given, it must be entered in the judgment book, and a certified copy of the entry forthwith remitted to the clerk with whom the original judgment

ment-roll is filed, or, if a new trial be ordered in another county, to the clerk of that county, unless the judgment be rendered in the absence of the adverse party, in which case, the court may direct it to be retained, not exceeding ten days.

See Court of Appeals rule, 15.

See notes under section 549, *post*.

**Direction upon affirmance.**—Upon affirmance of judgment of conviction, the court is directed to enter judgment and to remit a certified copy thereof with the return and decision of the general term to the trial court. *People v. Harris*, 28 St. Rep., 297, 301 ; 4 Silv. (Sup. Ct.), 537.

On affirmance of the judgment and order of the court of sessions, the clerk was directed to enter judgment and remit a certified copy thereof, with the return and decision of the general term, to the former court. *People v. Sweeny*, 36 St. Rep., 77 ; 13 N. Y. Supp., 25 ; *People v. Bosworth*, 45 St. Rep., 520 ; 64 Hun, 83 ; *People v. Upton*, 29 *id.*, 777, 779 ; 9 N. Y. Supp., 686

In *People v. Morehouse*, 25 St. Rep., 297 ; 2 Silv. (Sup. Ct.), 245 ; 6 N. Y. Supp., 765 ; the clerk was directed, upon affirmance of judgment and order denying a new trial, to enter judgment and remit a certified copy, with the return and decision of the general term to the trial court, pursuant to this and the following section.

**Direction upon reversal.**—Upon reversing the judgment of conviction, and order denying a new trial, the general term directed the clerk to enter judgment and remit a certified copy thereof, with the return and its decision to the court of sessions, pursuant to this and the next section. *People v. Benedict*, 49 St. Rep., 288 ; 21 N. Y. Supp., 62.

*People v. Hill*, 47 St. Rep., 779 ; 65 Hun, 420 ; *People v. Stoddard*, 45 St. Rep., 916 ; 19 N. Y. Supp., 937 ; *People v. Betsinger*, 49 St. Rep., 598 ; 21 N. Y. Supp., 137.

On the reversal of the judgment and disallowance of the demurrer, with liberty to defendant to plead, the clerk was directed to enter judgment and remit a certified copy thereof, with the return and decision of the general term, to the court of oyer and terminer. *People v. Crotty*, 30 St. Rep., 46.

See also *People v. Christy*, 47 St. Rep., 924 ; 65 Hun, 353 ; *People v. Ostrander*, 45 St. Rep., 555 ; 64 Hun, 83 ; *People v. Severence*, 51 St. Rep., 405 ; 67 Hun, 190 ; 22 N. Y. Supp., 96 ; *People v. Harris*, 28 St. Rep., 297 ; 7 N. Y. Supp., 776 ; *People v. Lyons*, 17 St. Rep., 766 ; 2 N. Y. Supp., 605, 606.

§ 548. **Papers returned, to be remitted.**—The decision of the court and the return shall be remitted to the court below in the same form and manner as in civil actions.

Amended by chap. 505 of 1884.

This amendment required the papers to be remitted by the appellate court.

See notes under the preceding section.

See *People v. Harris*, 28 St. Rep., 297, 301 ; 4 Silv. (Sup. Ct.), 537 ; 7 N. Y. Supp., 776 ; *People v. Morehouse*, 25 St. Rep., 297 ; 2 Silv. (Sup. Ct.), 245 ; 6 N. Y. Supp., 765 ; *People v. Severence*, 51 St. Rep., 405 ; 22 N. Y. Supp., 96 ; 67 Hun, 190 ; *People v. Betsinger*, 49 St. Rep., 597 ; 21 N. Y. Supp., 137 ; *People v. Benedict*, 49 St. Rep., 288 ; 21 N. Y. Supp., 62 ; *People v. Upton*, 29 St. Rep., 779 ; 9 N. Y. Supp., 686 ; *People v. Stoddard*, 45 St. Rep., 915 ; 19 N. Y. Supp., 937 ; *People v. Ostrander*, 45 St. Rep., 555 ; 64 Hun, 83 ; *People v. Hill*, 47 St. Rep., 777 ; 65 Hun, 422 ; *People v. Christy*, 47 St. Rep., 924 ; 65 Hun, 353 ; *People v. Beckwith*, 3 St. Rep., 759 ; 42 Hun, 368 ; 5 N. Y. Cr., 234.

§ 549.\* **Jurisdiction of appellate court ceases, after judgment remitted.**—After the certificate of the judgment has been remitted as provided in section 547, the appellate court has no further jurisdiction of the appeal, or of the proceedings thereon ; and except as provided in section 543, all orders, which may be

\*See § 830, *post*.

necessary to carry the judgment into effect, must be made by the court to which the certificate is remitted, or by any court to which the cause may thereafter be removed.

Am'd, ch. 427 of 1897.

This section is a general provision relating to all criminal appeals, and no exception is made as to capital cases. *People v. Lyons*, 17 St. Rep., 768; 6 N. Y. Cr., 136; 2 N. Y. Supp., 605, 606.

It is mandatory, and imposes an absolute duty upon the court to which the judgment has been remitted. *Id.*

In the absence of an application by the attorney-general or district attorney, under sections 503 and 504, *ante*, for re-sentencing the prisoner, the provisions of this section are in force. *Id.*

In the case of a conviction of murder in the first degree in the court of general sessions, this court has jurisdiction, after the cause has been remitted to it after an affirmance by the court of appeals, to name the date of the infliction of the death penalty. *Id.*

See *People v. Beckwith*, 3 St. Rep., 759; 42 Hun, 368; 5 N. Y. Cr., 234.

## TITLE XII.

### OF MISCELLANEOUS PROCEEDINGS.

#### **AFTER** I. Bail.

- II. Compelling the attendance of witnesses.
- III. Examination of witnesses, conditionally.
- IV. Examination of witnesses, on commission.
- V. Inquiry into the insanity of the defendant, before or during the trial, or after conviction.
- VI. Compromising certain crimes, by leave of the court.
- VII. Dismissal of the action, before or after the indictment, for want of prosecution, or otherwise.
- VIII. Remitting the punishment, in certain cases.
- IX. Proceedings against corporations.
- X. Entitling affidavits.
- XI. Errors and mistakes, in pleadings and other proceedings.
- XII. Disposal of property, stolen or embezzled.
- XIII. Reprieves, commutations and pardons.

## CHAPTER I.

### BAIL.

#### **ARTICLE** I. In what cases the defendant may be admitted to bail.

- II. Bail, upon being held to answer, before indictment.
- III. Bail, upon an indictment, before conviction.
- IV. Bail, upon an appeal.
- V. Deposit, instead of bail.
- VI. Surrender of the defendant.
- VII. Forfeiture of the undertaking of bail, or of the deposit of money.
- VIII. Re-commitment of the defendant, after having given bail, or deposited money instead of bail.

## ARTICLE I.

### WHAT CASES THE DEFENDANT MAY BE ADMITTED TO BAIL.

#### **SECTION 550.** Admission to bail, defined.

551. Taking bail, defined

552. Offenses notailable.

553. Admitting to bail. Form of undertaking.

**SECTION 554.** In what cases he may be admitted to bail, after conviction and upon appeal.

555. Nature of bail before conviction.

556. Nature of bail after conviction and upon appeal.

**§ 550. Admission to bail defined.**—When the defendant is held to appear for examination, bail for such appearance may be taken either,

1. By the magistrate who issued the warrant or before whom the same is returnable ; or
2. By any judge of the supreme court.

**§ 551. Taking bail, defined.**—The taking of bail consists in the acceptance, by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant according to the terms of the undertaking, or that the bail will pay to the people of this state a specified sum.

See eighth amendment to Federal Constitution; section 5, art. 1, of State Constitution.

The power to admit to bail is incident to the power to hear and determine. *People v. Van Horne*, 8 Barb., 158; 6 Abb. N. C., 88.

The probable amount of defendant's liability determines the amount of bail. *People v. Tweed*, 13 Abb., N. S., 148, 152. In a proper case, perhaps this rule may be relaxed. *Id.*

**§ 552. Offenses not bailable.**—The defendant cannot be admitted to bail except by a justice of the supreme court, where he is charged,

1. With a crime punishable with death ;
2. With the infliction of a probably fatal injury upon another, and under such circumstances, as that, if death ensue, the crime would be murder.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

Amended by chap. 860, of 1882.

This amendment introduced, in the first clause of the original section, the words, " except by a judge of the supreme court or by a court of oyer and terminer."

**Capital Cases.**—The principles which govern criminal courts in allowing persons, charged with crime, to go at large upon bail were stated in *Cole's case*, 4 Abb. N. S., 280.

The fact that, upon a former trial for murder, the jury disagreed, is not, of itself, a controlling reason for admitting the prisoner to bail pending a second trial. *Cole's case*, *ante*.

Even in capital cases, the accused is entitled to be bailed, unless the proof is evident, or the presumption is great. *People v. Perry*, 8 Abb. N. S., 27. In this case, it was held that, where the prisoner had been twice tried, and on both occasions, the jury were unable to agree on a verdict, it was a proper case for exercising the power to bail.

**§ 553. In what cases defendant may be admitted to bail, before conviction.**—If the charge be for any other crime, he may be admitted to bail, before conviction, as follows :

1. As matter of right, in cases of misdemeanor ;
2. As a matter of discretion, in all other cases.

**Misdemeanor.**—A person, arrested on a warrant for a violation of section 442 of the Penal Code, is entitled, as a matter of right, to be admitted to bail, under this section. *Matter of Vreeland v. Thomas*, 15 St. Rep., 857; 2 N. Y. Supp., 39.

**Felony.**—In cases of felony, the prisoner cannot, as a matter of right, be admitted to bail. *People v. Shattuck*, 6 Abb. N. C., 83. Whether he shall be let to bail, is a question resting in the sound legal discretion of the court. *Id.*



§ 554. In what cases he may be admitted to trial, before conviction, etc. Before conviction, defendant may be admitted to bail :

1. For his appearance before the magistrate on the examination of the charge, before being held to answer.

2. To appear at the court to which the magistrate is required by section two hundred and twenty-one to return the dispositions and statements upon the defendant being held to answer after examination.

3. After indictment, either upon the bench warrant issued for his arrest or upon an order of the court committing him or enlarging the amount of bail, or upon his being surrendered by his bail, to answer the indictment in the court in which it is found, or to which it may be sent or removed for trial. And any captain or sergeant of police, or acting sergeant of police, in any city or village of this state, must take bail for his appearance before a competent and accessible magistrate the next morning from any person arrested for a misdemeanor between eleven o'clock in the morning and eight o'clock the next morning, just as soon as the person offers himself as bail for the person or persons arrested. When such captain or sergeant of police or acting sergeant of police takes bail, he must take it by an undertaking in the form in this section mentioned, executed in his presence by the defendant and at least one surety, who must justify under oath, or by the personal undertaking of the defendant, secured by the deposit of money or personal property accompanied by an oath of ownership, in the cases and in such manner as hereinafter provided; and for these purposes the officer may administer all necessary oaths. The amount of bail taken by a captain or sergeant of police or acting sergeant of police, under this section, must be as follows: If the offense be the violation of a corporation ordinance, the amount of the bail must be one hundred dollars, except that if a conviction upon the charge would render the defendant liable only for a fine, the amount of the bail must be double the largest fine that could be imposed; if the conviction would render him liable to imprisonment for thirty days or less, the amount of the bail must be two hundred dollars. In all other cases the amount of bail must be five hundred dollars. In lieu of a bondsmen, if the offense be the violation of a corporation ordinance where conviction renders the defendant liable to a fine only, he may give his personal undertaking, secured by a deposit with such captain or sergeant of police, or acting sergeant of police, of money or of personal property equal in value to double the largest fine that can be imposed. If personal property, the person making or authorizing the deposit shall take and subscribe an oath that he is the owner thereof, and authorized to make such deposit. A false oath in this particular is declared to be perjury and punishable accordingly. Money or personal property thus deposited conveniently transportable shall be taken to the court, by the officer making the arrest, at the time defendant is required to appear and, upon the conditions of the undertaking being satisfied, it shall be restored to the defendant. If the deposit be personal property, which can not conveniently be brought to court, the defendant shall be entitled to an order from the magistrate directing the delivery thereof to the owner after the conditions of the undertaking have been satisfied.

The form of the undertaking, with surety, must be as follows :

We, A B, defendant, and residing at . . . . ., in . . . . ., and C D surety, residing at . . . . ., hereby jointly and severally undertake that the above A B, defendant, shall appear and answer the complaint (describing it briefly) before the magistrate before whom he would be arraigned if not bailed on the . . . . . day of . . . . ., eighteen hundred and ninety . . . . ., and at . . . . . o'clock, to answer to the complaint, and there remain to answer, subject to an order of the magistrate, and render himself in execution thereof, or if he fail to perform either of these conditions, then we will pay to the people of the state of New York the sum of . . . . . dollars.

The form of the personal undertaking, with deposit, shall be as follows :

I, A B, defendant, residing at number . . . . . street, in the . . . . . of . . . . ., hereby personally undertake and agree, that I will appear and answer to the complaint of violating the ordinances of the corporation of . . . . ., to wit : (here briefly state charge) before the magistrate before whom I would be arraigned if not bailed, on the . . . . . day of . . . . ., eighteen hundred and ninety . . . . ., at . . . . . o'clock in the . . . . . noon, to answer to the complaint, and there remain to answer, subject to any order of the magistrate, and render myself in execution thereof, or if I fail to perform either of these conditions, then I will pay to the people of the state of New York the sum of . . . . . dollars, to secure which payment there has been deposited herewith (if money, state amount; if personal property, briefly describe).



## OATH AS TO OWNERSHIP.

State of .....

..... of ..... ss.:

County of .....

..... being duly sworn, says, that he is the owner of the personal property, mentioned and described in the foregoing undertaking, and is authorized to, and hereby does, pledge and deposit the same, as security for the appearance of the defendant to answer the complaint made against him.

Subscribed and sworn to before me,

the ..... day of ..... 189...]

Amended by chap. 556 of 1896. In effect June 1, 1896.

This amendment included acting sergeant of police.

This amendment changed, in subd. 2, original section, the word "statement" into the word "statements," and added all after the first sentence in subd. 8.

Where a person is indicted for crime before his arrest, a justice of the supreme court, or a police officer, has no power to let him to bail during the session of the court having jurisdiction to try the indictment, *Babcock's Case*, 2 Abb. N. S., 204.

A person arrested on a warrant, issued on an indictment found in any court of criminal jurisdiction, may be let to bail by any justice of the supreme court of this state, provided it shall appear that the court having cognizance of the offense and jurisdiction to try the same is not sitting at the time the application for bail is made. *People v. Clews*, 14 Hun, 90.

§ 555. **Nature of bail before conviction.**—After the conviction of a crime not punishable with death, a defendant who has appealed, and when there is a stay of proceedings, but not otherwise, may be admitted to bail:

1. As a matter of right, when the appeal is from a judgment imposing a fine only;

2. As a matter of discretion, in all other cases.

§ 556.\* **Nature of bail after conviction and upon appeal.**—After conviction and upon appeal, the defendant may be admitted to bail as follows:

1. If the appeal be from a judgment imposing a fine only, on the undertaking of bail, that he will pay the same, or such part of it as the appellate court may direct, if the judgment be affirmed or modified or the appeal be dismissed, or the certificate of reasonable doubt be vacated as provided in section five hundred and twenty-nine.

2. If judgment of imprisonment have been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or if the certificate of reasonable doubt be vacated as aforesaid.

Am'd, ch. 427 of 1897.

Section 2060 of Code of Civil Procedure is not applicable.

**On appeal.**—The allowance of bail, under this section, is not a matter of right, but lies within the discretion of the judge. *People v. Bauman*, 8 N. Y. Cr., 458.

Cases may arise where it would seem to be proper that a convicted person should be admitted to bail pending an appeal. *Id.*

Bail is to be taken upon an appeal from a judgment, and not upon an appeal from an order dismissing a writ of *habeas corpus*. *Id.*

A party, convicted of a misdemeanor and sentenced, has a right to be heard upon an application to be let to bail, even after the execution of the judgment has commenced, where an appeal has been taken, and a stay of execution granted. *People v. Folmsbee*, 60 Barb., 480. He may, in the discretion of the justice before whom he is brought on *habeas corpus*, be let to bail, in such a case, pending the decision of the court on the appeal. *Id.*

## ARTICLE II.

## BAIL, UPON BEING HELD TO ANSWER, BEFORE INDICTMENT.

SECTION 557, 558. Admitting to bail.

559. At what time defendant may be admitted to bail by a magistrate.

560. In cities, if crime be felony, application for admission to bail must be on notice.

561. Form of order, if made by the court.

562. Form of order, if made by a magistrate.

563. If application be denied by a magistrate, no subsequent application can be made to another magistrate.

§ 554, subd. 4. Whenever a child under the age of sixteen years is arrested charged with any offense except a felony or a crime which if committed by an adult would be a felony, a captain or sergeant or acting sergeant of police, in any city may accept, in lieu of bail, the personal recognizance in writing, without security, of a parent, guardian or other lawful custodian of such child, to produce such child before the proper court or magistrate on the following day, at a time and place to be specified in said recognizance; and thereupon he shall place said child in the care and custody of the person executing the same who, on failure to so produce said child, pursuant to the terms of such recognizance, shall be liable to punishment by the court or magistrate, as for a criminal contempt in the manner provided in the code of civil procedure. A similar recognizance may be taken by the court or magistrate for the subsequent production of such child at a time and place to be specified therein, pending the final termination of the proceedings, and noncompliance therewith shall subject the person giving the same to the same punishment. Such failure to produce the child shall in either case vacate the said recognizance and warrant the immediate arrest of the child by order of the court or magistrate. But nothing in this act contained shall authorize the acceptance of such personal recognizance for the production of a child who has been the subject of a crime or a witness to its commission by another.

Added by Laws 1903, chap. 329.

Am'd by chap. 656, Laws 1905. Takes effect Sept. 1, 1905.

§ 554a. **Bail of certain railroad employes.**—Whenever a person employed as an engineer, fireman, motorman, conductor, trainman or otherwise, on a train or car of a steam, elevated or street surface railroad, is arrested in any city on a criminal charge, arising from an accident in connection with the operation of such train or car, resulting in an injury or death to a person or injury to property, such engineer, fireman, motorman, conductor, trainman or other employe, shall be immediately taken before a magistrate, if one is accessible, and otherwise, before a captain or sergeant of police, or acting sergeant of police, in charge of a police station in such city, and be given an opportunity to be admitted to bail. Such bail shall be taken in the same manner, so far as practicable, as is provided by section five hundred and fifty-four of this code, for the taking of bail in case of misdemeanors by a captain or sergeant of police, or acting sergeant of police in a city or village, except that the amount of bail shall be fixed by such officer at not exceeding one thousand dollars, and except that the undertaking shall provide for the appearance of the defendant before the magistrate, coroner, or other officer, who, except for this section, would be authorized to take such bail. Such officer may however in his discretion, instead of exacting bail release such employe on his own recognizance conditional for his appearance as above provided in case an undertaking is required.

As amended by L. 1903, chap. 614. In effect Sept. 1, 1903.



- SECTION 564.** Violation of last section a misdemeanor. Admission to bail in such case, how revoked or vacated.
565. Construction of last two sections
566. Decision final.
567. Bail, by whom taken.
568. Form of undertaking.
569. Qualification of bail.
- 570-572. Bail, how to justify.
573. Bail may be examined as to sufficiency.
574. Other testimony may be received as to their sufficiency.
575. Decision as to their sufficiency, and filing affidavits of justification and undertaking.
576. On allowance of bail, and execution of undertaking, defendant to be discharged. Form of discharge.
577. If bail disallowed.

§ 557. **Admitting to bail.**—When the defendant has been held to answer, as provided in section 208, the admission to bail may be by the magistrate by whom he is so held, if he be one of the magistrates mentioned in section 147, and the crime charged is a misdemeanor, or a felony punishable with imprisonment, not exceeding five years; or if he be a judge of the supreme court; or any judge authorized to preside in a court having jurisdiction to try indictments, in all cases where bail may be taken, before conviction, as provided in section 554.

Amended by chap. 360 of 1882.

This amendment substituted for "as follows: 1. by any" the words "if he be one;" for "when" the word "and," and for "2. by" the words "if he be."

See notes under section 554, *ante*.

See notes under section 580, *post*.

The recorder of the city of Cohoes is authorized to bail, upon an application for a postponement of the trial of a disorderly person, but has no authority to accept money in lieu thereof. *Eagan v. Stevens*, 39 Hun, 311.

In *People ex rel. Comaford v. Dutcher*, 83 N.Y., 240, it was held that the supreme court had no power to let to bail one charged with petit larceny, not charged as a second offense. See this section.

§ 558. **Admitting to bail.**—When, by reason of the degree of the crime, the committing magistrate has not authority to admit to bail, the defendant may be admitted to bail by one of the officers having authority to admit to bail in the case, as provided in the second subdivision of the last section, or by the court to which the depositions and statements are returned by the committing magistrate, as provided in section 221, if the case be triable therein, or if not, by the court to which, after indictment, it may be sent or removed for trial.

§ 559. **At what time defendant may be admitted to bail by a magistrate.**—The defendant may be admitted to bail by a magistrate, as provided in the last two sections, upon being held to answer, or at any time before the return of the depositions and statement, to the court. After that time he can be admitted to bail, only by a judge presiding in the court in which the crime is triable, if it be sitting, or if not, by one of the magistrates mentioned in the second subdivision of section 557.

See notes under section 554, *ante*.

Under the former provisions of the Revised Statutes (2 R. S., 728, section 56), one arrested upon a warrant after indictment might be admitted to bail by a justice of the supreme court in the county where he was arrested, though the indictment was found in another county. *People v. Clews*, 77 N. Y., 39.

Where the court, before whom the indictment is triable, is in session, no other tribunal has power to admit to bail. *People ex rel. Sherwin v. Mead*, 17 W. Dig., 125; 28 Hun, 227; *aff'd*, 92 N. Y., 415.

**§ 560. In cities, if crime be felony, application for admission to bail must be on notice.**—In the several cities of this state, if the crime charged be a felony, the application for admission to bail must be upon notice of at least two days, to the district attorney of the county, unless the magistrate by order fixes a shorter time; and the committing magistrate, upon the like note, in writing, requiring him to do so, must transmit the depositions and statement, or a copy thereof, to the court or magistrate to whom the application for bail is to be made.

**§ 561. Form of order, if made by the court.**—If the application be to the court, an order must be made, granting or denying it and if it be granted, stating the sum in which bail may be taken.

**§ 562. Form of order, if made by a magistrate.**—If the application be to a magistrate, he must certify, in writing, his decision granting or denying the same; and if he grant the application, must state in the certificate the sum in which bail may be taken; which certificate he must cause to be forthwith filed with the clerk of the court to which the depositions and statement are required to be sent.

The reference in *People v. Petrea*, 1 N. Y. Cr., 216, should be to section 542, *ante*.

**§ 563. If application be denied by a magistrate, no subsequent application can be made to another magistrate.**—If an application for admission to bail, made to a magistrate, be denied, not more than two subsequent applications therefor can be made to other magistrates, except that an application can be made to any magistrate mentioned in subdivision two of section 557, if no application has been previously made to a magistrate mentioned therein.

**§ 564. Violation of last section, a misdemeanor. Admission to bail in such case, how revoked or vacated.**—A violation of the last section is punishable as a misdemeanor, and the admission of the defendant to bail contrary thereto may be revoked by the magistrate who made it, or vacated by the court to which the depositions and statement are or must be sent, as provided in section 221, or to which, after indictment, the action must be sent for trial.

**§ 565. Construction of last two sections.**—The provisions of the last two sections shall not be construed to limit the power

of any judge presiding in the court in which the offense is triable to let the defendant to bail.

**§ 566. Decision final.**—The decision of the judge presiding in the court in which the crime is triable, granting or denying bail is final except as provided in section 563.

**§ 567.** If the defendant be admitted to bail by a magistrate, the bail may be taken by any magistrate in the county wherein the defendant is held to answer, as provided in section two hundred and eight.

Amended Laws 1904, chap. 202. Takes effect Sept. 1, 1904.

**§ 568. Form of undertaking.**—Bail is put in, by a written undertaking, executed by sufficient surety [with or without the defendant, in the discretion of the magistrate], and acknowledged before the magistrate in substantially the following form:

“An order having been made on the            day of           , 18   , by A. B., a justice of the peace of the town of           , [or as the case may be], that C. D. be held to answer, upon a charge of [stating briefly the nature of the crime,] upon which he has been duly admitted to bail, in the sum of            dollars;

We [C. D., defendant, if the defendant join in the undertaking], of [stating his place of residence and occupation] and E. F. and G. H., [stating place of residence and occupation], surety, or sureties [as the case may be], hereby undertake, jointly and severally, that the above-named C. D. shall appear and answer the charge above mentioned, in whatever court it may be prosecuted; and shall at all times render himself amenable to the orders and process of the court; and, if convicted, shall appear for judgment, and render himself in execution thereof; or if he fail to perform either of these conditions, that we will pay to the people of the state of New York, the sum of            dollars” [inserting the sum in which the defendant is admitted to bail].

Amended by chap. 360 of 1882.

This amendment introduced, after the word “undertake,” the words jointly and severally” in the form of undertaking given in the original section.

See notes under section 684, *post*.

This section prescribes the form of the undertaking of bail, when it is authorized to be taken in criminal cases by a magistrate, and subsequent sections specify the qualifications of bail and provide how they are to justify. *People ex rel. Gilbert v. Laidlaw*, 2 St. Rep., 537; 102 N. Y., 591.

**Sufficiency.**—The written undertaking upon the bailing of prisoners is required by this section to be in “substantially” the form therein given. *People v. Gillman*, 35 St. Rep., 280; 125 N. Y., 374.

An undertaking of bail, given in the form prescribed in this section, is not void because of an omission to fill in the blank, in the recital, intended for the specification of the nature of the crime. *Id.*

An omission to state the offense in the recognizance does not render the undertaking void. *Id.*

The liability of the sureties is not affected by the failure of the principal to acknowledge the undertaking. *People v. Hammond*, 26 St. Rep., 486.

Sufficiency of recognizance in case of manslaughter in second degree. *People v. Brown*, 37 St. Rep., 178.



**Breach.**—A bond conditioned for the appearance of the obligee at the next term of court, is not broken by his failure to appear at any subsequent time other than the term specified, though the prior term was adjourned to such time. *People v. Swales*, 83 Hun, 208.

The undertaking binds the surety for the appearance of the prisoner, not merely to answer to the specific charge upon which he was admitted to bail, but also that he shall at all times render himself amenable to the order and process of the court, and, if convicted, shall appear for judgment and render himself in execution thereof. *People v. Gillman*, 85 St. Rep., 260; 125 N. Y., 376.

§ 569. **Qualifications of bail.**—The qualifications of bail are as follows :

1. He must be a resident and a house holder or free holder within the state, and, unless the magistrate otherwise direct, within the county ;

2. He must be worth the amount specified in the undertaking, exclusive of property exempt from execution ; but the magistrate, on taking bail, may require two sureties, or may allow two or more to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of one sufficient surety.

Attorney cannot be surety. Sup. Ct. rule, 5.

§ 570. **Bail, how to justify.**—Except as prescribed in the next section, the bail may, in the exercise of a just discretion, be taken, and may justify, without notice to the district attorney, or reasonable notice of the intention to give bail may be required by the court or magistrate, to be given to the district attorney. When given, the notice shall be as prescribed in the next section.

§ 571. **Bail, how to justify.**—In the several cities of this state, if the crime charged be a felony, a previous notice in writing of at least two days, of the time and place of giving the bail, must be served upon the district attorney of the county, stating :

1. The names, places of residence and occupations of the proposed surety or sureties ;

2. A general description of the real or personal property of the surety or sureties, in respect to which they propose to justify as to their sufficiency, with the incumbrances thereon, by mortgage, judgment or otherwise, if any.

The district attorney may waive the giving of the notice herein provided for, or a shorter time than two days may be directed by the court or magistrate requiring the notice.

§ 572. **Bail, how to justify.**—The surety or sureties must in all cases justify by affidavit, taken before the magistrate. The affidavit must state that each of the sureties possesses the qualifications provided in section 569.

§ 573. **Bail may be examined as to sufficiency.**—The district attorney, or the magistrate, may thereupon further examine the sureties upon oath, concerning their sufficiency, in such manner as the magistrate may deem proper. The questions put to the

sureties, and their answers must be reduced to writing, and must be subscribed by them.

§ 574. **Other testimony may be received as to their sufficiency.**—The magistrate may also receive other testimony, either for or against the sufficiency of the bail, and may from time to time adjourn the taking of bail, to afford an opportunity of proving or disproving its sufficiency.

§ 575. **Decision as to their sufficiency, and filing affidavits of justification and undertaking.**—When the examination is closed, the magistrate must make an order, either allowing or disallowing the bail, and must forthwith cause the same, with the affidavits of justification, and the undertaking of bail, to be filed with the clerk of the court to which the depositions and statement must be sent, as prescribed in section 221.

§ 576. **On allowance of bail, and execution of undertaking, defendant to be discharged. Form of discharge.**—Upon the allowance of the bail and the execution of the undertaking, the court or magistrate must make an order, signed by him, with his name of office, for the discharge of the defendant, to the following effect:

“To the sheriff of the county of \_\_\_\_\_, [or, in the city and county of New York, “to the keeper of the city prison of the city of New York:”] “A. B., who is detained by you on a commitment to answer a charge for the crime of, [designating it generally,] having given sufficient bail to answer the same, you are commanded forthwith to discharge him from your custody.”

§ 577. **If bail disallowed.**—If the bail be disallowed, the defendant must be detained in custody until lawfully discharged.

*Amended by chap. 860 of 1882.*

This amendment changed the word “discharge” in the original, to the word “discharged” in the present section.

## ARTICLE III.

### BAIL, UPON AN INDICTMENT BEFORE CONVICTION.

**SECTION 578.** In misdemeanor, officer to take defendant before a magistrate.

579. In felony, to deliver him into custody.

580. Taking bail, when offense is bailable.

581. Bail, how put in; form of undertaking.

582. Sections applicable to qualifications of bail, to putting in and justifying bail, and to incidental proceedings.

§ 578. **In misdemeanor, officer to take defendant before a magistrate.**—When the crime charged in the indictment is a misdemeanor, the officer serving the bench-warrant must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail as prescribed in sections 302 and 305.

The case of *People ex rel. Sichel v. Chapman*, 30 How., 202, was one in

which a prisoner had been arrested upon a warrant of a police magistrate for the purpose of an examination before indictment. So also was the case of *Clark v. Cleveland*, 6 Hill, 344.

§ 579. **In felony, to deliver him into custody.**—If the crime charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody, according to the command of the bench-warrant, as prescribed in section 301.

§ 580. **Taking bail, when offense is bailable.**—When the defendant is so delivered into custody, if the felony charged be bailable, and the amount of bail have been fixed, bail may be taken by the judge presiding in the court in which the indictment was found, or to which it is sent or removed, or by any magistrate in the county belonging to the class mentioned in the second subdivision of section 557.

See notes under section 557, *ante*.

§ 581. **Bail, how put in ; form of undertaking.**—The bail must be put in by a written undertaking, executed by a sufficient surety, with or without the defendants, in the discretion of the magistrate, and acknowledged before the court or its clerk in open court or the magistrate, in substantially the following form:

“An indictment having been found on the            day of            , 18    , in the county court in the county of Albany [or as the case may be], charging A. B. with the crime of [designating it generally], and he having been duly admitted to bail in the sum of            dollars :

“ We, A. B., defendant [if the defendant join in the undertaking] and C. D., surety or sureties, as the case may be, of [stating his place of residence and occupation] and E. F., of [stating his place of residence and occupation] hereby jointly and severally undertake, that the above-named A. B. shall appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court ; and, if convicted, shall appear for judgment, and render himself in execution thereof ; or if he fails to perform either of these condition, that we will pay to the people of the state of New York the sum of            dollars,” [inserting the sum in which the defendant is admitted to bail.]

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 360 of 1882.

This amendment, in the first clause of the original section, changed “defendant” into “defendants,” and introduced the words “court or its clerk in open court or,” and, in the form given, inserted the words “jointly and severally.”

See section 593, *post*.

The failure of the defendant to acknowledge his signature to an undertaking for his appearance for trial does not affect the liability of the sureties, who have properly executed it. *People v. Hammond*, 26 St. Rep., 486 ; 4 Silv. (Sup. Ct.), 271 ; 7 N. Y. Supp., 219.

§ 582. **Sections applicable to qualifications of bail, to putting in and justifying bail, and to incidental proceedings.**—The provisions contained in sections 569 to 577, both inclusive, apply to

the qualifications of the sureties, and to all the proceedings respecting the putting in and justification of bail, and incidental thereto.

## ARTICLE IV.

### BAIL UPON AN APPEAL.

**SECTION 583.** Who may admit to bail.

584. Notice of the application, when required.

585. Qualifications of bail, and how put in.

§ 583. **Who may admit to bail.**—In the cases in which the defendant may be admitted to bail upon an appeal, as provided in section 556, the order admitting him to bail may be made, either by the court from which the appeal is taken, or a judge thereof, or by the appellate court, or a judge thereof, or by a judge of the supreme court.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

An application, under this section, is addressed to the sound discretion of the court or officer. *People v. Bowe*, 58 How., 393. It was held, in this case, that it was not the right of the prisoner, after conviction, to be let to bail, and that the bare possibility that an error may have been committed, does not entitle the prisoner to be bailed. It was also held that application, in such case, to admit to bail should be entertained only in cases of great question and difficulty.

§ 584. **Notice of the application, when required.**—The court or officer to whom the application for bail is made may require such notice thereof as he deems reasonable, to be given to the district attorney of the county in which the verdict or judgment was originally rendered.

§ 585. **Qualifications of bail, and how put in.**—The sureties must possess the qualifications, and the bail must be put in, in all respects, in the manner prescribed by sections 569 to 577, both inclusive; except that the undertaking must be to the effect that the defendant will, in all respects, abide the orders and judgment of the appellate court upon the appeal, and will surrender himself in execution of the judgment, if the certificate of reasonable doubt be vacated, as provided in § 529.

Am'd, ch. 427 of 1897.

## ARTICLE V.

### DEPOSIT INSTEAD OF BAIL.

**SECTION 586.** Deposit, when and how made.

587. May be made after bail given, and before forfeiture; and in such case bail discharged.

588. Bail may be given after deposit; and in such case money deposited to be refunded.

589. Deposit to be applied to payment of judgment of fine, and surplus to be refunded.

§ 586. **Deposit, when and how made.**—The defendant, at any time after an order admitting him to bail, or a witness committed in default of an undertaking to appear and testify, instead of entering into such an undertaking, may deposit with the county

treasurer, of the county in which he is held to answer or appear the sum mentioned in the order or commitment; and upon delivering to the officer, in whose custody he is, a certificate of the deposit, he must be discharged from custody.

Amended by chap. 220 of 1892.

This amendment extended this provision to the case of a witness committed in default of an undertaking to appear and testify.

**Disposition of deposit.**—Moneys deposited by a third person in lieu of bail for a defendant in a criminal action does not become the property of such defendant for the purpose of paying and satisfying his obligations in civil actions entirely disconnected from the criminal action and the subject matter thereof. *McShane v. Pinkham*, 46 St. Rep., 66; 19 N. Y. Supp., 970.

The recorder of the city of Cohoes has no authority to accept money in lieu of bail. *Eagan v. Stevens*, 39 Hun, 314. This section, which provides for a deposit in certain cases with the county treasurer, has no application to such a case. *Id.* The deposit should have been made with the treasurer and not with the recorder. *McShane v. Pinkham*, 46 St. Rep., 66.

The county treasurer has no authority to take a deposit in lieu of bail except by virtue of this and the following sections, and the deposit must be made in strict compliance with the statute. *People ex rel. Gilbert v. Laidlaw*, 2 St. Rep., 537; 102 N. Y., 592.

This section authorizes the deposit to be made by the defendant and by no one else. *Id.*

It is the plain purpose of these sections to require that the money so deposited shall, for the purposes of the deposit, be in fact the money of the defendant. *Id.*

In all cases where money is deposited in lieu of bail, it may be applied in payment of any fine imposed, and the surplus, if any, after the fine has been satisfied, must be returned to the defendant. *Id.*

Any person, making the deposit for the defendant, must be assumed to have known the provisions of these sections, and the money is thus devoted to the purposes of the statute, and to the use of the defendant. *Id.*

§ 587. **May be made after bail given, and before forfeiture; and in such case bail discharged.**—If the defendant have given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the undertaking; and upon the deposit being made the bail is exonerated.

See notes under preceding section.

§ 588. **Bail may be given after deposit; and in such case money deposited to be refunded.**—If money be deposited, as provided in the last section, bail may be given, in the same manner as if it had been originally given upon the order for admission to bail, at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken must thereupon direct, in the order of allowance, that the money deposited be refunded by the county treasurer to the defendant; and it must be refunded accordingly.

See notes under section 586, *ante*.

§ 589. **Deposit to be applied to payment of judgment of fine, and surplus to be refunded.**—When money has been deposited, if it remain on deposit and unforfeited at the time of a judgment for the payment of a fine, the county treasurer must, under direction of the court, apply the money in satisfaction

thereof, and after satisfying the fine, must refund the surplus, if any, to the defendant.

See notes under section 586, *ante*.

Money deposited in lieu of bail is, for the purposes of the criminal action, to be considered as the property of the defendant; and, though it was in fact furnished by a third person, it may be applied in payment of any fine imposed upon the defendant in the criminal action. *People ex rel. Gilbert v. Laidlaw*, 2 St. Rep., 537; 102 N. Y., 588; *McShane v. Pinkham*, 46 St. Rep., 66; 19 N. Y. Supp., 971.

## ARTICLE VI.

### SURRENDER OF THE DEFENDANT.

**SECTION 590.** Surrender, by whom, when, and how made.

591. By whom, when and where, defendant may be arrested for the purpose of a surrender.

592. On surrender before forfeiture, money deposited to be refunded. Order therefor, how obtained.

§ 590. Surrender, by whom, when, and how made.—At any time before the forfeiture of the undertaking, any surety may surrender the defendant in his exoneration, or the defendant may surrender himself, to the officer to whose custody he was committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of the bail must be delivered to the officer, who must detain the defendant in his custody thereon, as upon a commitment, and by a certificate in writing, acknowledge the surrender;

2. Upon the undertaking and the certificate of the officer, the court in which the indictment or the appeal, as the case may be, is pending, may, upon a notice of five days to the district attorney of the county, with a copy of the undertaking and certificate, order that the bail be exonerated; and on filing the order and the papers used on the application, the bail is exonerated accordingly.

See notes under section 586, *ante*.

§ 591. By whom, when and where, defendant may be arrested for the purpose of a surrender.—For the purpose of surrendering the defendant, any surety, at any time before he is finally charged, and at any place within the state, may himself arrest him, or by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

§ 592. On surrender before forfeiture, money deposited to be refunded.—If money have been deposited instead of bail and the defendant at any time before the forfeiture thereof surrender himself to the officer to whom the commitment was directed in the manner provided in section 590, the court must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon a



notice of five days to the district attorney, with a copy of this certificate.

See notes under section 586, *ante*.

People *ex rel.* Gilbert *v.* Laidlaw, 2 St. Rep., 537; 102 N. Y., 592.

## ARTICLE VII.

### FORFEITURE OF THE UNDERTAKING OF BAIL, OR OF THE DEPOSIT OF MONEY.

SECTION 593. In what cases, and how ordered.

594. When and how forfeiture may be discharged.

595. Forfeiture of bail, to be enforced by action.

596. Deposit of money when forfeited, how disposed of.

597. Remission of forfeiture.

598. Application to be on notice.

§ 593. **In what cases, and how ordered.**—If, without sufficient excuse, the defendant neglect to appear for arraignment, or for trial or judgment, or upon any other occasion where his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes; and the undertaking of his bail, or the money deposited, instead of bail, as the case may be, is thereupon forfeited.

See notes under section 568, *ante*.

**When to appear.**—Where a criminal is bound by recognizance to appear at court for trial, he is bound to remain during the trial to answer when he is called any time until the conclusion thereof, and the trial may be postponed from day to day, or for several days, without discharging his sureties. People *ex rel.* Van Aken *v.* Milham, 100 N. Y., 273; 4 N. Y. Cr., 132.

Under a recognizance for the appearance of the defendant before the justice on a specified day, and from time to time as directed by the said justice, he is not required thereby to appear upon any and every adjourned day, but only when directed by the justice. People *v.* Scott, 67 N. Y., 585. If the proceedings are adjourned at a time when the defendant is not present, there cannot be a forfeiture of the recognizance at a subsequent adjourned day. *Id.*

**Forfeiture of recognizance.**—Under this section, if the principal makes default and his non-appearance is entered in the minutes, the recognizance becomes *ipso facto* forfeited. People *v.* Bennett, 49 St. Rep., 910. See same case on appeal, 50 St. Rep., 926; 136 N. Y., 482. No further or formal order is necessary to fix the liability of the surety. *Id.* Judgment can be entered upon filing the recognizance and a certified copy of the minutes of the court. *Id.*

Where an order of forfeiture of bail is made on failure of the principal to appear, the court has done all that the statute requires to make the forfeiture complete. People *v.* Bennett, 50 St. Rep., 926; 136 N. Y., 482.

A failure of the clerk to enter such order, until after the principal has been surrendered, does not render the order nugatory. *Id.*

Where a principal makes default and his non-appearance is entered in the minutes of the court, the recognizance becomes *ipso facto* forfeited, and no further or formal order is necessary to fix the liability of the sureties. *Id.*

It then accrues and becomes absolute upon the record. *Id.* The subsequent surrender of the principal does not of itself work an exoneration of the sureties. *Id.* An arrest of the principal upon a bench warrant after a forfeiture, his discharge upon his entering into another recognizance, and his appearing and answering in accordance therewith, constitute no defense to an action upon the first recognizance. *Id.*

§ 594. **When and how forfeiture may be discharged.**—If, at any time before the final adjournment of the court, the defendant appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or deposit to be discharged, upon such terms as are just.

**Discharge.**—After forfeiture, the obligation of the surety continues until he is relieved or exonerated by the action of the court, or in some other lawful manner. *People v. Bennett*, 49 St. Rep., 910. The subsequent surrender of the principal does not, of itself, work an exoneration. *Id.* His arrest and discharge upon another recognizance are no defense to an action on the first recognizance. *Id.*

The practice of judges of the court of common pleas of discharging judgments upon recognizances in criminal cases, was condemned in *People v. Coman*, 5 Daly, 527; 49 How., 91.

§ 595. **Forfeiture of bail, to be enforced by action.**—If the forfeiture be not discharged, as provided in the last section, the district attorney may, at any time after the adjournment of the court, proceed against any surety upon his undertaking. Such proceeding shall be by action only, except in the city and county of New York, where it shall be in the method now prescribed by special statute.

§ 596. **Deposit of money when forfeited, how disposed of.**—If, by reason of the neglect of the defendant to appear, as provided in section 593, money deposited instead of bail is forfeited, and the forfeiture be not discharged or remitted, as provided in sections 594 and 597, the county treasurer with whom it is deposited may at any time after the final adjournment of the court apply the money deposited to the use of the county.

§ 597. **Remission of forfeiture.**—After the forfeiture of the undertaking or deposit, as provided in this article, the court directing the forfeiture, the county court of the county, or in the city of New York, the supreme court may remit the forfeiture or any part thereof, upon such terms as are just.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See section 350 of Code of Civil Procedure.

**General sessions.**—The judges of the court of general sessions are given concurrent jurisdiction with the common pleas to entertain and determine an application for the remission of a recognizance and to vacate the judgment entered thereon. *People v. Street*, 38 St. Rep., 101; 14 N. Y. Supp., 778. The determination of either tribunal is *res adjudicata*. *Id.*

**Essentials for vacation.**—Requisites to warrant vacation of judgment entered on a forfeited recognizance. *People v. Weber*, 31 St. Rep., 552; *People v. Kurtz*, *id.*, 276.

A judgment on a forfeited recognizance will not be discharged because of the illness of the surety at the time the recognizance was forfeited. *People v. Meehan*, 14 Daly, 333.

A judgment entered against surety and principal respectively, on a forfeited recognizance, will be canceled on motion, upon proof that, subsequent to the forfeiture, the accused appeared, was tried and paid the fine imposed. *People v. Boessemeecker*, 27 W. Dig., 387.

To warrant the discharge of a judgment upon a forfeited recognizance, it must be shown to the court that the accused did not escape conviction through the absence of prosecutor and witness. *Adolph v. Flegenheimer*, 15 St. Rep., 876.

An application to be relieved from the forfeiture of a recognizance will

not be granted unless it appears that the expense of recapture of the principal and the costs of the proceedings to enforce the forfeiture, have been paid. *People v. Kelly*, 3 *Mis. Rep.*, 223.

This and the next section give, in terms, to the court an almost absolute discretion to remit the forfeiture of undertakings given for the appearance of a person to answer a criminal charge. *People v. Spear*, 1 *N. Y. Cr.*, 540. But the exercise of such discretion should be based upon some principle, that will best promote the welfare of the public, including the sufferers by the forfeiture. *Id.* The forfeiture should be remitted only in a case of extreme hardship, and not for reasons founded only on sympathy or sentiment. *Id.*

When and upon what proof, a judgment entered upon a forfeited recognizance, should be vacated. *People v. Lasher*, 34 *St. Rep.*, 624; *People v. Brady*, *id.*, 307; *People v. Goltze*, 29 *id.*, 503; *People v. Madden*, *id.*, 503; *People v. Baer*, 28 *id.*, 412; *People v. Devine*, *id.*, 404; *People v. Perstein*, *id.*, 402, 171; *People v. Ketterly*, *id.*, 180; *People v. Smith*, *id.*, 181; *People v. Brady*, *id.*, 170; *People v. Samuels*, *id.*, 168; *People v. Carroll*, *id.*, 18; *People v. Tietjen*, *id.*, 13; *People v. Higgins*, 27 *id.*, 974; *People v. Grossman*, 25 *id.*, 754; *People v. Johnson*, 23 *id.*, 631.

**Action to recover back.**—An action will lie to recover moneys paid on a forfeited recognizance, on refusal, after the judgment has been vacated and an order for repayment made. *O'Donnell v. Mayor, etc.*, 36 *St. Rep.*, 988.

**Compromise.**—The court cannot direct a compromise of a judgment entered on a forfeited recognizance. *People v. Rofrano*, 30 *St. Rep.*, 427.

**Bastardy.**—Whether the forfeiture of an undertaking in bastardy proceedings, can be remitted, is doubtful. *People v. Lavery*, 34 *St. Rep.*, 297.

See *People v. Nooney*, 45 *St. Rep.*, 619; 64 *Hun*, 171; 19 *N. Y. Supp.*, 134.

§ 598. **Application to be on notice.**—The application must be upon at least five days' notice to the district attorney of the county served with copies of the affidavits and papers on which it is founded, and can be granted only upon payment of the costs and expenses incurred in the proceedings for the enforcement of the forfeiture.

Amended by chap. 360 of 1882.

This amendment inserted, after the word "county" in the original section, the word "served."

See notes under preceding section.

See *People v. Nooney*, 45 *St. Rep.*, 619; 64 *Hun*, 171; 19 *N. Y. Supp.*, 134.

## ARTICLE VIII.

### RE-COMMITMENT OF THE DEFENDANT, AFTER HAVING GIVEN BAIL, OR DEPOSITED MONEY INSTEAD OF BAIL.

**SECTION 599.** Court may direct arrest of defendant.

600. Contents of the order.

601. Defendant may be arrested in any county.

602. If for failure to appear for judgment, defendant must be committed.

603. If for other cause, he may be admitted to bail.

604. Bail in such case, by whom taken.

605. Form of undertaking.

606. Qualifications of bail, and how put in.

§ 599. **Court may direct arrest of defendant.**—The court to which the committing magistrate returns the deposition and statement, or in which an indictment or appeal is pending, or to which a

Judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, or if the court be not in session, any judge thereof may direct the arrest of the defendant, and his commitment to the officer to whose custody he was committed at the time he was admitted to bail, and his detention until legally discharged, in the following cases :

1. When, by reason, of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited instead thereof, as provided in section 593 ;

2. When it satisfactorily appears to the court that his bail, or either of them, are dead, or insufficient, or have removed from the state ;

3. Upon an indictment being found, in the cases provided in section 306.

*Amended by chap 367 of 1882.*

This amendment inserted, in the first part of the original section, the words "or if the court be not in session, any judge thereof may."

*See sections 299, 300, 306, 475 and 593, ante.*

**§ 600. Contents of the order.**—The order for the recommitment of the defendant must recite, generally, the facts upon which it is founded, and direct that the defendant be arrested by any sheriff, constable, marshal or policeman in this state, and committed to the officer to whose custody he was committed, at the time he was admitted to bail, to be detained until legally discharged.

**§ 601. Defendant may be arrested in any county.**—The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county, in the same manner as upon a warrant of arrest ; except, that when arrested in another county, the order need not be endorsed by a magistrate of that county.

**§ 602. If for failure to appear for judgment, defendant must be committed.**—If the order recite, as the ground upon which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order.

**§ 603. If for other cause, he may be admitted to bail.**—If the order be made for any other cause, and the crime be bailable, the court may fix the amount of bail, and may direct in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order.

**§ 604. Bail in such case, by whom taken.**—When the defendant is admitted to bail, the bail may be taken by any magistrate in the county, having authority, in a similar case, to admit to bail upon the holding of the defendant to answer before indictment, as prescribed in sections 557 and 558, or by any other magistrate to be designated by the court.

**§ 605. Form of undertaking.**—When bail is taken upon the

recommitment of the defendant, the undertaking of bail must be in substantially the following form :

“ An order having been made on the                      day of                      , 18                      by the court of [naming the court], that A. B. be admitted to bail in the sum of                      dollars, in an action pending in that court against him in behalf of the people of the state of New York, upon an [information, presentment, indictment or appeal, as the case may be.]

“ We A. B., defendant [if the defendant join in the undertaking,] and C. D., surety of [stating his place of residence and occupation,] and E. F., surety of [stating his place of residence and occupation,] hereby jointly and severally, undertake that the above-named A. B. shall appear in that or any other court in which his appearance may be lawfully required, upon that [information, presentment, indictment or appeal, as the case may be,] and shall at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof or if he fail to perform either of these conditions, that we will pay to the people of the state of New York the sum of                      dollars, [inserting the sum in which the defendant is admitted to bail.]

Am'd by chap. 360 of 1882.

This amendment inserted, before the word “ undertake ” in the original section, the words “ jointly and severally.”

§ 606. **Qualifications of bail and how put in.**—The bail must possess the qualifications, and must be put in, all respects, in the manner prescribed by sections 569 to 577, inclusive.

## CHAPTER II.

### COMPELLING THE ATTENDANCE OF WITNESSES.

**SECTION 607.** Subpœna, defined.

608. Magistrate may issue subpoenas, on information or presentment.

609. District attorney may issue subpoenas for witnesses before grand jury.

610. He may also issue subpoenas, for the people, on trial of an indictment.

611. Clerk may issue blank subpoenas, for witnesses for defendant on trial.

612. Form of subpoena.

613. Requirement in subpoena, to produce books, papers and documents.

614. Subpœna, by whom served.

615. How served.

616. Payment of expenses of witness, when he is from without the county, or is poor.

617. Same.

618. Witnesses residing or served with subpoena, out of the county, when and how compelled to attend.

619. Disobedience to subpoena, or refusal to be sworn or to testify, how punished.

§ 607. **Subpœna, defined.**—The process by which the attend-

ance of a witness, before a court or magistrate is required, is a subpoena.

§ 608. **Magistrate may issue subpoenas, on information or presentment.**—A magistrate, before whom an information is laid, may issue subpoenas, subscribed by him, for witnesses within the state, either on behalf of the people or of the defendant.

§ 609. **District attorney may issue subpoenas for witnesses before grand jury.**—The district attorney of the county may issue subpoenas, subscribed by him, for witnesses within the state, in support of the prosecution or for such other witnesses as the grand jury may direct, to appear before the grand jury, upon an investigation pending before them.

§ 610. **He may issue subpoenas for the people, on trial of an indictment.**—The district attorney may, in like manner, issue subpoenas subscribed by him, for witnesses within the state, in support of an indictment, to appear before the court at which it is to be tried.

A willful disobedience of a subpoena issued by a district attorney in a criminal action, was not an indictable offense under the Revised Statutes. *Sherwin v. People*, 100 N. Y., 351.

§ 611. **Clerk may issue blank subpoenas for witnesses for defendant, on trial.**—The clerk of a court at which an indictment is to be tried, must at all times, upon the application of the defendant, and without charge, issue as many blank subpoenas, under the seal of the court and subscribed by him as clerk, for witnesses within the state, as may be required by the defendant.

§ 612. **Form of subpoena.**—A subpoena, authorized by the last four sections, must be substantially in the following form:

“In the name of the people of the state of New York:

“To A. B.

“You are commanded to appear before C. D., a justice of the peace of the town of \_\_\_\_\_, [or “the grand jury of the county of \_\_\_\_\_,” or “the county court of the county of \_\_\_\_\_,” or as the case may be], at [naming the place,] on [stating the day and hour,] as a witness in a criminal action prosecuted by the people of the state of New York, against E. F.

“Dated at the town of \_\_\_\_\_, [as the case may be,] the day of \_\_\_\_\_, 18 \_\_\_\_.

“G. H., justice of the peace,” [or “I. K., district attorney,” or “By order of the court, L. M., clerk,” as the case may be.]

Am'd by chap. 880 of 1895. In effect January 1, 1896.

§ 613. **Requirement in subpoena to produce books, papers and documents.**—If chattels, books, papers or documents be required, a direction to the following effect must be contained in the subpoena: “And you are required also, to bring with you the following,” [describing intelligibly the chattels, books, papers or documents required.]

Am'd, ch. 547, 1897. To take effect Sept. 1, 1897.

This section provides for a subpoena *duces tecum*. *People ex rel. Webster v. Van Tassel*, 46 St. Rep., 583; 64 Hun, 449, 450; 19 N. Y. Supp., 644; aff'g 17 id., 941.



**§ 614. Subpœna, by whom served.**—A peace officer must serve, in his county, city, town or village, as the case may be, any subpœna delivered to him for service, either on the part of the people or of the defendant; and must make a written return of the service, subscribed by him, stating the time and place of service, without delay. A subpœna may, however, be served by any other person.

**§ 615. How served.**—A subpœna is served, by delivering it, or by showing it, and delivering a copy thereof, to the witness personally.

**§ 616. Fees of witnesses in behalf of the people.**—A witness in behalf of the people in a criminal action in a court of record is entitled to the same fees and mileage as a witness in a civil action in the same court, payable by the treasurer of the county upon the certificate of the clerk of the court, stating the number of days the witness actually attended and the number of miles traveled by him in order to attend. Such certificates shall only be issued by the clerk upon the production of the affidavit of the witness, stating that he attended as such either on subpœna or request of the district attorney, the number of miles necessarily traveled and the duration of attendance. An officer in any state department who attends as a witness under this section in his official capacity, or in consequence of any official action taken by him, and who receives a fixed sum in lieu of expenses, or who is entitled to receive the actual expenses incurred by him in the discharge of his official duties, is not entitled to the compensation herein provided.

Am'd by chap. 98 of 1899. In force Sept. 1, 1899.

**§ 617. Fees of defendant's witnesses.**—In any such action, the court may also, in its discretion, by order, direct the county treasurer to pay a reasonable sum, to be specified in the order, to any witness attending in behalf of the defendant, not exceeding the amount payable to a witness in a civil action in the same court. Upon the production of the order or a certified copy thereof, the county treasurer must pay the witness the sum specified therein, out of the county treasury.

Am'd by chap. 98 of 1895. To take effect September 1, 1895.

**§ 618. Witnesses residing or served with subpœna, out of the county, when and how compelled to attend.**—A person served with a subpœna, issued by any officer of any court of record of this state, a district attorney or a county clerk, must attend in obedience to the subpœna, at the time and place and before the court therein named, within any county of this state. No person is obliged to attend as a witness upon a subpœna, issued by any person or court other than a judge of a court of record, a court of record, a district attorney, or a county clerk, out of the county where the witness resides or is served with the subpœna, unless the county judge of the county where such subpœna is returnable, a justice of the supreme court, or a court of record, upon an affidavit of the prosecutor or district attorney, or of the defendant or his counsel, stating that he believes that the evidence of the witness is material, and his attendance at the trial or examination necessary, shall indorse on the subpœna an order for the attendance of the witness. [Am'd by ch. 794, of 1895. To take effect Sept. 1, 1895.]

This amendment adds the first provision of the present section and materially changes the balance.

**§ 619. Disobedience to subpœna, or refusal to be sworn or to testify, how punished.**—Disobedience to a subpœna, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt in the manner provided in the Code of Civil Procedure.

See sections 8-13; 858 of Code of Civil Procedure; subd. 4, section 143 of Penal Code.

The case of *People v. Sharp*, 10 St. Rep., 522; 45 Hun, 499; 5 N. Y. Cr., 465, was reversed in 12 St. Rep., 217; 107 N. Y., 427.



**§ 618a. Subpoena of witnesses to testify in criminal actions without the state.**—If a judge of a court of record in any state bordering on this state which by its laws has heretofore made provision for commanding persons within its borders to attend and testify in criminal actions in this state, certifies under the seal of such court that there is a criminal action pending in such court, wherein the defendant is charged with a crime of the grade of a felony, and that a person residing or being within this state is believed to be a material and necessary witness in such action, a judge of a court of record in this state, upon the presentation of such certificate and such proof of the materiality and necessity of such witness as he may require, opportunity being given such witness to appear before such judge and be heard in opposition thereto, and upon request so to do by the clerk of the court issuing such certificate, shall issue and attach to such certificate a subpoena commanding such witness to appear and testify in the court where such criminal action is pending at the time and place to be stated therein. If any person on whom such subpoena has been served in the manner provided by this chapter, having been tendered by the party asking for the subpoena the sum of ten cents for each mile to be traveled to and from such court, and the sum of five dollars for each day that his attendance is required, the number of days to be specified in the subpoena, shall unreasonably neglect to attend and testify at such court, he shall be punished in the manner provided for the punishment of disobedience of any other subpoena issued from a clerk of a court of record in this state, provided, however, that the laws of the state in which the trial is to be held gives to persons coming in the state under such subpoena, protection from the service of papers and arrest.

Added by ch. 94, Laws 1902. Took effect March 6, 1902.

**§ 618b. Judge may order witness to enter into an undertaking for appearance or be committed on refusal to comply therewith.**—Whenever a judge of a court of record in this state is satisfied, by proof on oath, that a person residing or being in this state is a necessary and material witness for the people in a criminal action or proceeding in any of the courts of this state, he may, after an opportunity has been given to such person to appear before such judge and be heard in opposition thereto order such person to enter into a written undertaking with such sureties and in such sum as he may deem proper, to the effect that he will appear and testify at the court in which such action or proceeding may be heard or tried, and upon his neglect or refusal to comply with the order for that purpose, the judge must commit him to such place, other than a state prison, as he may deem proper, until he comply or be legally discharged.

Added by chap. 437, Laws 1904. Takes effect May 17, 1904.

**Punishment.**—This section provides that, for disobedience to a subpoena, the witness may be punished in the manner prescribed by the Civil Code. *People ex rel. Webster v. Van Tassell*, 46 St. Rep., 583; 64 Hun, 450; 19 N. Y. Supp., 644.

This section includes only proceedings for the punishment of a witness who disobeys a subpoena or refuses to be sworn or testify in a criminal case. *People ex rel. Munsell v. Court, etc.*, 36 Hun, 280.

**Indictment.**—The disobedience of a subpoena is not under our statute a criminal offense punishable by indictment. *Sherwin v. People*, 92 N. Y., 415, 8 N. Y. Cr., 524.

**Contempt.**—This section makes a disobedience to a subpoena, or refusal to be sworn or testify, a criminal contempt. *People ex rel. Munsell v. Court, etc.*, 101 N. Y., 251.

## CHAPTER III.

### EXAMINATION OF WITNESSES, CONDITIONALLY.

**SECTION 620.** Witnesses to be examined conditionally, for the defendant as provided in this chapter.

621. In what cases defendant may apply for order.

622. Application, on what facts to be founded,

623. If during term, to be made to the court.

624. If not during term, to whom to be made.

625. The order, when granted and what to contain.

626. If made by the court, may direct examination before a judge or magistrate. If made by a judge, examination to be before him.

627. On proof of service, if district attorney absent, examination to proceed.

628. If facts on which order was founded, be disproved, examination not to proceed.

629. Testimony, how taken and authenticated.

630. Deposition, how, by whom and when filed.

631. When it may be read in evidence.

632. When to be excluded.

633. On reading the deposition, on trial, what objections may be taken.

634. Attendance of witness for examination, how compelled.

635. Disobedience of witness, how punished.

§ 620. Witnesses to be examined conditionally for the defendant as provided in this chapter.—When a defendant has been held to answer a charge of a crime, he may, either before or after indictment, have witnesses examined conditionally on his behalf, as prescribed in this chapter, and not otherwise.

See notes under section 633, *post*.

This chapter makes no provision for an examination of witnesses before trial by the people.

The provisions of section 885 of Code of Civil Procedure do not apply to criminal cases. *People v. Squire*, 4 N. Y. Cr., 582.

§ 621. In what cases defendant may apply for order.—When a material witness for the defendant is about to leave the state, or is so sick or infirm, as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

See subd. 5, section 872 of Code of Civil Procedure.

See note in 1 Silv. (Sup. Ct.), 2.

§ 622. **Application, on what facts to be founded.**—The application must be made upon affidavit, showing :

1. The nature of the crime charged ;
2. The state of the proceedings in the action ;
3. The name and residence of the witness, and that his testimony is material to the defense of the action ; and
4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial.

§ 623. **If during term, to be made to the court.**—The application, if made during the term, must be made to the court.

§ 624. **If not during term, to whom to be made.**—If not made during the term, it may be made as follows :

1. When the indictment is pending in the supreme court, or in a county court other than in the city of New York, to a judge of the supreme court, or to the county judge ;
2. When the indictment is pending in the court of general sessions of the city of New York, to the recorder or city judge or judge of general sessions, or one of the judges of the supreme court in that city ;
3. When the indictment is pending in a city court, to the recorder or city judge of the city in which it is pending.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

§ 625 **The order, when granted and what to contain.**—If the court or officer be satisfied that the examination of the witness is necessary to the attainment of justice, an order must be made, that the witness be examined conditionally, at a specified time and place, and that a copy of the order, and of the affidavit on which it was granted, be served on the district attorney, within a specified time before that fixed for the examination.

§ 626. **If made by the court, may direct examination before a judge or magistrate. If made by a judge, examination to be before him.**—If the order be made by the court, it may direct that the examination be taken before a judge thereof, or before a magistrate in the county, to be named in the order. If made by any of the officers mentioned in section 624, it must direct the examination to be taken before him.

This statute only authorizes a commission to take testimony to be read on the trial of an indictment. *People v. Haight*, 8 N. Y. Cr., 61 ; 18 Abb. N. C., 197. But the testimony of a witness residing out of the state cannot be taken on commission to be read before commissioners appointed to examine and report on the sanity of a defendant. *Id.*

§ 627. **On proof of service, if district attorney absent, examination to proceed.**—On proof being furnished to the officer before whom the examination is appointed, of the service upon the district attorney, of a copy of the order and of the affidavit on which it was granted, if no counsel appear on the part of the people, the examination must proceed.

§ 628. **If facts on which order was founded, be disproved, ex-**

**amination not to proceed.**—If the district attorney or other counsel appear on the part of the people, and it be shown to the satisfaction of the court or officer, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place; otherwise it must proceed.

§ 629. **Testimony, how taken and authenticated.**—The testimony given by the witness must be reduced to writing, and authenticated in the same manner as the testimony of a witness taken in support of an information, as prescribed in section 200.

See section 200, *ante*, and notes under such section.

See *People v. Guidici*, 100 N. Y., 507; 3 N. Y. Cr., 557.

§ 630. **Deposition, how, by whom and when filed.**—The deposition must be retained by the officer taking it, and filed by him in the office of the clerk of the court without unnecessary delay.

The officer acts ministerially in taking and reducing the evidence of the witness to writing. *Hewlett v. Wood*, 67 N. Y., 399. He cannot judicially determine any question that may be made, or control the counsel in the examination. *Id.* He must insert in the deposition every answer or declaration of the witness which either party shall require to be included therein. *Id.*

See *People v. Guidici*, 100 N. Y., 507; 3 N. Y. Cr., 557.

§ 631. **When it may be read in evidence.**—The deposition, or a certified copy thereof, may be read in evidence by either party on trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness or infirmity, or of his continued absence from the state.

See section 882 of Code of Civil Procedure and notes to said section in *Bliss' or Stover's Code*.

**Condition.**—The inability of the witness to attend must exist at the time of the trial. *Fry v. Bennett*, 4 Duer, 247.

**Proof of continued absence.** *Bronner v. Frauenthal*, 37 N. Y., 166; See *People v. Guidici*, 100 N. Y., 507; 3 N. Y. Cr., 557; *Mutual Life Ins. Co. v. Anthony*, 4 N. Y. Supp., 503; *Same v. Nat. B. & L. Co.*, 19 St. Rep., 41.

§ 632. **When to be excluded.**—The deposition cannot, however, be read, if it appear that the copy of the order and of the affidavit on which it was founded, was not served on the district attorney, as directed, or that the examination was in any respect unfair or not conducted as prescribed in this chapter.

**Suppression.**—A deposition may, in the discretion of the court, be suppressed in advance of the trial. *Hewlett v. Wood*, 67 N. Y., 394.

Where the opportunity to cross-examine the witness has been lost through his misconduct, or through the fault or omission of the party on whose behalf he is examined, or other like cause, the deposition should be set aside or testimony rejected. *Id.*

An objection to the witness' refusal to answer proper and material questions must be availed of upon the examination, or afterwards by motion before the trial. *Sturm v. Atlantic Mutual Ins. Co.*, 63 N. Y., 77. A party cannot object, on the trial, to the reading of the deposition or move then to suppress it. *Id.*

See *People v. Guidici*, 100 N. Y., 507; 3 N. Y. Cr., 557.



§ 633. **On reading the deposition, on trial, what objections may be taken.**—Upon the reading of the deposition in evidence, the same objections may be taken to a question or answer contained therein, as if the witness had been examined orally in court.

See section 883 of Code of Civil Procedure and notes to such section in Bliss' or Stover's Code.

Where, upon a criminal trial, the deposition of a witness taken on commission, on the application of the defendant, was offered in evidence on behalf of the people, and received without objection or exception on the part of the defendant, no question as to its admissibility can be considered in the court of appeals. *People v. Guidici*, 100 N. Y., 503; 3 N. Y. Cr., 557.

§ 634. **Attendance of witness for examination, how compelled.**—The attendance of the witness may be enforced, by a subpoena subscribed by the officer, or issued under the seal of the court.

See *People v. Guidici*, 100 N. Y., 507; 3 N. Y. Cr., 557.

§ 635. **Disobedience of witness, how punished.**—Disobedience to the subpoena, or a refusal to be sworn or to testify, may be punished by the court or officer, as prescribed in section 619.

The case of *People v. Sharp*, 10 St. Rep., 522; 45 Hun, 493; 5 N. Y. Cr., 465, was reversed in 12 St. Rep., 217; 107 N. Y., 427.

By this section, a disobedience to a subpoena, or a refusal to be sworn or testify, is made a criminal contempt. *People ex rel. Munsell v. Court, etc.*, 101 N. Y., 251.

See *People v. Guidici*, 100 N. Y., 507; 3 N. Y. Cr., 557.

## CHAPTER IV.

### EXAMINATION OF WITNESSES ON COMMISSION.

**SECTION 636.** Witness residing out of the state, to be examined for defendant, as provided in this chapter.

637. In what cases defendant may apply for order to examine witnesses on commission.

638. Commission defined.

639. Application for commission, on what facts to be founded.

640. If during term, to be made to the court.

641. If not during term, to whom to be made.

642. Nature of application, when required and how given.

643. Order of commission, when granted.

644. Trial to be stayed until execution and return of commission.

645. Interrogatories, and notice of settlement.

646. Cross-interrogatories, and notice of settlement.

647, 648. What may be inserted in interrogatories.

649. Direction as to return of commission.

650. Commission, how executed.

651. Copy of last section to be annexed to commission.

652, 653. Commission, how returned, when delivered to agent for that purpose.

654. When and how filed.

655. Commission returned by mail, how disposed of.

656. Commission and return to be open for inspection, and copies to be furnished.

657. Deposition to be read in evidence. What objections may be taken thereto.

**§ 635. Witness residing out of the state, to be examined for defendant, as provided in this chapter.**—When an issue of fact is joined upon an indictment, the defendant may have any material witness residing out of the state examined in his behalf, as prescribed in this chapter, and not otherwise.

**Commission.**—By express limitation, the defendant is the only party who can procure the issuing of a commission under this chapter.

The right of a party to an action to have the evidence of witnesses taken upon commission, and the power of the court to award a commission, depends solely upon the statute. *McColl v. Sun Mutual Ins. Co.*, 50 N. Y., 134.

The power of the court to award a commission can only be exercised before trial and judgment, or upon the granting of a new trial. *Id.*

A person under indictment, who pleads insanity, is not entitled to a commission to take the testimony of a non-resident witness, under sections 636 to 657 inclusive, when such testimony is only to be used before commissioners, appointed by the court before trial, to inquire as to the insanity of the accused, and to report to the court. *People v. Haight*, 13 Abb. N. C., 98; 3 N. Y. Cr., 61.

Sections 636–662, examined and construed. *People v. Haight*, 13 Abb. N. C., 197; 3 N. Y. Cr., 61.

**§ 637. In what cases defendant may apply for order to examine witnesses on commission.**—When a material witness for the defendant resides out of the state, the defendant may apply for an order that the witness be examined on a commission.

**§ 638. Commission defined.**—A commission is a process issued under the seal of the court, and the signature of the clerk, directed to one or more persons, designated as commissioners, authorizing them to examine the witness upon oath, on interrogatories annexed thereto, and to take and return the deposition of the witness, according to the directions given, with the commission.

**§ 639. Application for commission, on what facts to be founded.**—The application must be made upon affidavit, showing:

1. The nature of the crime charged;
2. The state of the proceedings in the action, and that issue of fact has been joined therein;
3. The name of the witness, and that his testimony is material to the defense of the action;
4. That the witness resides out of the state.

**Object.**—Sections 639 to 657 inclusive, show that the object of the statute is to authorize a commission to take testimony to be read only upon the trial of the indictment. *People v. Haight*, 3 N. Y. Cr., 63; 13 Abb. N. C., 99. No provision is made for the case of an inquiry by commissioners into the sanity of a defendant under indictment. *Id.*

**Upon what proof.**—Upon an application for a commission, it must be made to appear, among other things, that an issue of fact has been joined in the action, and that the witness is material to the defense of the action. *People v. Haight*, 3 N. Y. Cr., 62; 13 Abb. N. C., 199.

**§ 640. If during term, to be made to the court.**—The application, if made during the term, must be made to the court.

**§ 641. If not during term, to whom to be made.**—If not made during the term, the application may be made as follows:

1. When the indictment is pending in the supreme court, except in the city and county of New York, in a county court, to a judge of the supreme court or to the county judge;

2. When the indictment is pending in the court of general sessions in the city and county of New York, to the recorder or city judge or judge of general sessions, or one of the justices of the supreme court in that city;

3. When the indictment is pending in a city court, to the recorder or judge of the court in which it is pending.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

§ 642. **Without notice to district attorney unless court otherwise order.**—If the application be made to the court, it may be without notice to the district attorney, unless the court directs notice to be given, in which case it must prescribe the manner of giving the same. If made to one of the officers mentioned in the last section, the application must be upon five days' notice to the district attorney, served with a copy of the affidavit upon which it is founded.

Amended by chap 360 of 1882.

This amendment inserted, after the word "attorney" in the second sentence of the original section, the word "served."

§ 643. **Order for commission, when granted.**—If the court or officer to whom the application is made, be satisfied that the witness resides out of the state, and that his examination is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and that the people be permitted to join in the commission, and to examine witnesses in support of the indictment.

If the commission is granted, the order must provide that the people be permitted to join in the commission and to examine witnesses in support of the indictment. *People v. Haight*, 3 N. Y. Cr., 62; 13 Abb. N. C., 199.

§ 644. **Trial to be stayed until execution and return of commission.**—If the application for a commission be granted, the court or judge must insert in the order therefor, a direction that the trial of the indictment be stayed for a specified time, reasonably sufficient for the execution and return of the commission.

See *People v. Haight*, 3 N. Y. Cr., 62; 13 Abb. N. C., 199.

§ 645. **Interrogatories, and notice of settlement.**—When the commission is ordered, the defendant must serve upon the district attorney, and the district attorney, if he intend to join in the commission and examine witnesses in support of the indictment, must serve upon the defendant or his counsel, a copy of the interrogatories to be annexed thereto, with a notice of two days of their settlement, before an officer who might have granted the order out of term, as provided in section 641.

See *People v. Haight*, 3 N. Y. Cr., 62; 13 Abb. N. C., 199.

§ 646. **Cross-interrogatories and notice of settlement.**—The district attorney, and the defendant, may, in the same manner,

serve cross-interrogatories, to be annexed to the commission, with the like notice of the settlement thereof.

§ 647. **What may be inserted in interrogatories.**—In the interrogatories, either party may insert any question pertinent to the issue.

See *People v. Haight*, 3 N. Y. Cr., 62 ; 13 Abb. N. C., 199.

§ 648. **What may be inserted in interrogatories.**—Upon the settlement of the interrogatories, the judge must expunge every question not pertinent to the issue, and modify the questions, so as to conform them to the rules of evidence, and when settled, must indorse upon them his allowance, and annex them to the commission.

See *People v. Haight*, 3 N. Y., Cr., 62 ; 13 Abb. N. C., 201.

§ 649. **Direction as to return of commission.**—Unless the parties otherwise consent, by an indorsement upon the commission, the officer must indorse thereon a direction, as to the manner in which it must be returned ; and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the indictment is pending, designating his name and the place where his office is kept.

§ 650. **Commission, how executed.**—The commissioners, or any one of them, unless otherwise specially directed, may execute the commission as follows :

1. They must publicly administer an oath to the witness, that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth ;

2. They must cause the examination of the witness, to be reduced to writing ;

3. They must write the answers of the witness, as nearly as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it, until it is made conformable to what he declares is the truth ;

4. If the witness decline answering a question, that fact, with the reason for which he declines answering it, as he gives it, must be stated ;

5. If papers or documents are produced before them, and proved by the witness, they must be annexed to his deposition, and be subscribed by the witness, and certified by the commissioners ;

6. The commissioners must subscribe their names to each sheet of the deposition, and annex the deposition, with the papers or documents proved by the witness, to the commission, and must close it up under seal, and address it, as directed thereon.

7. If there be a direction on the commission, to return it by mail, the commissioners must immediately deposit it in the nearest post-office. If any other direction be made, by the written consent of the parties, or by the officer, on the commission, as to its return, they must comply with the direction.

**§ 651. Copy of last section to be annexed to commission.**—A copy of the last section must be annexed to the commission.

See *People ex rel. Sherrer v. Walsh*, 67 How. 484.

**§ 652. Commission, how returned, when delivered to agent for that purpose.**—If the commission and return be delivered by the commissioners to an agent, he must deliver it to the clerk to whom it is directed, or to a judge of the court in which the indictment is pending, by whom it may be received and opened, upon the affidavit of the agent, that he received it from the hands of one of the commissioners, and that it has not been opened or altered since he received it.

**§ 653. Commission, how returned, when delivered to agent for that purpose.**—If the agent be dead, or from sickness or other casualty, unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent, that the agent is dead, or from sickness or other casualty, unable to deliver it, that it has not been opened or altered since the person making the affidavit received it, and that he believes it has not been opened or altered since it came from the hands of the commissioners.

**§ 654. When and how filed.**—The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending.

**§ 655. Commission returned by mail, how disposed of.**—If the commission and return be transmitted by mail, the clerk to whom it is addressed must open and file it in his office, where it must remain, unless the court otherwise direct.

**§ 656. Commission and return to be open for inspection, and copies to be furnished.**—The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same, or of any part thereof, on payment of his fees, at the rate of five cents for every hundred words.

See section 909 of Code of Civil Procedure.

**§ 657. Deposition to be read in evidence. What objections may be taken thereto.**—The deposition, taken under the commission, may be read in evidence by either party on the trial, and the same objections may be taken to a question in the interrogatories, or to an answer in the deposition, as if the witness had been examined orally in court.

See section 911 of Code of Civil Procedure, and notes to said section in Bliss' or Stover's Code.

See *People v. Haight*, 3 N. Y. Cr., 62 ; 13 Abb. N. C., 199.

A deposition, taken under a commission, will not be excluded because an

swer to a cross-interrogatory is not full. *Baker v. Spencer*, 47 N. Y., 562. In such case the party can elicit further facts only by obtaining a re-examination of the commission. *Id.*

## CHAPTER V.

### QUIRY INTO THE INSANITY OF THE DEFENDANT, BEFORE OR DURING THE TRIAL, OR AFTER CONVICTION.

**SECTION 658.** Appointment of commission ; their proceedings.

659. If found insane, trial or judgment suspended, and defendant to be committed to state lunatic asylum, if his discharge be dangerous to the public peace or safety.

660. If defendant committed, bail exonerated or deposit of money refunded.

661. Detention of defendant in asylum, and proceedings on his becoming sane.

662. Expenses incident to sending defendant to asylum, how paid.

**§ 658. Appointment of commission ; their proceedings.**—When defendant pleads insanity as prescribed in section 336, the court in which the indictment is pending, instead of proceeding with the trial of the indictment, may appoint a commission of not more than three disinterested persons, to examine him and report to the court as to his sanity at the time of the commission of the crime.

If a defendant in confinement, under indictment, appears to be at any time before or after conviction, insane, the court in which the indictment is pending, unless the defendant is under sentence of death, may appoint a like commission to examine him and report to the court as to his sanity at the time of the examination.

The commission must summarily proceed to make their examination. Before commencing they must take the oath prescribed in the Code of Civil Procedure, to be taken by referees. They must be attended by the district attorney of the county, and may call and examine witnesses and compel their attendance. The counsel of the defendant may take part in the proceedings. When the commissioners have concluded their examination they must forthwith report the facts to the court with their opinion thereon.

See section 20 of Penal Code.

For commissioner's oath, see section 1016 of Code of Civil Procedure.

**Power of commission.**—The facts, contained in the report of the commission, and the opinion based upon them, are intended for the information and guidance of the court in any subsequent proceeding which it may become necessary for it to adopt. *People v. Rhineland*, 3 N. Y. Cr., 341.

The power of the commission is limited to an examination into the matter referred to them, and to report the result of their examination, with their opinion, to the court. *Id.*

It has no power to determine finally these questions. *Id.*

The findings of the majority of the commission upon the question of the defendant's sanity, at the time of the examination, are not conclusive. *Id.*

**Two cases for commission.**—This section seems to contemplate two cases in which a commission may be appointed : first, after a plea on the merits and before trial, to determine the mental condition of the defendant



at the time of the commission of the crime ; and, second, when a person in confinement under indictment, whether before or after conviction, appears to be insane, to determine his mental condition at the time of the examination. *People v. McElvaine*, 36 St. Rep., 180 ; 125 N. Y., 605 ; 8 N. Y. Cr., 159.

**Discretion.**—It invests the trial judge with a discretion to appoint or not appoint a commission, as in the exercise of his judgment he may deem it proper or necessary to do. *Id.*

**Duty of court.**—It is the duty of the court, when the subject is brought to its attention by responsible parties to examine sufficiently to determine the good faith of the application. *Id.*

Under the second paragraph of this section, it is only when the necessity of such an examination is made to appear, that the court is bound to order an examination. *Id.*

**Commission.**—No provision is made for a commission to take testimony to be read upon an inquiry by commissioners, appointed under this section, into the sanity of a defendant under indictment. *People v. Haight*, 3 N. Y. Cr., 63 ; 13 Abb. N. C., 199.

See *People v. Taylor*, 52 St. Rep., 920 ; 138 N. Y., 408.

§ 659. **If found insane, trial or judgment suspended, and defendant to be committed to state lunatic asylum, if his discharge be dangerous to the public peace or safety.**—If the commission find the defendant insane the trial or judgment must be suspended, until he becomes sane ; and the court, if it deem his discharge dangerous to the public peace or safety, must order that he be, in the meantime, committed by the sheriff to a state lunatic asylum, and that upon his becoming sane, he be re-delivered by the superintendent of the asylum to the sheriff.

**Not final.**—The report of the commissioners is not a final determination of the question of the defendant's sanity at the time when it is alleged that he committed the offense. *People v. Haight*, 3 N. Y. Cr., 61 ; 13 Abb. N. C., 198.

The provisions of this section do not deprive the court of the power to review the action of the commission. *People v. Rhineland*, 3 N. Y. Cr., 338.

The court has discretion as to suspending the trial of the indictment. *Id.*

**Test.**—It is sufficient, in such a proceeding, to put the defendant to his defense that he is capable of rightly understanding his own condition, the nature of the charge against him, and of conducting his defense in a rational manner. *Id.*

§ 660. **If defendant committed, bail exonerated or deposit of money refunded.**—The commitment of the defendant, as mentioned in the last section, exonerates his bail, or entitles a person authorized to receive the property of the defendant, to a return of any money he may have deposited instead of bail.

§ 661. **Detention of defendant in asylum and proceedings on his becoming sane.**—If the defendant be received into the asylum, he must be detained there until he become sane. When he becomes sane, the superintendent must give a written notice of that fact to a judge of the supreme court of the district in which the asylum is situated. The judge must require the sheriff without delay to bring the defendant from the asylum, and place him in the proper custody until he be brought to trial, judgment, or execution as the case may be, or be legally discharged.

The report of the commissioners will not prevent the defendant from

having the question of his sanity passed upon by the jury on the trial of the indictment. *People v. Haight*, 3 N. Y. Cr., 61; 13 Abb. N. C., 198.

**§ 662. Expenses incident to sending defendant to asylum, how paid.**—The expenses of sending the defendant to the asylum, of keeping him there, and of bringing him back, are, in the first instance, chargeable to the county from which he was sent; but the county may recover them from the estate of the defendant, if he have any, or from a relative, town, city, or county, bound to provide for and maintain him elsewhere.

**§ 662a. Costs of commission charge upon the county.**—The costs of any commission of lunacy pursuant to the provisions of this article, shall be a charge upon the county in which the commission shall have been executed. The commissioners are entitled to such compensation for their services as the court may direct.

Added by L. 1903, chap. 129. In effect Sept. 1, 1903.

## CHAPTER VI.

### COMPROMISING CERTAIN CRIMES, BY LEAVE OF THE COURT.

**SECTION 663.** What crimes may be compromised.

664. When proceedings may be stayed and the defendant discharged.

665. Order, a bar to another prosecution.

666. No public offense to be compromised, except as provided in this chapter.

**§ 663. What crimes may be compromised.**—When a defendant is brought before a magistrate, or is held to answer on a charge of a misdemeanor, for which the person injured by the act constituting the crime has a remedy by civil action, the crime may be compromised, as provided in the next section, except when it was committed,

1. By or upon an officer of justice while in the execution of the duties of his office ;

2. Riotously; or

3. With an intent to commit a felony.

Amended by chap. 63 of 1884.

This amendment inserted the words "is brought before a magistrate, or."

The termination of a prosecution by compromise, as provided for by this and the following section, does not constitute such a termination as will justify an action for malicious prosecution. *Gallagher v. Stoddard*, 13 St. Rep., 218; 47 Hun. 103.

**§ 664. When proceedings may be stayed and the defendant discharged.**—If the party injured appear before the magistrate, or before the court to which the depositions and statements are required, by section two hundred and twenty-one, to be returned at any time before trial or commitment by the magistrate, or trial on indictment for the crime, and acknowledge in writing that he has received satisfaction for the injury, the magistrate or court may, in his or its discretion, on payment of the costs and expenses incurred, if such magistrate or court shall see fit so to direct, order all proceedings to be stayed upon the prosecution and the defendant be discharged therefrom. But in that case, the reason for the order must be set forth therein and entered upon the minutes.

Amended by chap. 63 of 1884.

This amendment gave to the magistrate the same power as the court had by the original section.

§ 665. **Order, a bar to another prosecution.**—The order authorized by the last section is a bar to another prosecution for the same offense.

§ 666. **No public offense to be compromised, except as provided in this chapter.**—No crime can be compromised, nor can any proceeding for the prosecution or punishment thereof upon a compromise, be stayed, except as provided in sections 663 and 664.

## CHAPTER VII.

### DISMISSAL OF THE ACTION, BEFORE OR AFTER INDICTMENT, FOR WANT OF PROSECUTION OR OTHERWISE.

SECTION 667. Dismissal, when a person held to answer is not indicted at the next term thereafter.

668. When a person indicted is not brought to trial at the next term thereafter.

669. Court may order action to be continued, and in the meantime discharge defendant from custody, on his own undertaking, or on bail.

670. If action dismissed, defendant to be discharged from custody, or his bail exonerated, or deposit of money refunded.

671. Court may order indictment to be dismissed.

672. Nolle prosequi abolished ; no indictment to be dismissed or abandoned, except according to this chapter.

673. Dismissal, a bar, in misdemeanor ; but not in felony.

§ 667. **Dismissal, when a person held to answer is not indicted at the next term thereafter.**—When a person has been held to answer for a crime, if an indictment be not found against him, at the next term of the court at which he is held, to answer, the court may on application of the defendant order the prosecution to be dismissed, unless good cause to the contrary be shown.

§ 668. **When a person indicted is not brought to trial at the next term thereafter.**—If a defendant, indicted for a crime, whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.

**Indictment dismissed.**—This section is new, and was not law previous to the Code. *People v. Beckwith*, 2 N. Y. Cr., 31.

Where there are several indictments against the same defendant, it is neither wise nor just for the prosecution to allow years to elapse between the trials on the indictment. *People v. Smith*, 2 N. Y. Cr., 45.

The former statute, which contemplated the discharge of a prisoner who is not brought to trial within the time mentioned in the statutes, did not give an absolute right to a release. *Matter of People ex rel. Estes v. Warden*, etc., 11 W. Dig., 271. If the prosecution could furnish a good reason to the contrary, the application need not to be granted. *Id.*

§ 669. **Court may order action to be continued, and in the meantime discharge defendant from custody, on his own undertaking, or on bail.**—If the defendant be not indicted or tried

as provided in the last two sections, and sufficient reason therefor be shown, the court may order the action to be continued from term to term, and in the mean time may discharge the defendant from custody on his own undertaking, or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

See notes under preceding section.

The circumstances, in *People v. Smith*, 2 N. Y. Cr., 45, were held to be such as to require the discharge of the defendant on his own recognizance.

§ 670. **If action dismissed, defendant to be discharged from custody, or his bail exonerated, or deposit of money refunded.**—If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him.

See notes under section 668, *ante*.

§ 671. **Court may order indictment to be dismissed.**—The court may, either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed.

See *People v. Smith*, 2 N. Y. Cr., 46.

This section is new, and was not law prior to the Code. *People v. Beckwith*, 2 N. Y. Cr., 31

**Dismissal.**—The Code has not taken away the power which the court formerly possessed over indictments, but has rather enlarged it. *People v. Brickner*, 8 N. Y. Cr., 221 ; 15 N. Y. Supp., 530.

The power given by this section may be exercised upon the application of the district attorney or on motion of the court. *Id.* The court may act either upon its own motion or at the suggestion of an *amicus curiæ*, or upon the request of the defendant, if he can make it appear that a proper case exists. *Id.*

An indictment, filed previous to the time that the Code of Criminal Procedure took effect, cannot be dismissed upon the motion of the defendant under this section. *People v. Beckwith*, 2 N. Y. Cr., 29 ; *People v. Smith*, *id.* 15.

§ 672. **Nolle prosequi abolished. No indictment to be dismissed or abandoned except according to this chapter.**—The entry of a *nolle prosequi* is abolished ; and neither the attorney-general, nor the district attorney, can discontinue or abandon a prosecution for a crime except as provided in the last section.

This section abolishes the old practice of entering a *nolle prosequi*. *People v. Beckwith*, 2 N. Y. Cr., 52.

§ 673. **Dismissal, a bar, in misdemeanor, but not in felony.**—An order for the dismissal of the action, as provided in this chapter, is a bar to another prosecution for the same offense, if it be a misdemeanor ; but it is not a bar, if the offense charged be a felony.

See section 9, *ante*, and notes under such section.

## CHAPTER VIII.

## REMITTING THE PUNISHMENT, IN CERTAIN CASES.

**SECTION 674.** Punishment, upon conviction of a master of a vessel from a foreign country.

§ 674. **Punishment, upon conviction of a master of a vessel from a foreign country.**—When the master of a vessel arriving from a foreign country is convicted of having knowingly brought a person convicted therein of a crime, which, if committed in this state, would be a felony, to a place within the state, the court before which the conviction is had may, if satisfied that the defendant has reconveyed the convict to the place from which he took him, and on payment of the costs of prosecution, order the punishment upon the conviction to be remitted.

## CHAPTER IX.

## PROCEEDINGS AGAINST CORPORATIONS.

**SECTION 675.** Summons upon an information or presentment against a corporation, by whom issued, and when returnable.

676. Form of the summons.

677. When and how served.

678. Examination of the charge.

679. Certificate of the magistrate, and return thereof with the depositions.

680. Grand jury may proceed as in the case of a natural person.

681. Bringing an indicted corporation into court.

682. Fine, on conviction, how collected.

§ 675. **Summons upon an information or presentment against a corporation, by whom issued, and when returnable.**—Upon an information against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge; the time to be not less than ten days after the issuing of the summons.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 191; 5 N. Y. Supp. 20.

§ 676. **Form of the summons.**—The summons must be in substantially the following form:

“County of Albany [or as the case may be].

“In the name of the people of the state of New York:

“To the [naming the corporation.]

“You are hereby summoned to appear before me, at [naming the place], on [specifying the day and hour], to answer a charge

made against you, upon the information of A. B., for [designating the offense, generally].

“Dated at the city [or town] of \_\_\_\_\_, the  
day of \_\_\_\_\_, 18 \_\_\_\_.

G. H., Justice of the peace.”

[Or as the case may be.]

See *People v. Equitable Gas light Co.*, 6 N. Y. Cr., 192 ; 5 N. Y. Supp., 20,

§ 677. **When and how served.**—The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president, or other head of the corporation, or to the secretary, cashier, or managing agent thereof.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 192 ; 5 N. Y. Supp., 20.

§ 678. **Examination of the charge.**—At the time appointed in the summons, the magistrate must proceed to investigate the charge, in the same manner as in the case of a natural person brought before him, so far as those proceedings are applicable.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 192 ; 5 N. Y. Supp., 20.

§ 679. **Certificate of the magistrate, and return thereof with the depositions.**—After hearing the proofs, the magistrate must certify upon the depositions, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the depositions and certificate, in the manner prescribed in section 221.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 192 ; 5 N. Y., Supp., 20.

§ 680. **Grand jury may proceed as in the case of a natural person.**—If the magistrate return a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the grand jury may proceed thereon, as in the case of a natural person held to answer.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 192 ; 5 N. Y. Supp., 20, 21.

§ 681. **Bringing an indicted corporation in court.**—When an indictment is filed against any corporation, such corporation must be arraigned thereon, and the court acquires jurisdiction over the corporation, in the manner following:

1. The clerk of the court wherein such indictment is found, or to which it is sent or removed, or the district attorney of the county, must issue a summons signed by him with his name of office, requiring such corporation to appear and answer the indictment by a demurrer or written plea to be verified in like manner as a pleading in a civil action, at a time and place to be specified in such summons, such time to be not less than five days after the issue thereof. The summons may be substantially in the following form:



Supreme court, county of [state the proper county  
or court as the case may be.]  
The People of the State of New York  
vs.  
The A. B. Company.

You are hereby summoned to appear in this court and, by demurrer or plea in writing duly verified, answer an indictment filed against you by the grand jury of this county, on the day of , charging you with the crime of [designating the offense generally], at a term of the supreme court [or as the case may be] of this county, at [naming the place] on [stating the day and hour], and in case of your failure to so appear and answer, judgment will be pronounced against you.

Dated at the city [or town] of , the day of 18 .  
C. D.,  
District Attorney.

[Or by order of the court, E. F., clerk, as the case may be.]

2. The summons must be served at least four days before the appearance fixed therein, in the same manner as is provided for the service of a summons upon a corporation in a civil action; and if the corporation does not appear in the manner and at the time and place specified in the summons, judgment must be pronounced against it.

3. Nothing contained in this section shall be construed as preventing the appearance of a corporation by counsel to answer an indictment, without the issuance or service of the summons as above provided. And when an indictment shall have been filed against a corporation it may voluntarily appear and answer the same by counsel duly authorized to so appear for it; in which case the court acquires full jurisdiction over the corporation in the same manner as if the summons had been issued and served.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 219 of 1892.

This amendment virtually substituted the present, for the original, section.

No provision was made, prior to the amendment of 1892, to compel a corporation, indicted for a criminal offense, to appear and submit to the jurisdiction of the court in which the indictment was filed. *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 189 : 5 N. Y. Supp., 20, 21.

No provision was made for notice to a corporation of the finding of an indictment, and no opportunity given it of availing itself of the benefit of a motion to set it aside, demur or plead specially thereto. *Id.*

§ 682. **Fine, on conviction, how collected.**—When a fine is imposed upon a corporation, on conviction, it may be collected by virtue of the order imposing it, by the sheriff of the county, out of their real and personal property, in the same manner as upon an execution in a civil action.

Amended by chap. 219 of 1892.

This amendment virtually substituted the present, for the original, section.

See *People v. Equitable Gas Light Co.*, 6 N. Y. Cr., 191 ; 5 N. Y. Supp., 20 ; *People v. Clark*, 14 id., 655.

## CHAPTER X.

### ENTITLING AFFIDAVITS.

#### SECTION 683. Affidavits defectively entitled, valid.

**683. Affidavits defectively entitled, valid.**—It is not necessary to entitle an affidavit or deposition in the action, whether taken before or after indictment, or upon an appeal ; but if made without a title, or with an erroneous title, it is as valid and effectual for every purpose, as if it were duly entitled, if it intelligibly refer to the proceeding, indictment or appeal in which it is made.

The reference in *Kibbe v. Wetmore*, 31 Hun, 425, to this section, should be to section 683 of Code of Civil Procedure.

## CHAPTER XI.

### ERRORS AND MISTAKES, IN PLEADINGS AND OTHER PROCEEDINGS.

#### SECTION 684. Errors, etc., when not material.

**§ 684. Errors, etc., when not material.**—Neither a departure from the form or mode prescribed by this Code, in respect to any pleadings or proceedings, nor an error or mistake therein, renders it invalid, unless it have actually prejudiced the defendant, or tend to his prejudice, in respect to a substantial right.

See sections 285 and 542, *ante*.

See notes under section 568, *ante*.

**Disregarding errors, etc.**—An appellate court should give, with reason and discretion, full force and effect to the provisions of this section. *People v. Dimick*, 11 St. Rep., 739 ; 107 N. Y., 13, 34.

This section is general in its application, and is intended to cure defects in form under the general rules of criminal pleading. *People v. Williams*, 18 St. Rep., 405 ; 2 N. Y. Supp., 382, 383.

This section, more specifically than section 285, *ante*, cures deviations from the particular forms prescribed by the Criminal Code. *Id*.

After judgment, every intendment is to be indulged in support thereof and the court is to deal with matters of substance, not form. *Schrumpf v. People*, 14 Hun, 13.

Under this section, technical errors or defects, or exceptions, not affecting the substantial rights of the parties, will be disregarded in giving judgment on appeal. *Willett v. People*, 27 Hun, 461, 471.

**Instances.**—Where an omission to arraign the defendant upon the indictment, or have him plead thereto, does not tend to prejudice his rights, it will be disregarded. *People v. Tower*, 42 St. Rep., 164, 166 ; 17 N. Y. Supp., 397.

The omission to fill in the blank, in the recital of an undertaking of bail, intended for the specification of the nature of the crime, is not one prejudicing, or tending to prejudice, the defendant in respect to a substantial right, and so does not render the undertaking invalid. *People v. Gillman*, 85 St. Rep., 281 ; 125 N. Y., 375.

Where a variance between the indictment and proof, in the name of the complainant, does not in any way prejudice the defendant, it does not ren-

der the indictment invalid. *People v. Hagan*, 37 St. Rep., 661 ; 14 N. Y. Supp., 233.

The court can, under this section, disregard it upon the trial. *Id.*

The provisions of this section were applied, in *Tillotson v. Martin*, 40 Hun, 322, to remedy a departure from the form of undertaking prescribed by section 882, *post*.

Where a warrant of commitment substantially complies with the requirements of section 721, *post*, as to certificates, and the variance is at most a defect in the proceeding, which works no prejudice, the objection will be disregarded under this section. *People v. Holmes*, 2 St. Rep., 676 ; 5 N. Y. Cr., 131 ; 41 Hun, 55.

See *People v. Hughes*, 46 St. Rep., 415 ; 8 N. Y. Cr., 451 ; 19 N. Y. Supp., 551 ; *People v. Menken*, 36 Hun, 98 ; 3 N. Y. Cr., 238 ; *People v. Lawrence*, 51 St. Rep., 288 ; 137 N. Y., 522 ; *People ex rel. Pickard v. Sheriff, etc.*, 11 Civ. Pro., 186.

## CHAPTER XII.

### DISPOSAL OF PROPERTY, STOLEN OR EMBEZZLED.

**SECTION 685.** When property, alleged to be stolen or embezzled, comes into custody of peace officer.

686. Order for its delivery to owner.

687. When it comes into custody of magistrate, he must deliver it to owner, on proof of title and payment of expenses.

688. Court in which trial is had for stealing or embezzling it, may order it to be delivered to owner.

689. If not claimed in six months, to be delivered to county superintendent of the poor, or in New York, to commissioners of charities and corrections.

690. Receipt for money or property taken from a person arrested for a public offense.

691. Duties of police clerks in the city of New York, etc.

§ 685. **When property, alleged to be stolen or embezzled comes into custody of peace officer.**—When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it, subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

The provisions of the Revised Statutes upon the subject are superseded by those of the Code of Criminal Procedure. *Simpson v. St. John*, 93 N. Y., 366.

**Custody of officer.**—Under these provisions, the stolen property in the custody of an officer is, pending the prosecution of the criminal, in the custody of the court. *Id.*

An officer has a right, by virtue of a warrant for grand larceny, when he arrest the accused, to seize and take before the magistrate the property alleged to have been stolen, when the same is found on the person or in the possession of the accused, and is pointed out to the officer, on his demand or request, as that described in the process. *Houghton v. Bachman*, 47 Barb., 388.

The magistrate, if he deems the retention of the stolen property until a trial unnecessary, may order its return to the owner. *Simpson v. St. John*, 93 N. Y., 366. If he makes no such order, its retention must be deemed necessary to the purposes of public justice until, by conviction or acquittal, the necessity is ended. *Id.* In such case, the owner's right of possession cannot be enforced by an action for the claim and delivery of personal property. *Id.*

§ 686. **Order for its delivery to owner.**—On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge

gainst the person accused of stealing or embezzling the property, may order it to be delivered to the owner, unless its temporary retention be deemed necessary in furtherance of justice, on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

See notes under preceding section.

The magistrate, before whom stolen property is brought by the officer who arrested the accused, has authority to order the delivery thereof to the person from whom it was alleged to have been stolen, if, on examination of the accused, he adjudges that it was so stolen, and that such person is the owner. *Houghton v. Bachman*, 47 Barb., 388.

§ 687. When it comes into custody of magistrate he must deliver property to owner, on proof of title and payment of expenses.—If property stolen or embezzled comes into the custody of a magistrate, it must, unless its temporary retention be deemed necessary in furtherance of justice, be delivered to the owner, on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

See notes under section 685, *ante*.

See notes under preceding section.

§ 688. Court in which trial is had for stealing or embezzling it, may order it to be delivered to owner.—If property stolen or embezzled have not been delivered to the owner, the court before which a trial is had for stealing or embezzling it, may, on proof of his title, order it to be restored to the owner.

§ 689. If not claimed in six months, to be delivered to county superintendent of the poor, or in New York, to commissioners of charities and corrections.—If property stolen or embezzled be not claimed by the owner, before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in his custody must, on payment of the necessary expenses incurred in its preservation, deliver it to the county superintendents of the poor, or in the city of New York, to the commissioners of charities and corrections, to be applied for the benefit of the poor of the county or city, as the case may be.

§ 690. Receipt for money or property, taken from a person arrested for a public offense.—Except in the city of New York, when money or other property is taken from a defendant, arrested upon a charge of a crime, the officer taking it must, at the time, give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant, and the other of which he must forthwith file with the clerk of the court to which the depositions and statement must be sent, as provided in section 21.

§ 691. Duties of police clerks in the city of New York, etc.—The commissioners of police of the city of New York may design-

nate some person to take charge of all property alleged to be stolen or embezzled, and which may be brought into the police office, and all property taken from the person of a prisoner, and may prescribe regulations in regard to the duties of the clerk or clerks so designated, and to require and take security for the faithful performance of the duties imposed by this section, and it shall be the duty of every officer into whose possession such property may come, to deliver the same forthwith to the person so designated.

## CHAPTER XIII.

### REPRIEVES, COMMUTATIONS AND PARDONS.

**SECTION 692.** Power of governor to grant reprieves, commutations and pardons.

693. His power in respect to convictions for treason. Duty of the legislature, in such cases.

694. Governor to communicate annually to legislature, reprieves, commutations and pardons.

695. Officers to supply governor statement of facts, etc.

696. Conditional pardon; procedure on violation of.

697. *Idem.*

698. *Idem.*

**§ 692. Power of governor to grant reprieves, commutations and pardons.**—The governor has power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to the regulations provided in this chapter.

**Conditional.** In case of a breach of a conditional pardon, the pardon becomes void, and the criminal may be remanded on his original sentence. *People v. Potter.*, 1 Park., 47.

**Effect of.**—A pardon, while it wipes out the offense against the public, does not annul the act or affect the rights of private justice. *Anon.*, 86 N. Y., 563.

**Fraudulent.**—The court cannot go behind a pardon, though fraudulently obtained. *In re Endymion*, 8 How., 478.

**Void provisions.**—A provision in a pardon that it shall not remove disabilities is void. *People v. Pease*, 3 John, Cas., 333.

**§ 693. His power in respect to convictions for treason; duty of the legislature, in such cases.**—He may also suspend the execution of the sentence, upon a conviction for treason, until the case can be reported to the legislature, at its next meeting, when the legislature must either pardon or commute the sentence, direct the execution thereof, or grant a further reprieve.

**§ 694. Governor to communicate annually to legislature, reprieves, commutations and pardons.**—He must annually communicate to the legislature, each case of reprieve, commutation or pardon; stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.

**§ 695. Officers to supply governor statement of facts, etc.**—When application is made to the governor for a pardon, commu-

cation or reprieve, it shall be the duty of the presiding judge of the court before which the conviction was had, and the district attorney by whom the criminal action was prosecuted, or the district attorney of the county where the conviction was had, holding office at the time of such application, to supply the governor, upon his request therefor, and without delay, with a statement of the facts proved on the trial: or, if a trial was not had, the facts appearing before the grand jury which found the indictment, and of any other facts having reference to the propriety of granting or refusing such pardon, commutation or reprieve.

Amended by chap. 356 of 1884.

This section substituted the present, for the original, section.

§ 696 of original Code was repealed by section 3, chap. 360 of 1882.

§ 697 of original Code was repealed by section 3, chap. 360 of 1882.

See *People v. Trimble*, 38 St. Rep., 999.

§ 698 of original Code was repealed by section 3, chap. 360 of 1882.

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**§ 696. Conditional pardons, procedure on violation of.—**  
If any person who has been discharged from imprisonment, by virtue of any conditional pardon, or conditional commutation of his sentence, shall violate such condition or neglect to perform it, his pardon or commutation shall be void and he shall be remanded to place of his former imprisonment and there confined for the unexpired term for which he had been sentenced. When complaint, upon oath, shall be made to a magistrate, that any such person, within his county, has violated or failed to perform the condition of his pardon or commutation, the magistrate shall issue a warrant as provided in chapter two, title three, part four of this act. When the defendant shall have been brought before him,



the magistrate, if there is then sitting in his county any of the courts mentioned in titles three or five of part one of this act, shall remit to it the complaint and depositions, if any, that have been taken before him. If no such court is then in session the magistrate shall proceed to examination of the defendant, in the manner prescribed in chapter seven, title three, part four of this act, and shall either discharge him or shall hold him to answer the charge against him at the next term of such court to be held in the county, and the defendant shall either give bail so to appear and answer, or shall be committed as prescribed in said chapter seven. The warrant may also be issued by any of the courts mentioned in this section upon the like complaint as if application is made to a magistrate.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

§ 697. **Idem.**—When the defendant shall be brought before the court it shall, forthwith, make an order that the defendant show cause why his pardon or commutation should not be adjudged to be void, and he should not be remanded to the place of his former imprisonment for the unexpired term of his sentence. The order shall set forth the facts which constitute the violation of or the neglect to perform the condition of the pardon or commutation. The defendant shall plead to said order in writing. If he admit the facts the court shall at once proceed to pronounce judgment. If the defendant shall deny any material fact, the issue so joined shall be tried by a jury. Upon such trial the people and the defendant shall each be allowed five peremptory challenges, and no more. Upon the return of the verdict the court shall, without delay, proceed to judgment. If judgment is rendered against the defendant it shall adjudge that his pardon or commutation is void, and shall commit him to the place of imprisonment from which he had been discharged, upon his pardon or commutation, there to be confined for that portion of the term of his former sentence which had not expired, when he had been discharged by virtue of the pardon or commutation.

§ 698. *Idem.* — If an issue of fact upon a material question shall be raised by the answer of the defendant, and it shall appear that the violation of, or the failure to perform the condition took place in a county other than that in which the arrest was made, the court may, in its discretion, in furtherance of justice change the place of trial to such other county. The papers in the case shall be filed with the clerk of the county to which the place of trial was changed, with the order changing the place of trial, and a copy of such order shall be sent to the district attorney of such county, and the defendant shall be committed to the custody of the sheriff of said county, or be held to bail to appear at the next term of the court in which subsequent proceedings shall be had. All the subsequent proceedings shall be had in the supreme court or county court of the county, to which the place of trial had been changed, with the same effect as if they had originally been begun in that court.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

## PART V.

### OF PROCEEDINGS OF COURTS OF SPECIAL SESSIONS AND POLICE COURTS.

- TITLE I.** OF THE PROCEEDINGS IN COURTS OF SPECIAL SESSIONS IN THE COUNTIES OTHER THAN NEW YORK.
- II.** OF THE PROCEEDINGS IN THE COURTS OF SPECIAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.
- III.** OF APPEALS FROM THE COURTS OF SPECIAL SESSIONS.

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#### TITLE I.

#### OF PROCEEDINGS IN COURTS OF SPECIAL SESSIONS IN THE COUNTIES OTHER THAN NEW YORK.

- SECTION 699.** Charge to be read to defendant.
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703. Venire for a jury.
704. Summoning the jury, and returning the list.
705. Depositing ballots in box.
706. Drawing the jury.
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- 721-722. Form of record of conviction.
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- SECTION 733.** During time allowed for bail, and until judgment, defendant to be continued in custody of officer, or committed to jail.
734. Form of commitment.
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736. Defendant may be admitted to bail.
737. Bail, how and by whom taken.
738. Form of the undertaking.
739. Undertaking, when forfeited and action thereon.
740. Forfeiture, how and by whom remitted.

**§ 699. Charge to be read to defendant.**—In the cases in which the courts of special sessions or police courts have jurisdiction, when the defendant is brought before the magistrate, the charge against him must be distinctly read to him, and he must be required to plead thereto.

Amended by chap. 360 of 1882.

This amendment inserted the words "the courts of special sessions or," and omitted the words "as provided in section 74."

**Extension of section.**—This section was amended in 1882, in order to have it express that such section shall apply to special sessions and police courts, which it did not do prior to the amendment. *People v. Trumble*, 1 N. Y. Cr., 446.

**Reading charge.**—Under this section, the charge must be distinctly read to the defendant either from the information, warrant or some record. *People ex rel. Baker v. Beatty*, 39 Hun, 477.

It is not an oral charge. *Id.*

**Trial.**—The magistrate must try the offender when brought before him, if the cause is triable in a special sessions. *People ex rel. Fraser v. Board*, etc., 17 St. Rep., 875; 2 N. Y. Supp., 611.

**§ 700. The plea, and how put in.**—The defendant may plead the same pleas as upon an indictment, as provided in section 332. His plea must be oral, and entered upon the minutes of the court.

The plea of guilty, without entering any objection to the preliminary proceedings, removes from the case all grounds of error based on matters of mere irregularity. *People v. McIntosh*, 5 N. Y. Cr., 39.

See *People ex rel. Baker v. Beatty*, 39 Hun, 477.

**§ 701. Issue, how tried.**—Upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the court must proceed to try the issue.

In the cases of *People v. Berberich*, 20 Barb. 224, and *People v. Lied*, 19 Alb. L. J. 400, the defendant offered bail for his appearance at the court of sessions, and his offer was denied.

**Application.**—The constitutional provision giving a party a right to a trial by jury, etc., does not apply to the petty offenses triable before a court of special sessions. *People ex rel. Murray v. Justices*, etc., 74 N. Y., 406.

**Election.**—In order to entitle a defendant to a trial by jury in a court of special sessions, he must demand to be so tried, before the court hears any of the testimony upon the trial. *People v. Cook*, 9 St. Rep., 412; 45 Hun, 37.

In courts of special sessions, where they have exclusive jurisdiction under either section 56 or section 60, no election other than a failure to obtain a certificate of removal is necessary to give jurisdiction to try the case. *People ex rel. Templeman v. Green*, 4 N. Y. Cr., 443.

Where the defendant neither obtains a certificate of removal in cases under section 56 or 60, nor demands trial by jury, he is properly tried by the court. *People ex rel. Templeman v. Green*, 4 N. Y. Cr., 443.

The defendant, by an election to be tried by the court, waives all objections to its jurisdiction. *Gill v. People*, 3 Hun, 187.

**Waiver.**—An infant, accused of petit larceny, may waive his right to a trial by jury, and elect to be tried by a court of special sessions. *People ex rel. Sammons v. Wandell*, 21 Hun, 515.

Prior to the Code, it was held that a court of special sessions could not acquire jurisdiction to try a prisoner, without a jury, for an offense, unless it affirmatively appeared in the proceedings had before trial, that he expressly waived his right to a trial by jury. *People v. Mallon*, 39 How., 454.

§ 702. **Defendant may demand a trial by jury.**—Before the court hears any testimony upon the trial, the defendant may demand a trial by jury.

See notes under preceding section.

**Demand.**—If the prisoner demands a trial by jury, the court must summon one. *People ex rel. Templeman v. Green*, 4 N. Y. Cr., 443.

Before the Code, the court of special sessions could not acquire jurisdiction to try a prisoner for an offense, unless it appeared affirmatively, in the proceedings had before trial, that the prisoner expressly waived his right to a trial by jury. *People v. Mallon*, 39 How., 454. Under the Code, the court may proceed to try the case without a jury, unless the defendant demands a jury trial before any testimony is taken. See sections 701, and 702.

In *People v. Mallon*, 39 How., 454, the defendant demanded to be tried by a jury, and the demand was refused.

See *People v. Cook*, 9 St. Rep., 412 ; 45 Hun, 37.

§ 703. **Jury ; how summoned.**—If a trial by jury be demanded, the court must forthwith draw from the box or other receptacle kept and used in accordance with the requirements of the Code of Civil Procedure, relative to the drawing of jurors in justice courts in civil cases, twelve of the ballots provided for in section twenty-nine hundred and ninety and twenty-nine hundred and ninety-one of the Code of Civil Procedure to be kept and used by justices of the peace in civil cases. If a person whose name thus drawn, shall, in the opinion of the court, reside more than three miles from the place where the said issue is to be tried, the court may set aside such juror, and in that case draw another ballot and so can continue until twelve be drawn to serve as jurors. The court must thereupon insert the names of the persons so drawn in an order directed to any constable of the county, or marshal or police officer of the city or village where the offense is to be tried and having authority to execute process of the court, commanding him to summon the persons therein named to appear before the said court at a time not more than three days from the time of the making of said order, unless the trial of said issue be longer adjourned by consent and at a place named therein, to constitute a jury for the trial of the alleged offense. It shall be the duty of every town or city clerk in this state, within ten days after the taking effect of this act, to make and deliver to every recorder, police justice or other judicial officer having authority to hold courts of special sessions in their respective towns or cities in accordance with the provisions of this title, a certified copy of the jury list as is now required by section twenty-nine hundred and ninety of the Code of Civil Procedure to be furnished by them to the justices of the peace

f their various towns and cities for the drawing of jurors in civil actions, and any such clerk neglecting for refusing so to do shall be deemed guilty of a misdemeanor. The boxes or other receptacles now used by justices of the peace for the purpose of drawing jurors in civil cases shall be used by them for drawing jurors to serve in courts of special sessions as herein provided, and recorders, police justices and other judicial officers empowered to hold such courts of special sessions, as provided by this title, are hereby required to procure and use the same in the manner provided by this section.

Amended by chap. 360 of 1882.

This amendment inserted in the original section the words "and having authority to execute process from the court."

Amended by chap. 127 of 1893.

The entire provision was modified by this amendment so as to make the practice conform to that in civil matters in justice's court. It will take effect, September 1, 1893.

See notes under preceding section.

**Jury.**—This section prescribes how a jury shall be procured and that twelve jurors shall be summoned. *People v. Hulett*, 39 St. Rep., 648; 15 N. Y. app., 631.

The manner of procuring a jury in the court of special sessions is plainly prescribed in title I of part V. of the Code of Criminal Procedure. *Id.*

Section 703 of this title prescribes that twelve jurors shall be summoned. In section 705, it is provided that the names returned shall be written on slips of paper and placed in a box; and, in section 706, that the court must draw out six of the ballots, and even more in case any are set aside on challenge. Provision is made in section 708, for summoning talesmen, and, in section 709, for issuing in certain cases a new order or venire; and section 710 provides that, when six jurors appear and are accepted, they constitute the jury. *Id.*

**§ 704. Summoning the jury, and returning the order.**—The court must deliver, or cause to be delivered, the said order to any officer to whom the same is directed and empowered to execute the same. The officer to whom said order is so delivered must thereupon summon personally each of the persons drawn and named therein to serve as such jurors by exhibiting to them the said order and at the same time reading to or stating to them the substance thereof. He shall then make his return to said order certifying that he personally served it upon each of the persons named therein and in each case of his being unable to do so the reason thereof. Any person so summoned not attending at the time and place and not having sufficient legal excuse for doing so, specified in said order, is hereby declared guilty of contempt of court and is punishable by a fine not exceeding fifty dollars or imprisonment not more than thirty days, or by both such fine and imprisonment.

Amended by chap. 127 of 1893.

This amendment makes the practice as to summoning a jury in a criminal action conform to the present practice in a civil action in justice's court. It goes in effect September 1, 1893.

**§ 705. Depositing ballots in box.**—The names of the persons returned as jurors must be written on separate ballots, folded as nearly alike as possible, so that the name cannot be seen, and



must, under the direction of the court, be deposited in a box, or other convenient thing.

See *People v. Hulett*, 39 St. Rep., 648; 15 N. Y. Supp., 631.

§ 706. **Drawing the jury.**—The court must then draw out six of the ballots, successively; and if any of the persons whose names are drawn do not appear, or are challenged and set aside, such further number must be drawn as will make a jury of six, after all legal challenges have been allowed.

**Jury.**—When the jury may consist of six persons. *People ex rel. Eckler v. Clark*, 23 Hun, 374.

The special sessions has no authority to try a person by a jury of less than six, though both the prosecution and defendant consent thereto. *Germond v. People*, 1 Hill, 343.

An act, which extends the jurisdiction of inferior courts, is not unconstitutional, for the reason that it transfers a class of cases from courts of record, where the jury is composed of twelve men, to courts in which it consists of six men. *Dawson v. Horan*, 51 Barb., 459.

See *People v. Hulett*, 39 St. Rep., 648; 15 N. Y. Supp., 631.

§ 707. **Challenges.**—The same challenges may be taken by either party, to the panel of jurors, or to an individual juror, as on the trial of an indictment for a misdemeanor, so far as applicable; and the challenge must, in all cases, be tried by the court.

§ 708. **Talesmen, when and how ordered and summoned.**—If six of the jurors summoned do not attend, or be not obtained, the court may direct the officer to summon any of the bystanders, or others, who may be competent, and against whom there is no sufficient cause of challenge, to act as jurors.

See *People v. Hulett*, 39 St. Rep., 648; 15 N. Y. Supp., 631.

§ 709. **Failure to return venire may be punished.**—If the officer to whom the order is delivered do not return it, as required by section 704, he may be punished by the court, as for contempt; and the court must issue a new order for the summoning of jurors, in substantially the same form; upon which the same proceedings must be had as upon the one first issued.

Amended by chap. 360 of 1882.

This amendment omitted, from before the word “jurors” in the original section, the words “the same.”

See *People v. Hulett*, 39 St. Rep., 648; 15 N. Y. Supp., 631.

§ 710. **Jury, how constituted.**—When six jurors appear and are accepted, they constitute a jury.

See notes under section 706, *ante*.

See *People v. Hulett*, 39 St. Rep., 648; 15 N. Y. Supp., 631.

§ 711. **Their oath.**—The court must thereupon administer to the jury the following oath or affirmation: “You do swear,” [or “you do solemnly affirm,” as the case may be,] “that you will well and truly try this issue, between the people of the state of New York and A. B., the defendant, and a true verdict give, according to the evidence.”

§ 712. **Trial, how conducted.**—After the jury are sworn, they must sit together and hear the proofs and allegations of the

arties, which must be delivered in public, and in the presence of the defendant.

Where the defendant, on applying for an adjournment of the trial, agreed and did deliver to the justice a sum of money for the complainant's private counsel and for the complainant's expenses, which was presumably paid by the justice to the counsel, it was held, in *People v. Parker*, 53 St. Rep., 411; 23 N. Y. Supp., 704; 69 Hun, 130, that this furnished no ground for a reversal of the conviction.

§ 713. **Jury may decide in court, or retire. Oath of officer on their retirement.**—After hearing the proofs and allegations, the jury may either decide in court or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: "You do swear, that you will keep this jury together in some private and convenient place, without food or drink, except bread and water, unless otherwise ordered by the court; that you will not permit any person to speak to or communicate with them, nor do so yourself, unless it be to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed, or when ordered by the court."

§ 714. **Delivering verdict, and entry thereof.**—When the jury have agreed on their verdict, they must deliver it publicly to the court, which must enter it in its minutes.

Amended by chap. 360 of 1882.

This amendment changed the word "who" in the original, into the word "which" in the present, section.

§ 715. **Jury, discharge of.**—The jury cannot be discharged, after the cause is submitted to them, until they have agreed upon, and rendered their verdict, unless for some cause within the meaning of sections 428 and 429, the court sooner discharge them.

Amended by chap. 715 of 1882.

This amendment inserted the word "the" before the word "meaning."

§ 716. **In such case, cause to be retried.**—If the jury be discharged, as provided in the last section, the court may proceed again to the trial, in the same manner as upon the first trial; and so on, until a verdict is rendered.

§ 717. **Judgment on conviction.**—When the defendant pleads guilty, or is convicted either by the court or by a jury, the court must render judgment thereon, of fine or imprisonment, or both, as the case may require; but the fine cannot exceed fifty dollars, nor the imprisonment six months.

See section 719, *post*.

**Effect of section.**—The question whether this section has not specially prescribed, within the meaning of section 15 of the Penal Code, a punishment for the offense of assault in the third degree, so as to make it the punishment to be imposed therefor in all the courts, though this section has special reference to the courts of special sessions, was raised but not decided, in *People v. Palmer*, 6 St. Rep., 341; 43 Hun, 397. [This section does not affect the power of the other courts. Ed.]

**When rendered.**—There is nothing in this section, which requires a court of special sessions to render judgment forthwith upon the delivery of

the verdict by the jury, but undoubtedly it must be rendered during the continuance of the session of the court and before it is at an end. *People ex rel. Cook v. Smith*, 28 St. Rep., 307 ; 9 N. Y. Supp., 181.

**Entry.**—This section does not require that any judgment should be entered in the minutes of the court. *Id.*

There is but one mode of rendering judgment and that is by pronouncing sentence. *Id.* And there is but one record of the judgment and this is the certificate of the sentence. *Id.*

**On plea of guilty.**—When the defendant pleads guilty, it is not necessary that there should be any conviction. *People ex rel. Evans v. McEwan*, 2 N. Y. Cr., 313 ; 67 How., 105.

**Judgment of special sessions.**—This section provides for and limits the judgment of a court of special sessions. *Burns v. Norton*, 35 St. Rep., 418 ; 15 N. Y. Supp., 75-78.

Sections 535 and 15 of the Penal Code do not expressly or impliedly repeal this section. *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr., 439.

The justice can either fine or imprison, or he can do both, only the fine must be limited to fifty dollars or less, and the imprisonment to not exceeding six months. *People v. Henschel*, 35 St. Rep., 276 ; 12 N. Y. Supp., 46, 47.

The legislature, when it conferred exclusive jurisdiction upon courts of special sessions to hear in the first instance a large number of offenses, intended to prevent these courts from inflicting as severe punishment for an offense as can be imposed by a court of record, upon the removal of the case thereto. *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr., 440.

By this section, the greatest punishment that can be inflicted by a court of special sessions upon any offender convicted before it, is a fine not exceeding fifty dollars, and imprisonment not exceeding six months. *Id.*

This section limits the punishment, which may be inflicted by courts of special sessions to a fine of fifty dollars, or imprisonment for six months. *Matter of Bray*, 34 St. Rep., 642 ; 12 N. Y. Supp., 367.

A court of special sessions cannot impose a fine to exceed fifty dollars, or imprisonment for over six months, or both. *People ex rel. Stokes v. Risley*, 38 Hun, 281 ; 4 N. Y. Cr., 110.

**Void sentence.**—A sentence, which is simply in the disjunctive, without any declaration that, by the payment of the fine, the convicted person will escape the imprisonment, is illegal. *Matter of Hoffman*, 1 N. Y. Cr., 484.

A sentence, in a court of sessions, to pay a fine of two hundred and fifty dollars, and to stand committed not exceeding one year, till the fine is paid, is invalid. *People ex rel. Stokes v. Risley*, 38 Hun, 281 ; 4 N. Y. Cr., 110.

The defendant cannot be punished thereunder, even to the extent of fifty dollars fine, or fifty days imprisonment.

Where the judgment is one that the court of special sessions cannot, under any circumstances, have pronounced, it is absolutely void, and the defendant cannot be detained for the longest term that the court could have legally imposed. *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr., 440.

**Re-sentence.**—A prisoner in custody under a void sentence upon a valid judgment of conviction should not be discharged on *habeas corpus*, but should be remanded to be sentenced according to law. *People ex rel. Devoe v. Kelly*, 97 N. Y., 212 ; 2 N. Y. Cr., 428.

The power of a court of special sessions to punish for a violation of the excise law is limited to imposing a fine not exceeding fifty dollars, or imprisonment not exceeding six months, or both. *People v. Carter*, 15 St. Rep., 640 ; 14 Civ. Pro., 245 ; 48 Hun, 165. Where such court imposes for such offense a fine of one hundred dollars, and directs imprisonment until such fine is paid, the judgment is void though the conviction is proper. *Id.*, *People ex rel. Stokes v. Risley*, 38 Hun, 280 ; *People v. Nash*, 12 W. Dig., 545 ; *People ex rel. Devoe v. Kelly*, 97 N. Y., 212 ; *People v. Bork*, 96 id., 188 ; *People ex rel. Tweed v. Liscomb*, 60 id., 559.

The power of the appellate court to remit a case for re-sentence, where the judgment is void but the conviction is proper, was held in *People v. Carter*, 15 St. Rep., 640 ; 48 Hun, 165 ; 14 Civ. Pro., 241, to be limited to cases where the conviction is had upon an indictment ; and that no power exists to remit a case for re-sentence to a court of special sessions.

But cannot the appellate court, in case of an appeal, render under section 64, *post*, the judgment which the court below should have rendered, without remanding the case to such court?

See *People v. Hollenbeck*, 1 N. Y. Cr., 437, note ; 65 How., 404 ; *People ex rel. Baker v. Beatty*, 39 Hun, 477.

**§ 718. Judgment of imprisonment, until fine be paid. Extent of imprisonment.**—A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied ; specifying the extent of the imprisonment, which can not exceed one day for every one dollar of the fine.

See notes under last section.

See section 484, *ante*, and notes thereunder.

This section is a transcript of the last sentence of section 484, *ante*.

**Imprisonment until payment of fine.**—This section authorizes the imposition of a fine, and of imprisonment until it is paid, for a specified time, not exceeding the statutory limit. *Matter of Bray*, 34 St. Rep., 641, 643 ; 12 N. Y. Supp., 367. A sentence, plainly in the alternative, is not good. *Id.*

A judgment for a specified term of imprisonment and a fine, and for imprisonment not exceeding one day for each dollar of said fine, is not erroneous. *People v. Sutton*, 24 St. Rep., 726 ; 2 Silv. (Sup. Ct.), 575 ; 6 N. Y. Supp., 96.

A commitment, which recites that the defendant has been adjudged to pay a fine of \$100, and, in default, to be imprisoned for three months, complies fully with the provisions of this section. *Matter of Bray*, 34 St. Rep., 641, 643 ; 12 N. Y. Supp., 367.

See *Matter of Hoffman*, 1 N. Y. Cr., 485.

**§ 719. Defendant, on acquittal, to be discharged. Order that prosecutor pay the costs.**—When the defendant is acquitted, either by the court or by a jury, he must be immediately discharged ; and if the court certify, upon its minutes, or the jury find that the prosecution was malicious or without probable cause, the court must order the prosecutor to pay the costs of the proceedings, or to give satisfactory security, by a written undertaking, with one or more sureties, to pay the same to the county within thirty days after the trial.

**Judgment.**—Where the prosecution in a criminal proceeding in the court of special sessions is charged, under this section, with the costs of prosecution, by reason of having instituted it without probable cause, such determination is not a judgment upon conviction, within the meaning of section 749, *post*. *People v. Norton*, 33 Hun, 277 ; 2 N. Y. Cr., 324.

A judgment, rendered in pursuance of this and the following section, is not a judgment in a civil action. *People v. Carr*, 28 St. Rep., 288 ; 54 Hun, 445 ; 7 N. Y. Supp., 725. No appeal can be taken therefrom under section 749, *post*, or under sections 3044 and 3045 of the Code of Civil Procedure. *Id.*

But see next section which authorizes a judgment and allows an appeal.

**§ 720. Judgment against prosecutor for costs.**—If the prosecutor do not pay the costs or give security therefor, the court may enter judgment against him for the amount thereof, which may be enforced and appealed from, in all respects, in the same manner as a judgment rendered by a justice court held by a justice of the peace.

Amended by chap. 186 of 1890.

This amendment introduced, after the word “ enforced,” the words “ and appealed from.”

**See notes under the preceding section.**

The purpose of this section is, to prescribe a mode of procedure to be adopted in a criminal action for the collection of costs when imposed upon the prosecutor. *People v. Carr*, 28 St. Rep., 288 ; 54 Hun, 445 ; 7 N. Y. Supp., 725. It does not have the effect to change the action from a criminal to a civil action. *Id.* But the amendment of 1890 allows an appeal.

§ 721. **Form of record of conviction.**—When a conviction is had, upon a plea of guilty or upon a trial, the court must make and sign a certificate in substantially the following form:

" Court of Special Sessions, or Police Court,  
 " County of Albany. Town of Berne [or as the case may be].  
 " The People of the state New York }  
                 against  
                 A. B.

January 1, 18 .

“ The above-named A. B., having been brought before C. D., justice of special sessions, justice of the peace [or other magistrate, as the case may be] or police justice, of the town [or city or village] of [as the case may be] charged with [briefly designating the offense], and having thereupon pleaded guilty or not guilty [or as the case may be], and demanded [or ‘ failed to demand,’ as the case may be,] a jury, and having been thereupon duly tried, and upon such trial, duly convicted.

"It is adjudged that he be imprisoned in the jail of this county  
days [or 'pay a fine of dollars and be imprisoned  
until it be paid, not exceeding days,' or both, as the case  
may be].

"Dated at the town or [city] of \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_.

**"C. D.,**

“Justice of the peace or police justice or other magistrate [as the case may be] of the town [or ‘city’] of \_\_\_\_\_, the \_\_\_\_\_” [as the case may be].

**Amended by chap. 360 of 1882.**

This amendment substituted a different form of record or certificate of conviction.

**Certificate.**—The provisions of this section and section 725, *post*, are not exclusive, nor necessarily inconsistent with section 31 of 2 R. S., 716. *People v. Holmes*, 2 St. Rep., 676 ; 5 N. Y. Cr., 130.

The court must make and sign a certificate of conviction, in a form briefly designating the offense stated in the information and necessarily stated in the warrant. *People ex rel. Baker v. Beatty*, 39 Hun, 477.

Commitment is not invalid for defect in form. **Matter of Nichols**, 19 Abb. N. C., 138.

Words of a statute, which prescribe what shall be done with the prisoner, and how he shall be kept, after he reaches the penitentiary, and are simply directory to the keeper, are no part of, and need not be included in, the sentence. *People ex rel. Van Houton v. Sadler*, 97 N. Y., 146; 3 N. Y. Cr., 473.

It is not necessary that the commitment should contain the names of the witnesses or the testimony given by them. *People ex rel. Catlin v. Neilson*, 16 Hun, 214. It is sufficient if it contains a brief statement of the offense charged and the conviction and judgment thereon. *Id.*



It is not necessary to set forth in a warrant of commitment issued upon a judgment of a court of special sessions, that the prisoner was convicted of petit larceny charged as a first offense. *People ex rel. Loughlin v. Finn*, 7 N. Y., 533. It is sufficient if it appears that the conviction was for an offense of which such court had jurisdiction. *Id.*

**As a court.**—The making and signing of the certificate are a part of the duty of the court of special sessions, while organized as such. *People ex rel. Cook v. Smith*, 28 St. Rep., 307 ; 9 N. Y. Supp., 181.

A court of special sessions is organized only *pro hac vice* for the trial and judgment in each particular case, and is *functus officio* when judgment is rendered therein and a certificate of such judgment is made, signed and delivered to the sheriff or constable. *People v. Starks*, 17 St. Rep., 234 ; *People ex rel. Cook v. Smith*, *ante*.

**When to be made.**—The language of this section, though not to be construed to mean immediately or upon the instant of the rendition of the judgment, undoubtedly does intend that the certificate shall be made during the session of the court and cannot be made by the justice after the court, organized for the trial of the case, has ceased to exist, *ante*.

See *People ex rel. McGrath v. Supervisors, etc.*, 28 St. Rep., 939 ; 119 N. Y., 130.

**§ 722. Form of record of conviction.**—If the defendant have pleaded guilty,—instead of the second paragraph, the certificate must state substantially as follows: “And the above-named A. B. having been thereupon duly convicted, upon a plea of guilty.”

This section gives a form which need only be followed substantially. *People ex rel. Evans v. McEwan*, 2 N. Y. Cr., 313 ; 67 How., 105.

**§ 723. Certificate when filed.**—Within twenty days after the conviction, the court must cause the certificate to be filed in the office of the clerk of the county.

The reference in *Kibbe v. Wetmore*, 81 Hun, 425, to this section, should be to section 723 of Code of Civil Procedure.

This section is merely directory ; it is sufficient if the certificate of conviction is made in due form, though not filed at the time required. *People ex rel. Slatzkata v. Baker*, 19 St. Rep., 487 ; 3 N. Y. Supp., 537. Failure to file such certificate is not cause for discharge. *Id.*

See *People v. Holmes*, 2 St. Rep., 676 ; 5 N. Y. Cr., 130.

**§ 724. Certificate, conclusive evidence.**—The certificate, made and filed as prescribed in the last two sections, or a certified copy thereof, is conclusive evidence of the facts stated therein.

By this section, the certificate required to be filed by the preceding section, or a certified copy thereof is made conclusive evidence of the facts herein stated. *People ex rel. Slatzkata v. Baker*, 19 St. Rep., 487 ; 3 N. Y. Supp., 537.

See *People ex rel. Evans v. McEwan*, 2 N. Y. Cr., 312 ; 67 How., 113.

**§ 725. Judgment, by whom executed.**—The judgment must be executed by the sheriff of the county, or by a constable, marshal or policeman of the city, village or town in which the conviction is had, upon receiving a copy of the certificate prescribed in section 721, certified by the court or the county clerk.

See notes under section 721, *ante*.

A prisoner, who has been properly and legally sentenced to prison, cannot be released simply because there is an imperfection in what is commonly called the *mittimus*. *People ex rel. Evans v. McEwan*, 2 N. Y. Cr., 312 ; 67 How., 113.

The constable who, upon receiving a certificate of the judgment of conviction with directions to execute it, conveys by force of that warrant, the prisoner to the jail or penitentiary and delivers him over for punishment,



is engaged in a criminal proceeding. *People ex rel. McGrath v. Supervisors, etc.*, 28 St. Rep., 941; 119 N. Y., 126.

**§ 726. Fine, receipt and payment of, by court.**—If a fine imposed be paid before commitment, it must be received by the court, and within thirty days after its receipt paid by such court to the supervisor of the town in and for which such court is held. [Am'd by chap. 581 of 1895; to take effect Sept. 1, 1895.]

The words "to the supervisors of the town in and for which such court is held," were substituted for the words "into the county treasury," by this amendment.

Amended by chap. 392 of 1884.

This amendment directed the court to pay the whole fine, within thirty days after its receipt, into the county treasury, and omitted the application of any part thereof to the expenses of the prosecution.

See *People ex rel. Fraser v. Board of Auditors*, 17 St. Rep., 875; 2 N. Y. Supp. 611.

**§ 727. Fine to whom paid after commitment, and how applied.**—If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county, but to no other person; who must, in like manner, within thirty days after the receipt thereof, pay it to the supervisor of the town in and for which such court is held. [Am'd by chap. 581 of 1895; to take effect Sept. 1, 1895.]

The words "to the supervisor of the town in and for which such court is held," were substituted for the words "into the county treasury," by this amendment.

*People ex rel. Fraser v. Board of Auditors*, 17 St. Rep. 875; 2 N. Y. Supp. 611.

**§ 728. Proceedings against magistrate or sheriff on neglect to pay fine to supervisor.**—If the court or sheriff receiving the fine fail to pay to the supervisor, as provided in the last two sections, such supervisor must immediately commence an action therefor against the sheriff or the magistrate or magistrates composing the court in the name of his town. [Am'd by chap. 581 of 1895; to take effect Sept. 1, 1895.]

By this amendment, the words "to the supervisor, as provided in the last two sections, such supervisor," were substituted for the words "it into the county treasury, the county treasurer," and the words "his town" for "the county."

Amended by chap. 392 of 1884.

This amendment omitted the words "such part of it as is so payable," and "therefor," and substituted the word "comprising" for "composing."

**§ 729. Subpœnas for witnesses, and punishing them for their disobedience.**—The court may issue subpœnas for witnesses, as provided in section 608, and punish disobedience thereof, as provided in section 619.

**§ 730. Punishing jurors for non-attendance.**—If a person summoned as a juror fail to appear, he may be punished by a fine not exceeding five dollars imposed by the court, by an order entered in his minutes. The order is deemed a judgment, in all respects, in favor of the poor of the town or city.

**§ 731. No fees to jurors or witnesses.**—No fees are payable to a juror or witness, for his service or attendance in a court of special sessions.

See sections 494 and 616, *ante*.

**§ 732. When defendant requests a trial by police court, preliminary examination dispensed with.**—When the defendant, upon being brought before the magistrate, requests a trial by a court of special sessions, the preliminary examination of the case is dispensed with.

**§ 733. During time allowed for bail, and until judgment, defendant to be continued in custody of officer or committed to jail.**—During the time allowed to the defendant to give bail, and

judgment is given, he may be continued in the custody of the sheriff, or committed to the jail of the county to answer the charge, as the magistrate may direct.

**4. Form of commitment.**—The commitment must be made by the magistrate, by his name of office, and must be in substantially the following form:

I, the sheriff of the county of \_\_\_\_\_, is required to receive and detain A. B., who stands charged before me for [designating the offense, generally], to answer the charge before a court of sessions in the town [or city] of [as the case may be].  
 Made and committed at the town [or city] of \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_.

“C. D., justice of the peace of the town [or city] of \_\_\_\_\_,” [as the case may be].

Section 721, *ante*.

**Description of offense.**—The crime of which the defendant is convicted need not be called, in a warrant of commitment, by its technical name, but it must provide the description of the act, which constitutes the offense, in plain and precise language, and leaves no doubt of its exact character. *Matter of N. Y. Cr.*, 306. A warrant of commitment, which shows a conviction of “assault and battery,” is a sufficient statement of a conviction of that crime in the third degree. *Id.*

A statement in a commitment issued on conviction of petit larceny, that the defendant was convicted of the “misprision of petit larceny,” is a sufficient description of the crime. *People v. Houghlin v. Finn*, 87 N. Y., 533.

**5. By whom executed.**—When committed, the defendant must be delivered to the custody of the proper officer, by any officer in the county to whom the magistrate may deliver the commitment.

**6. Defendant may be admitted to bail.**—Either before or after committal, or upon being committed, the defendant may, if he require it, be admitted to bail.

**7. Bail, how and by whom taken.**—The bail must be taken by the magistrate, by a written undertaking, executed by the defendant, with one or more sufficient sureties approved by the magistrate, in a sum not exceeding two hundred dollars.

**8. Form of the undertaking.**—The undertaking must be in substantially the following form:

I, B., having been duly charged before C. D., a justice of the peace in the town [or city] of \_\_\_\_\_ [as the case may be], of the offense of [designating the offense generally].

I do undertake, jointly and severally, that he shall appear before a court of sessions in the town or village [or city] of \_\_\_\_\_ [as the case may be] competent to try the case, or that we \* will pay to the sheriff of \_\_\_\_\_ [naming the county in which the court is held], the sum of \_\_\_\_\_ dollars,” [inserting the sum fixed by the magistrate]

Made and committed at the town [or city] of \_\_\_\_\_,” [as the case may be.]

\* “He” in original.

Amended by chap. 360 of 1882.

This amendment inserted the words "jointly and severally," and, "or village," and substituted the words "competent to try the case" for the words "held by the justice above named, and such other justices as may be associated with him to constitute such court."

See *County of Orleans v. Winchester*, 45 St. Rep., 411; 18 N. Y. Supp., 668.

§ 739. **Undertaking, when forfeited and action thereon.**—If the defendant fail to appear according to the undertaking, the court, unless a sufficient excuse be shown, must declare the undertaking of bail forfeited, and the county treasurer must immediately commence an action for the recovery of the sum mentioned therein, in the name of the county.

§ 740. **Forfeiture, how and by whom remitted.**—The county court of the county, or in the city of New York, the supreme court may remit the forfeithre or any part thereof, in the cases and in the manner provided in the Code of Civil Procedure.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

See sections 286, 294, 350–353 of Code of Civil Procedure.

## TITLE II.

### OF THE PROCEEDINGS IN THE COURT OF SPECIAL SESSIONS IN THE CITY OF NEW YORK.

SECTION 741. Courts of special sessions in the city of New York to proceed as prescribed in last title, except as otherwise specially provided.

742. Trial by and form of information.

743. Duty of district attorney in relation to the information and dismissal of prosecution.

744. Clerk to issue subpœna, sign certificate of judgment, and enter proceedings of court and sentences upon convictions.

745. Fines before committal, to be paid to clerk; his accounts, when and to whom rendered.

746. No transcript of conviction to be filed; certified copy of minutes, conclusive evidence.

§ 741. **Courts of special sessions in the city of New York, to proceed as prescribed in last title, except as otherwise specially provided.**—The courts of special sessions in the city of New York must proceed upon a criminal charge in the manner prescribed in the last title, except as provided in the next five sections, and as otherwise specially provided.

Amended by chap. 563, Laws 1904. Takes effect Sept. 1, 1904.

§ 742. **Trial by and form of information.**—All criminal actions in the courts of special sessions in the city of New York, except in the parts devoted to the trial of children under sixteen years of age and known as children's courts, must be prosecuted by information made by the district attorney. The information shall be signed by the district attorney of the county wherein the action was begun and may be substantially in the following form:

## Court of Special Sessions of the City of New York.

.....Division.

The People of the State of New York }  
 against  
 A. B. }

Be it remembered that I  
 the District Attorney of the county of \_\_\_\_\_, by  
 this information accuse A. B. of the crime (here insert the name of the  
 crime, if it have one, such as petit larceny, assault in the third degree, or  
 the like, or if it have no general name insert a brief description of it as it  
 is given by statute) committed as follows:

The said A. B., on the \_\_\_\_\_ day of \_\_\_\_\_ 190\_\_\_\_\_,  
 at the city of New York, in the county of \_\_\_\_\_ (here  
 set forth the act charged as an offense.)

C. D.,

District Attorney of the County of \_\_\_\_\_

Amended by chap. 563, Laws 1904. Takes effect Sept. 1, 1904.

**§ 743. Duty of district attorney in relation to the information and dismissal of prosecution.**—The district attorney of a county within the city of New York, on the receipt by him of the papers in a criminal action, returned to him by a magistrate as provided by section two hundred and twenty-one hereof, shall either make and file with the clerk of the court of special sessions an information against the defendant in such action, as provided in the last preceding section, or, move in said court for the dismissal of the prosecution of the action. This duty, unless the time prescribed therefor be extended by the court, shall be performed in manner following:

1. Where a defendant is in custody the information shall be filed not later than the day following the receipt by the district attorney of the magistrate's return, and in all other cases within ten days thereafter.

2. In all actions where return has been made to the district attorney as required by section two hundred and twenty-one of this code, and he has failed to make and file an information as provided in subdivision one of this section, he shall, within thirty days after such return, move for the dismissal of the prosecution of such action, filing with the clerk of the court a statement in writing of his reasons for making such motion.

3. The district attorney shall file with the clerk of the court all papers returned to him under the provisions of section two hundred and twenty-one of this code, those upon which informations are based with the informations and all others when he moves to dismiss the prosecution of the action in which they were taken.

Amended by chap. 563, Laws 1904. Takes effect Sept. 1, 1904.

**§ 744. Clerk to issue subpoenas, sign certificate of judgment, and enter proceedings of court and sentences upon convictions.**—Subpoenas for witnesses, and the certificate of the judgment, must be signed by the clerk of the court, who must also enter all the proceedings of the court, and the sentences upon convictions, in a book of minutes, and when necessary, certify the proceedings of the court.

Amended by chap. 563, Laws 1904. Takes effect Sept. 1, 1904.

**§ 745. Fines before committal, to be paid to clerk; his accounts, when and to whom rendered.**—Fines, imposed by the court, must be received by the clerk, if paid before committal in execution of judgment. He must, every thirty days, render to the comptroller of the city, accounts of the fines imposed and received by him, and of the expenses attending the court.

Amended by chap. 563, Laws 1904. Takes effect Sept. 1, 1904.

**§ 746. No transcript of conviction to be filed; certified copy of minutes, conclusive evidence.**—No transcript of a conviction, had in a court of special sessions in the city of New York, need be certified or filed; but a copy of the minutes of the conviction, certified by the clerk, is conclusive evidence of the facts contained therein.

Amended by chap. 563, Laws 1904. Takes effect Sept. 1, 1904.

### **TITLE III.**

#### **OF APPEALS FROM COURTS OF SPECIAL SESSIONS.**

**SECTION 749. Review on appeal from minor courts.**

- 750. Appeal, when allowed.
- 751. Appeal, how taken.
- 752. How allowed.
- 753. Release on bail pending an appeal.
- 754. Undertaking, when and with whom filed.
- 755. Delivery of affidavit, and allowance of appeal.
- 756. Return, when and how made.
- 757. Compelling return.
- 758. Ordering and compelling further or amended return.
- 759. Appeal, by whom and how brought to argument.
- 760. If not brought to argument, as provided in last section, to be dismissed, unless continued for cause shown.
- 761. Service of return on district attorney, and consequences of failure.
- 762. If brought to hearing by defendant, appeal must be argued, though no one oppose, etc.
- 763. Appeal to be heard on original return.
- 764. Judgment on appeal.
- 765. Judgment to be entered on the minutes.
- 766. Order upon judgment for affirmance.
- 767. Order upon judgment of reversal.
- 768. If new trial ordered, to be had in county court.
- 769. Proceedings to carry judgment upon appeal into effect, to be had in county court.
- 770. On judgment of county court, defendant may appeal to appellate division.
- 771. Judgment of supreme court upon appeal, final.
- 772. Proceedings to carry into effect judgment of supreme court.

§ 749. Review on appeal from minor courts. — A judgment upon conviction, rendered by a court of special sessions, police court, police magistrate, or justice of the peace, in any criminal action or proceedings or special proceedings of a criminal nature, including a judgment of commitment made under section two hundred and ninety-one of the Penal Code, may be reviewed by the county court of the county, upon an appeal as prescribed by this title, and not otherwise; and any appeals heretofore taken and allowed from a judgment of any police court or police magistrate in the manner that appeals are directed to be taken and allowed by this title, and now pending undetermined in any court of this state, are hereby declared to be legal and valid and of the same force and effect as if taken after the passage of this act. An appeal from a judgment of commitment made under section two hundred and ninety-one of the Penal Code may be allowed to any person having, previous to such commitment, a right to the custody of the child; but upon such appeal, in addition to the notice and papers required

this title to be served on appeals in criminal actions, notice of all proceedings and copies of the affidavit and allowance of appeal therein must be served upon the institution named in the commitment, and upon the society mentioned in section two hundred and ninety-three of the Penal Code, if there be one within the county. Such institution and society, or either, shall have the right to move, to argue or dismiss, and to be heard upon the argument of such appeal; and shall have the like right to appeal from the judgment of the county court of the county to the supreme court as is conferred by section seven hundred and twenty of this Code upon a defendant, and to the court of appeals by section five hundred and nineteen of this Code; and pending any appeal and until the final determination thereof the child named in the commitment must remain in the custody of the institution therein specified.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

Amended by chap. 372 of 1884.

This amendment enlarged the provisions of the original section so as to include "police court, police magistrate, or justice of the peace," and "any criminal proceedings or special proceeding of a criminal nature."

Amended by chap. 89 of 1890.

This amendment further enlarged the provision of the section, as amended in 1884, by including "a judgment of commitment made under section 291 Penal Code," and added the provisions as to appeals from judgments of commitment of children and as to their custody pending appeal.

The subject of appeals from courts of special sessions is embraced in title part 5 of the Code of Criminal Procedure. *People v. Snyder*, 7 St. Rep., 2; 44 Hun, 198.

The right of appeal exists when expressly conferred by statute. *People v. Trumble*, 1 N. Y. Cr., 445.

Prior to 1884.—Prior to the amendment of 1884 to this section, the Code contained no provision for an appeal in special proceedings of a criminal nature. *People ex rel. Vitan v. Vitan*, 20 Abb. N. C., 802; 10 N. Y. Supp., 911.

Since the institution of the proceedings in *People ex rel. Scherer v. Walsh*, 26 Hun, 346; 67 How., 484; 2 N. Y. Cr., 326; the amendment of 1884 to this section was enacted and provided for a review of special proceedings of a criminal nature by appeal.

The case of *Matter of Killoran v. Barton*, 26 Hun, 648, was decided before the amendment of 1884 to this section. After such amendment, the section was broad enough to include such a case.

Prior to the amendment of 1884 to this section, an appeal to the court of sessions from a judgment rendered by a police magistrate was, neither expressly nor by necessary implication, authorized. *People v. Trumble*, 1 N. Y. Cr., 443; 29 Hun, 205.

It was held, in *People v. Trumble*, 1 N. Y. Cr., 443, that no appeal to the court of sessions lies from the judgment of a police justice. But, since that decision, this section has been so amended as to give the right to such an appeal.

In this section, the right of appeal is given in words that do not include cases where only a certificate is to be made by a magistrate. *Matter of Killoran v. Barton*, 26 Hun, 649; 14 W. Dig., 490. See amendments of 1884 and 1890.

Since amendment of 1884.—An appeal from a conviction by a police magistrate of the City of New York lies directly to the court of general sessions. *People ex rel. Com'rs, etc., v. Glaze*, 48 St. Rep., 814; 65 Hun, 560; 10 N. Y. Supp., 577.

Since the amendment of 1884 to this section, orders of the court of special sessions, police court, police magistrate or justice of the peace, made in summary proceedings can be reviewed only on an appeal. *People ex rel. Wright v. Court, etc.*, 9 St. Rep. 307, 45 Hun, 55.



An appeal lies to the court of general sessions of New York county from a judgment of conviction by the special sessions entered upon an order affirming a conviction, by a police justice, of defendant as a disorderly person upon his wife's charge of abandonment, without adequate support. *People ex rel. Vitan v. Vitan*, 20 Abb. N. C., 303 ; 10 N. Y. Supp., 910, 911.

**Court of sessions of the county.**—When, in this section, the term “the court of sessions of the county” is used, it evidently refers to the court of sessions as defined in section 38, *ante*, which includes the court of general sessions of the city and county of New York. *People ex rel. Com'rs, etc., v. Glaze*, 48 St. Rep., 811 ; 65 Hun, 560 ; 20 N. Y. Supp., 577.

**Prosecutor's appeal, etc.**—The prosecutor has no right of appeal from a judgment for costs, rendered against him by a court of special sessions in a prosecution for petit larceny. *People v. Carr*, 28 St. Rep., 287 ; 54 Hun, 444 ; 7 N. Y. Supp., 724.

No appeal lies to a court of sessions from a judgment of the special sessions charging a prosecutor with costs. *People v. Norton*, 33 Hun, 277 ; 2 N. Y. Cr., 324. The right of appeal is provided by the amendment of 1890 to section 720, *ante*.

§ 750. **Appeal, when allowed.**—An appeal may be allowed for an erroneous decision or determination of law or fact upon the trial.

Amended by chap. 360 of 1882.

This amendment substituted the present, for the original section. An appeal was previously limited to an erroneous decision of the court.

§ 751. **Appeal, how taken.**—For the purpose of appealing, the defendant, or some one on his behalf, must within sixty days after the judgment, or within sixty days after the commitment where the appeal is from the latter, make an affidavit stating the fact showing the alleged errors in the proceedings or conviction or commitment complained of, and must within that time present it to the county judge or a justice of the supreme court, or in the city and county of New York, to the recorder or a judge authorized to hold a court of general sessions in that city, or in the city of Albany, to the recorder, and may apply thereon for the allowance of the appeal.

Am'd, ch. 781 of 1897.

Amended by chap. 39 of 1890.

This amendment inserted in the original section the words “or within twenty days after the commitment where the appeal is from the latter,” and “or commitment,” and substituted “justice” for “judge,” and “a judge authorized to hold a court” for “city judge or judge,” and “in” for “of.”

**Affidavit.**—An appeal may be taken by the presentation of an affidavit showing the alleged errors of which complaint is made. *People ex rel. Baker v. Beatty*, 39 Hun, 478.

The error to be relied upon on appeal must be specified in the affidavit, upon which the appeal is allowed, or it will not be considered in the appellate court. *People v. McGann*, 6 St. Rep., 541 ; 43 Hun, 57 ; *People ex rel. Baker v. Beatty*, 39 id., 476.

§ 752. **How allowed.**—If, in the opinion of the judge, it is proper that the question arising on the appeal should be decided by the county court, he must indorse on the affidavit an allowance of the appeal to that court; and the defendant, or his attorney, must within five days thereafter, serve a copy of the affidavit upon which the appeal is granted, together with a notice that the same has been allowed, upon the district attorney of the county in which the appeal is to be heard.

Am'd, ch. 536 of 1897. To take effect Sept. 1, 1897.

§ 753. **Release on bail pending an appeal.**—Upon allowing the appeal, if satisfied that there is a reasonable doubt whether the conviction should stand, but not otherwise, the judge may take from the defendant, a written undertaking, with such sureties as he may

approve, that the defendant will abide the judgment of the county court upon the appeal, and may thereupon order that he be discharged from imprisonment, on service of the order upon the officer having him in custody, or if he be not in custody, that all proceedings on the judgment be stayed.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

Amended by chap. 279 of 1892.

This amendment inserted, after the word "appeal" in the original section, the words "if satisfied that there is a reasonable doubt whether the conviction would stand, but not otherwise."

**§ 754. Undertaking, when and with whom filed.**—The undertaking upon the appeal must be immediately filed with the clerk of the county court, and the said clerk of the county court shall within five days thereafter, give notice to the district attorney of the county that such bond has been filed, which notice shall give the name of the defendant and his sureties, the offense for which the defendant was charged and the amount of the bail given.

Am'd, ch. 536, 1897. To take effect Sept. 1, 1897.

**§ 755. Delivery of affidavit, and allowance of appeal.**—The affidavit and allowance of the appeal must be delivered to the magistrate, or clerk of the court rendering the judgment, within five days after the allowance of the appeal, and when so delivered the appeal is deemed taken.

Amended by chap. 39 of 1890.

This amendment substituted the words "or clerk of the court rendering the judgment," for the words "who tried the action, or, if in the city and county of New York, to the clerk of the court of special sessions."

**§ 756. Return, when and how made.**—The magistrate or court rendering the judgment, must make a return to all the matters stated in the affidavit, and must cause the affidavit and return to be filed in the office of the county clerk, within ten days after the service of the affidavit and allowance of the appeal.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

**Return.**—The affidavit and return made up a sort of bill of exceptions which state only so much of the proceedings as are necessary to give point to the alleged errors stated in the affidavit. *People ex rel. Baker v. Beatty*, 39 Hun, 478.

The magistrate, upon appeal, is not required to make returns as to matters not contained in the affidavit. *People v. McGann*, 6 St. Rep., 541; 43 Hun, 57. The return is made with reference to the errors only. *Id.*

**§ 757. Compelling return.**—If the return be not made within the time prescribed in the last section, the county court, or the judge thereof, may order that a return be made within a specified time which may be deemed reasonable; and the court may, by attachment, compel a compliance with the order.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

**§ 758. Ordering and compelling further or amended return.**—If the return be defective, a further or amended return may be ordered, and the order may be enforced in the manner provided in the last section.

See *People v. Carnrick*, 39 St. Rep., 596; 15 N. Y. Supp., 438.

**§ 759. Appeal by whom and how brought to argument.**—The appeal must be brought to argument by the defendant at the next term, upon a notice of not less than ten days before said term to the district attorney of the county.

Amended by chap. 601 of 1899. In effect Sept. 1, 1899.

**§ 760. If not brought to argument, as provided in last section, to be dismissed, unless continued for cause shown.**—If the defendant omit to bring the appeal to argument, as provided in the last section, the court must dismiss it, unless it continue the same, by special order, for cause shown.

**§ 761. Service of return on district attorney, and consequences of failure.**—The defendant must serve upon the district attorney, a copy of the return, with or before the notice of argument. If he fail to do so, the appeal must be dismissed, upon proof of the failure, unless the court otherwise direct.

**§ 762. If brought to hearing by defendant, appeal must be argued, though no one opposes, etc.**—If the appeal be brought to hearing by the defendant, it must be argued, though no one appear to oppose; but if brought on by the district attorney, he may take judgment of affirmance, unless the defendant appear to argue the appeal.

**§ 763. Appeal to be heard on original return.**—The appeal must be heard upon the original return; and no copy thereof need be furnished for the use of the court.

**§ 764. Judgment on appeal.**—After hearing the appeal, the court must give judgment, without regard to technical errors or defects, which have not prejudiced the substantial rights of the defendants, and may render the judgment which the court below should have rendered, or may, according to the justice of the case, affirm or reverse the judgment in whole or in part, as to all or any of the defendants, if there be more than one, or may order a new trial, or may modify the sentence.

Amended by chap. 360 of 1882.

This amendment substituted the word “defendant” for “defendants” where first used in the section, and added the words “or may modify the sentence.”

See notes under section 717, *ante*.

See notes under section 542 of the Code of Criminal Procedure.

**Technical objections.**—Technical objections are disregarded in rendering judgment on appeal. *People v. Cutler*, 1 N. Y. Cr., 178; 28 Hun, 465.

In reviewing the judgment of the court of special sessions, it is the duty of the court of sessions of the county to give judgment without regard to technical errors or defects, which have not prejudiced the substantial rights of the defendant. *People v. Upton*, 29 St. Rep., 777, 779; 9 N. Y. Supp., 686.

Where the appellate court can see that a violation of section 427, *ante*, is harmless, it will disregard it under this section. *People v. Moore*, 20 St. Rep., 4; 50 Hun, 359; 3 N. Y. Supp., 161.

**Modification.**—This section gives to the court of sessions, upon appeal, power to modify the sentence of the court of special sessions. *People v. Starks*, 17 St. Rep., 237; 1 N. Y. Supp., 723.

Under this section, the court of sessions is authorized, on appeal, to change a sentence of imprisonment in the penitentiary imposed by the court of special sessions, to imprisonment in the county jail, and affirm the conviction and sentence as thus modified. *People v. McIntosh*, 5 N. Y. Cr., 89.

The appellate court, upon appeal, can set aside an illegal, and pronounce

a legal, judgment. *People ex rel. Stokes v. Riseley*, 88 Hun, 282 ; 4 N. Y. Cr., 111.

But a prisoner, held under a void judgment, is not confined to an appeal ; he may procure his discharge by *habeas corpus*. *Id.*

**Power of special sessions.**—After an appeal to the court of sessions, the justice of the peace, who held the special sessions, has no power to alter the sentence. *People v. Starks*, 17 St. Rep., 234 ; 1 N. Y. Supp., 723. In such case, a supreme court justice, on adjudging the sentence of the special sessions illegal, cannot remand the prisoner to the latter court for re-sentence. *Id.*

See *People v. Clark*, 41 St. Rep., 448 ; 62 Hun, 84 ; 16 N. Y. Supp., 695 ; *People v. Harris*, 28 St. Rep., 300 ; 4 Silv. (Sup. Ct.), 536 ; 7 N. Y. Supp., 776.

§ 765. **Judgment to be entered on the minutes.**—When judgment is given upon the appeal, it must be entered upon the minutes.

§ 766. **Order upon judgment for affirmance.**—If the judgment be affirmed, the court must direct its execution, and if the defendant have been discharged on bail, after the commencement of the execution of a judgment of imprisonment, must commit him to the proper custody for the remainder of his term of imprisonment.

§ 767. **Order upon judgment of reversal.**—If the judgment be reversed, and the defendant be imprisoned in pursuance of the judgment of the police court, the county court must order him to be discharged.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See *People v. Trumble*, 1 N. Y. Cr., 446.

§ 768. **If new trial ordered, to be had in county court.**—If a new trial be ordered, it must be had in the county court, in the same manner as upon an issue of fact on an indictment ; and that court may proceed to judgment and execution, as in an action prosecuted by indictment. But where the appeal was from a judgment of commitment made under section two hundred and ninety-one of the Penal Code, the new trial shall be had before the county court without a jury.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 39 of 1890.

This amendment added the latter sentence of the present section.

§ 769. **Proceedings to carry judgment upon appeal into effect, to be had in county court.**—If any proceedings be necessary to carry the judgment upon the appeal in effect, they must be had in the county court.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

§ 770. **On judgment of county court, defendant may appeal to the appellate division.**—If the judgment on the appeal be against the defendant, he may appeal therefrom to the appellate division of the supreme court, in the same manner as from a judgment in an action prosecuted by indictment, and may be admitted to bail upon the appeal, in like manner.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**Appeal to supreme court.**—If, on an appeal from the court of special sessions to the court of sessions, the judgment is against the defendant, he may appeal therefrom to the supreme court. *People v. Snyder*, 7 St. Rep., 842 ; 44 Hun, 193.

No appeal can be taken by the people from a judgment of a court of ses-

sions, reversing a judgment of a court of special sessions convicting the defendant of an assault. *Id.*

An appeal by the defendant to the general term from a judgment of affirmance of the general sessions is given by this section. *People v. Trumble*, 1 N. Y. Cr., 447.

See *People ex rel. Wright v. Court, etc.*, 9 St. Rep., 607; 45 Hun, 55.

**§ 771. Judgment of supreme court upon appeal, final.—**The judgment of the appellate division of the supreme court upon the appeal is final; except that where the original appeal was from a judgment of commitment of a child, either party may appeal to the court of appeals in like manner as a defendant under section five hundred and nineteen of this Code.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 39 of 1890.

This amendment added the exception to the present section.

The judgment of the supreme court on an appeal from a judgment of the sessions, affirming a conviction of the special sessions, is final. *People v. Snyder*, 7 St. Rep., 842; 44 Hun, 193.

See *People ex rel. Wright v. Court, etc.*, 9 St. Rep., 607; 45 Hun, 55.

**§ 772. Proceedings to carry into effect judgment of supreme court.—**The same proceedings must be had, to carry into effect the judgment of the appellate division of the supreme court upon the appeal, as if it had been taken upon a judgment in an action prosecuted by indictment.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See *People v. Clark*, 41 St. Rep. 449; 62 Hun, 84; 16 N. Y. Supp., 605.

## PART VI.

## OF SPECIAL PROCEEDINGS OF A CRIMINAL NATURE.

- TITLE I.** OF CORONERS' INQUESTS, AND THE DUTIES OF CORONERS.  
**II.** OF SEARCH WARRANTS.  
**III.** OF THE OUTLAWRY OF PERSONS CONVICTED OF TREASON.  
**IV.** OF PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.  
**V.** OF PROCEEDINGS RESPECTING BASTARDS.  
**VI.** OF PROCEEDINGS RESPECTING VAGRANTS.  
**VII.** OF PROCEEDINGS RESPECTING DISORDERLY PERSONS.  
**VIII.** OF PROCEEDINGS RESPECTING THE SUPPORT OF POOR PERSONS.  
**IX.** OF PROCEEDINGS RESPECTING MASTERS, APPRENTICES, AND SERVANTS.  
**X.** OF CRIMINAL STATISTICS.  
**XI.** MISCELLANEOUS PROVISIONS RESPECTING PROCEEDINGS OF A CRIMINAL NATURE.

## TITLE I.

## OF CORONERS' INQUESTS, AND THE DUTIES OF CORONERS.

- SECTION 773.** Coroner, when to summon jury to inquire into cause of death or wounding. Issue of warrant of arrest and proceedings thereupon. Coroner, when disqualified from acting.
774. Jury to be sworn.  
 775. Witnesses to be subpoenaed.  
 776. Compelling attendance of witnesses, and punishing their disobedience.  
 777. Verdict of the jury.  
 778. Testimony, how taken and filed.  
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 781. Coroner's warrant, form of.  
 782. Warrant, how executed.  
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 785. Coroner to deliver money or property found, on deceased, to county treasurer.  
 786. County treasurer to place money to credit of county ; and to sell other property and place proceeds to credit of county.  
 787. Money, when and how paid to representatives of deceased.  
 788. Supervisors to require statement under oath, from coroner, before auditing his accounts.  
 789. In New York, police justices may perform duties of coroner, during his inability.  
 790. Compensation of coroners.

**§ 773. Coroner's jury and examination.**—Whenever a coroner is informed that a person has been killed or dangerously wounded by another, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, or



has committed suicide, he must go to the place where the person is and forthwith inquire into the cause of the death, or wounding, and in case such death, or wounding, occurred in a county in which is situated in whole, or in part, a city of the first class, but not otherwise, summon not less than nine, nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith, at a specified place, to inquire into the cause of the death or wound, and if it shall appear from the sworn examination of the informant, or complainant, or if it shall appear from the evidence taken on, or during, the inquisition, or hearing, that any person, or persons, are chargeable with the killing or wounding, or that there is probable cause to believe that any person or persons are chargeable therewith, and if such person or persons be not in custody, he must forthwith issue a warrant for the arrest of the person or persons charged with such killing or wounding; and upon the arrest of any person, or persons, chargeable therewith, he must be arraigned before the coroner for examination, and the said coroner shall have power to commit the person or persons so arrested to await the result of the inquisition or decision. Any coroner shall be disqualified from acting as such in any case where the person killed, or dangerously wounded, or dying suddenly, as aforesaid, is a co-employee with said coroner, of any person, or persons, association, or corporation, or where it appears that the killing or wounding has been occasioned, directly or indirectly, by the employer of said coroner.

Amended by chap. 464 of 1899. In effect Sept. 1, 1899.

Amended by chap. 321 of 1887.

This amendment inserted after the word "forthwith" in the original section the words "inquire into the cause of the death or wounding, and," and after the word "jurors," the words "if such death or wounding be of a criminal nature," and added the provisions as to the warrant of arrest and the proceedings thereupon.

Amended by chap. 562 of 1892.

This amendment added the provision as to disqualification of coroner.

See section 311 of Penal Code.

See chap. 341 of 1893, amending chap. 231 of 1884, which provided for the election and compensation of a coroner in the county of Onondaga, and for *post-mortem* examinations in coroners' cases in said county.

The case of *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 38, was reversed in 6 St. Rep., 828; 105 N. Y., 146.

**Powers.**—The powers and duties of a coroner are conferred by statute. *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 38; 5 N. Y. Cr., 339.

The dissenting opinion of Justice Hardin at general term, reported in *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 38; 5 N. Y. Cr., 336, was approved and virtually concurred in on appeal by court of appeals in 6 St. Rep., 828; 105 N. Y., 146; 5 N. Y. Cr., 352.

A coroner is not one of the magistrates enumerated in section 147, *ante*. *People v. McGloin*, 91 N. Y., 248.

**Inquest.**—This section and the two following sections are substantially re-enactments of the provisions of the Revised Statutes in respect to coroners' inquests. (2 R. S., 743.) *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 38; 5 N. Y. Cr., 340.

A coroner's inquest is a judicial proceeding. *Crisfield v. Perine*, 15 Hun, 200; *aff'd*, 81 N. Y., 622.

A person, under arrest before a coroner's jury and accused of having occasioned death by criminal means, occupies before the coroner and his

jury a position similar to that of such a person before an examining magistrate. *People v. Mondon*, 2 St. Rep., 713; 103 N. Y., 211.

Experiments made upon a regular examination before a coroner, with a view of sustaining the correctness of the testimony of a witness who has previously been examined thereon, constitute a part of the proceedings before the coroner, and partake of the judicial character of the examination. *People v. Willett*, 92 N. Y., 29; 1 N. Y. Cr., 355.

**Upon what proof.**—This section seems to warrant the conclusion that affidavits, or information even not sworn to, may be acted upon by a coroner in determining whether it is his duty to proceed in a given case. *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun. 38; 5 N. Y. Cr., 340, 354.

**Post-mortem.**—For the purpose of inquiring into the cause of death, the coroner is authorized to employ a surgeon or physician to make a *post-mortem* examination. *People v. Fitzgerald*, 5 N. Y. Cr., 341.

A *post-mortem* examination, conducted by surgeons employed by a coroner holding an inquest, is not a part of the inquest in such a sense as that every citizen has a right freely to attend it. *Crisfield v. Perine*, 15 Hun, 202; *aff'd*, 81 N. Y., 622.

The *post-mortem* should not be in the presence of the jury. *People v. Fitzgerald*, 6 St. Rep., 828; 105 N. Y., 335; 5 N. Y. Cr., 354. They are to be instructed by the testimony of the physicians who are designated by the coroner to make it. *Id.*

The point of law is debatable whether a *post-mortem* should take place before the coroner has impaneled a jury. *People v. Fitzgerald*, 6 St. Rep., 828; 105 N. Y., 152; 5 N. Y. Cr., 354.

If the body is interred before he comes, he must dig it up. *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 38; 5 N. Y. Cr., 342; *Rex v. Ferrand*, 3 Barn. & Ald., 261.

One accused, or suspected of the murder of the person to be examined, has no right, *it seems*, to be present at the *post-mortem* examination. *Crisfield v. Perine*, 15 Hun, 200; *aff'd*, 81 N. Y., 622.

**Who present.**—The coroner has a discretion to determine whether any persons and what persons, besides the surgeons, may be present at the *post-mortem* examination. *Rhodes v. Brandt*, 21 Hun, 1.

**Dissection.**—Dissection by order of the coroner is expressly authorized. See Penal Code. *People v. Fitzgerald*, 6 St. Rep., 828; 105 N. Y., 152; 5 N. Y. Cr., 354.

§ 774. Repealed by chapter 464 of 1899. In effect September 1. 1899.

In the ordinary discharge of his duty, his jury should be sworn, view the remains and certify to their inquest. *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 38; 5 N. Y. Cr., 342. Though this opinion was a dissenting opinion, it was virtually concurred in by the court of appeals.

§ 775. **Witnesses to be subpoenaed.**—The coroner may issue subpoenas for witnesses, returnable forthwith, or at such time and place as he may appoint. He must summon and examine as witnesses, every person who, in his opinion, or that of any of the jury, has any knowledge of the facts; and he must summon as a witness a surgeon or physician, who must in the presence of the jury, inspect the body, and give a professional opinion as to the cause of the death or wounding.

See notes under section 773, *ante*.

**Right of prisoner.**—The prisoner has no right to cross-examine witnesses,

or produce witnesses in his own behalf, before the coroner. *People v. Collins*, 20 How., 111; 11 Abb., 406.

On an inquest before a coroner's jury, the coroner has no power to take testimony to establish the innocence of the prisoner. *People v. Collins*, 20 How., 111; *Matter of Ramscar*, 1 N. Y. Cr., 37; 10 Abb. N. C., 442; 63 How., 255.

**Expenses.**—Prior to the passage of chap. 620 of 1875, the coroner of New York city had no power to bind the city for the expense of a chemical analysis of the remains of a deceased person to ascertain the cause of death. *Doremus v. Mayor*, etc., 6 Daly, 121. But the act of 1875 conferred this power.

See *People v. Fitzgerald*, 6 St. Rep., 599; 43 Hun, 38; 5 N. Y. Cr., 340. As to this opinion, see preceding section.

**§ 776. Compelling attendance of witnesses, and punishing their disobedience.**—A witness served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, as upon a subpoena issued by a magistrate, as provided in this Code.

See section 619, *ante*; sections 8–13, 853–863 of Code of Civil Procedure.

**§ 777. Verdict of the jury.**—After inspecting the body and hearing the testimony, the coroner must render his decision, or if in a county where a jury is summoned as provided in section seven hundred and seventy-three, the jury must render their verdict, and certify it by an inquisition or decision in writing, signed by him or them as the case may be, and setting forth who the person killed or wounded is, and when, where and by what means he came to his death, or was wounded; and if he were killed, or wounded, or his death were occasioned by the act of another, by criminal means, who is guilty thereof, in so far as by such inquisition he or such jury has been able to ascertain.

Amended by chap. 464 of 1899. In effect Sept. 1, 1899.

**Duty of jury.**—By this section, it becomes the duty of the jury, if the death was occasioned by criminal means, to find who was the guilty person, and, on such finding, the coroner is empowered to issue his warrant for the arrest of the guilty party, if not already in custody. *People v. Mondon*, 2 St. Rep., 713; 103 N. Y., 216.

**Minutes of testimony.**—It is not provided that the minutes of testimony shall form a part of the inquisition. *People ex rel. Cosford v. Supervisors*, etc., 38 St. Rep., 966; 13 N. Y. Supp., 681. They shall be taken and filed for use, if needed in the prosecution of the person suspected of the crime. *Id.*

**Examining magistrate.**—The coroner, from the time that a felonious homicide is established, acts substantially in the place of an examining magistrate. *McMahon v. People*, 15 N. Y., 384; *People v. Mondon*, 2 St. Rep., 713; 103 *id.*, 216.

See note in *People v. Everhardt*, 2 Silv. (Ct. App.), 521.

**§ 778. Testimony how taken and filed.**—The testimony of the witnesses examined before the coroner or the jury must be reduced to writing by the coroner, or under his direction, and must be forthwith by him, with the inquisition, or decision, filed in the office of the clerk of the county court of the county, or of a city court, having power to inquire into the offense by the intervention of a grand jury.

Amended by chap. 464 of 1899. In effect Sept. 1, 1899.

See section 395, *ante*.

**Filing testimony.**—There is no law requiring the coroner to keep an office. *People ex rel. Masterton v. Gallup*, 30 Hun, 504.

This section requires the coroner to file depositions and inquisitions in certain clerk's office.

**Duty of coroner.**—It is made the duty of the coroner, by this section,

to reduce to writing the testimony of witnesses examined before the jury in the case of inquests. *People ex rel. Cosford v. Supervisors, etc.*, 38 St. Rep., 966; 15 N. Y. Supp., 681.

**Defendant entitled to hearing before magistrate.**—The defendant, against whom an inquisition has been found by a coroner's jury, is entitled to a hearing before a magistrate, whether he has been arrested before or after the inquisition has been filed. *Matter of Ramscar*, 1 N. Y. Cr., 34; 63 How., 255; 10 Abb. N. C., 444.

See sections 781, 783 and 784, *post*, as amended by chap. 321 of 1887.

§ 779. **If defendant arrested before inquisition filed, depositions to be delivered to magistrate, and by him returned.**—If, however, the defendant be arrested before the inquisition can be filed, the coroner must deliver it with the testimony, to the magistrate before whom the defendant is brought, as provided in section 781, who must return it with the depositions and statement taken before him, in the manner prescribed in section 221.

Under the provisions of this section, a defendant, who has been arrested before the inquisition can be filed, is entitled to be examined before a magistrate, before whom he may be brought, as provided in section 781, *post*; and a prisoner who has not been arrested until the inquisition was filed under sections 781 and 783, *post*, is entitled to be heard before a magistrate in all respects as upon a warrant of arrest on an information. *Matter of Ramscar*, 1 N. Y. Cr., 36; 63 How., 255; 10 Abb. N. C., 444.

§ 780. **Warrant for arrest of party charged by verdict.**—If the coroner or jury, where a jury is summoned, finds that the person was killed or wounded by another, under circumstances not excusable, or justifiable, by law, or that his death was occasioned by the act of another, by criminal means, and the party committing the act be ascertained by the inquisition or decision, and be not in custody, the coroner must issue a warrant, signed by him with his name of office, into one or more counties, as may be necessary, for the arrest of the person charged.

Amended by chap. 464 of 1899. In effect Sept. 1, 1899.

See *matter of Ramscar*, 1 N. Y. Cr., 34; 63 How., 255; 10 Abb. N. C., 444.

§ 781. **Form of warrant.**—The coroner's warrant must be in substantially the following form: County of Albany (or as the case may be). In the name of the people of the state of New York, to any sheriff, constable, marshal or policeman in this county: An inquisition having been this day found by a coroner's jury before me (or a decision having been made by me), stating that A B has come to his death by the act of C D by criminal means (or as the case may be), as found by the inquisition (or decision); or information having been this day laid before me that A B has been killed or dangerously wounded by C D by criminal means (or as the case may be), you are hereby commanded forthwith to arrest the above named C D and bring him before me, or in the case of my absence or inability to act, before the nearest or most accessible coroner in this county.

Dated at the city of Albany (or as the case may be), this  
day of

E. F.

Coroner of the county of Albany (or as the case may be).

Amended by chap. 464 of 1899. In effect Sept. 1, 1899.

Amended by chap. 360 of 1882.

This amendment substitutes the words "peace officer" for the words "sheriff, constable, marshal or policeman."

Amended by chap. 321 of 1887.

This amendment substituted for the words "To any peace officer in this state," in the section as amended in 1882, the words "to any sheriff, constable, marshal or policeman in this county," for the word "therefore," the word "hereby," for the words "take him," the words "bring him before me, or in case of my absence or inability to act," and for the word "magistrate" the word "coroner," and inserted, after the word "inquisition," the words "or, information having been this day laid before me that A. B. has been killed or dangerously wounded by C. D. by criminal means [or as the case may be]."

This section prescribes the form of warrant to be issued by coroner, and by such warrant the sheriff, constable, marshal or policeman, to whom it is directed, is commanded to arrest the person charged, and take him before the nearest magistrate in the county. *Matter of Ramscar*, 1 N. Y. Cr., 34; 63 How., 255; 10 Abb. N. C., 444. See this section, as amended by chap. 321 of 1887.

This section, as amended by chap. 321 of 1887, seems to direct that the defendant, on arrest upon a coroner's warrant, be brought before the coroner who issued the warrant, and in case of his absence or inability to act, before the nearest or most accessible coroner in the county.

But sections 783 and 784, as amended by chap. 321 of 1887, presuppose authority to bring the defendant, when arrested on such warrant, before a magistrate as well as a coroner.

§ 782. **Warrant, how executed.**—The coroner's warrant may be served in any county; and the officer serving it must proceed thereon, in all respects, as upon a warrant of arrest on an information; except, that when served in another county, it need not be indorsed by a magistrate of that county.

See *Matter of Ramscar*, 1 N. Y. Cr., 34; 63 How., 255; 10 Abb. N. C., 444.

§ 783. **Duty of magistrate upon examination of charge.**—The magistrate, or coroner, when the defendant is brought before him, must proceed to examine the charge contained in the inquisition or information, and hold the defendant to answer or discharge him therefrom, in the same manner in all respects as upon a warrant of arrest on an information.

Amended by chap. 321 of 1887.

This amendment inserted after the word "magistrate," the words "or coroner," and after the word "inquisition" the words "or information."

See notes under section 781, *ante*.

§ 784. **Inquisition and testimony for magistrate.**—Upon the arrest of the defendant, the clerk with whom the inquisition is filed, must, without delay, furnish to the magistrate, or coroner, before whom the defendant is brought, a certified copy of the inquisition and of the testimony returned therewith.

Amended by chap. 321 of 1887.

This amendment inserted after the word "magistrate" the words "or coroner, before whom the defendant is brought," and substituted for the word "it," the words "the inquisition."

See notes under section 781, *ante*.

The clerk, referred to in this section, who is to furnish the magistrate with a certified copy of the inquisition and testimony, is the clerk referred to in section 778, *ante*, with whom the inquisition and testimony are directed to be filed by the coroner. *Matter of Ramscar*, 1 N. Y. Cr., 36; 63 How., 255; 10 Abb. N. C., 444.



§ 785. **Coroner to deliver money, or property found, on deceased, to county treasurer.**—The coroner must within thirty days after an inquest upon a dead body, deliver to the county treasurer, any money or other property which may be found upon the body, unless claimed in the meantime by the legal representatives of the deceased. If he fail to do so, the treasurer may proceed against him for its recovery, by a civil action in the name of the county.

This section and sections 786 and 787, *post*, embody sections 1 and 2 of chap. 155 of 1842. *Sutton v. Public Administrator*, 4 Dem., 34.

§ 786. **County treasurer to place money to credit of county, and to sell other property and place proceeds to credit of county.**—Upon the delivery of money to the treasurer he must place it to the credit of the county. If it be other property, he must, within thirty days, sell it at public auction, upon reasonable public notice; and must, in like manner, place the proceeds to the credit of the county.

See *Sutton v. Public Administrator*, 4 Dem., 34.

§ 787. **Money, when and how paid to representatives of deceased.**—If the money in the treasury be demanded within six years, by the legal representatives of the deceased, the treasurer must pay it to them, after deducting the fees and expenses of the coroner and of the county, in relation to the matter, or it may be so paid at any time thereafter, upon the order of the board of supervisors.

See *Sutton v. Public Administrator*, 4 Dem., 35.

§ 788. **Supervisors to require statement under oath from coroner, before auditing his accounts.**—Before auditing and allowing the account of the coroner, the board of supervisors must require from him a statement in writing, of any money or other property found upon persons on whom inquests have been held by him, verified by his oath, to the effect that the statement is true and that the money or property mentioned in it has been delivered to the legal representatives of the deceased, or to the county treasurer.

§ 789. **In New York, police justices may perform duties of coroner, during his inability.**—In the city of New York, if the coroner be absent or be unable, for any cause, to attend, the duties imposed by this title may be performed by a police justice, but by no other officer, with the same authority, and subject to the same obligations and penalties as applied to the coroner.

§ 790. **Compensation of coroners.**—The coroner is entitled, for his services, in holding inquests and performing any other duty incidental thereto, to such compensation as defined by special statutes.

A coroner is not entitled to compensation for taking the minutes of testimony on an inquest. *People ex rel. Cosford v. Supervisors, etc.*, 38 St. Rep., 4.



Whether he is entitled to more than one traveling fee in going to, and returning from, the place of inquest, is doubtful. *Id.*

Physicians employed by him have no claim upon him, but must look to the county for their compensation. *Id.*

## TITLE II.

### OF SEARCH WARRANTS.

- SECTION 791.** Search warrant defined.
792. Upon what grounds it may be issued.
793. It cannot be issued but upon probable cause, supported by affidavit.
794. Before issuing warrant, magistrate must examine, on oath, the complainant and his witnesses.
795. Depositions, what to contain.
796. Magistrate, when to issue warrant.
797. Form of search warrant.
798. By whom served.
799. Officer may break open door or window, to execute warrant.
800. May break open door or window, to liberate person acting in his aid, or for his own liberation.
801. When warrant may be served in the night time, and direction therefor.
802. Within what time warrant must be executed and returned.
803. Officer to give receipt for property taken.
804. Property, when delivered to magistrate, how disposed of.
805. Return of warrant, and delivery to magistrate of inventory of property taken.
806. Magistrate to deliver copy of inventory to the person from whose possession property is taken, and to applicant for warrant.
807. If grounds for warrant controverted, magistrate to take testimony.
808. Testimony, how taken and authenticated.
809. Property, when to be restored to person from whom it was taken.
810. Depositions, search warrant, etc., to be returned to county court or city court having jurisdiction.
811. Maliciously and without probable cause procuring search warrant, a misdemeanor.
812. Peace officer, exceeding his authority.
813. Person charged with felony supposed to have a dangerous weapon.

**§ 791. Search warrant defined.**—A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

The dwellings and premises of citizens are under the highest protection against search, and may not be invaded with impunity save on full compliance with all constitutional and statutory requirements. *Johnson v. Comstock*, 14 Hun, 242.

See *People v. Noelke*, 29 Hun, 469.

**§ 792. Upon what grounds it may be issued.**—It may be issued upon either of the following grounds :

1. When the property was stolen or embezzled ; in which

case, it may be taken, on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be ;

2. When it was used as the means of committing a felony : in which case, it may be taken, on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the crime, or of any other person in whose possession it may be.

3. When it is in the possession of any person, with the intent to use it as the means of committing a public offense, or in the possession of another, to whom he may have delivered it for the purpose of concealing it, or preventing its being discovered ; in which case, it may be taken, on the warrant, from such person, or from a house or other place occupied by him, or under his control, or from the possession of the person to whom he may have so delivered it.

See *People v. Noelke*, 29 Hun, 469.

§ 793. It cannot be issued but upon probable cause, supported by affidavit.—A search warrant cannot be issued, but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched.

§ 794. Before issuing warrant, magistrate must examine, on oath, the complainant and his witnesses.—The magistrate must, before issuing the warrant, examine, on oath, the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

§ 795. Depositions, what to contain.—The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

§ 796. Magistrate, when to issue warrant.—If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

§ 797. Form of search warrant.—The warrant must be in substantially the following form :

“County of Albany [or as the case may be].

“In the name of the people of the state of New York : To any peace officer in the county of Albany [or as the case may be], proof by affidavit, having been this day made before me, by [naming every person whose affidavit has been taken], that [stating the particular grounds of the application, according to

section 792; or if the affidavits be not positive, 'that there is probable cause for believing that'—stating the ground of the application in the same manner;]

"You are therefore commanded, in the day-time, [or 'at any time of day or night,' as the case may be, according to section 801,] to make immediate search on the person of C. D., [or 'in the building situated'—describing it or any other place to be searched with reasonable particularity, as the case may be,] for the following property: [describing it with reasonable particularity;] and if you find the same or any part thereof, to bring it forthwith before me, at [stating the place.]

"Dated at the city of Albany [or as the case may be], the day of       , 18   .

"E. F.,

"Justice of the peace of the city"  
[or town] of [or as the case may be].

Amended by chap. 360 of 1882.

This amendment substitutes "peace officer," for "sheriff, constable, marshal or policeman."

The constitution and law require a particular description, in the warrant, of the place to be searched. *Johnson v. Comstock*, 14 Hun, 241. The direction should not be in the alternative; for instance, barn, house or store. *Id.*

§ 798. **By whom served.**—A search warrant may, in all cases, be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer, on his requiring it, he being present and acting in its execution.

§ 799. **Officer may break open door or window, to execute warrant.**—The officer may break open an outer or inner door or window of a building, or any part of the building, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

§ 800. **May break open door or window, to liberate person acting in his aid, or for his own liberation.**—He may break open any outer or inner door or window of a building, for the purpose of liberating a person, who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

§ 801. **When warrant may be served in the night-time and direction therefor.**—The magistrate must insert a direction in the warrant, that it be served in the day-time, unless the affidavits be positive that the property is on the person, or in the place to be searched; in which case, he may insert a direction that it be served at any time of the day or night.

§ 802. **Within what time warrant must be executed and returned.**—A search warrant must be executed, and returned to the magistrate by whom it was issued, if issued in the city and county of New York, within five days after its date, and if in any other county, within ten days. After the expiration of those times respectively, the warrant, unless executed, is void.

**Officer to give receipt for property taken.**—When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail,) to the person from whom it was taken by him, or in whose possession it was; in the absence of any person, he must leave it in the place where he found the property.

**Property when delivered to magistrate, how disposed of.**—When the property is delivered to the magistrate, he must, if the property is stolen or embezzled, dispose of it as provided in sections 139, both inclusive. If it were taken on a warrant issued on grounds stated in the second and third subdivision of section 192, he must retain it in his possession, subject to the order of the court to which he is required to return the proceeds of the sale of the property, or of any other court in which the offense, in respect to which the property was taken, is triable.

**Return of warrant, and delivery to magistrate of inventory of property taken.**—The officer must forthwith return the warrant to the magistrate and deliver to him a written inventory of the property taken, made publicly, or in the presence of the person from whose possession it was taken and of the affiant, or the warrant, if they be present, verified by the affiant. The officer, before the magistrate to the following effect: “I, A. B., the officer by whom this warrant was executed, do swear that the above inventory contains a true and correct account of all the property taken by me on the warrant.”

**Magistrate to deliver copy of inventory to the person from whose possession property is taken, and to the applicant for warrant.**—The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

**If grounds for warrant controverted, magistrate to take testimony.**—If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto.

**Testimony how taken and authenticated.**—The testimony given by each witness must be reduced to writing and authenticated in the manner prescribed in section 200.

**Property, when to be restored to person from whom it was taken.**—If it appear that the property taken is not the same as described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

**Depositions, search warrant, etc., to be returned to county court or city court having jurisdiction, etc.**—The magistrate must annex together the depositions, the search warrant, and return, and the inventory, and return them to the county court of the county, or city court, having power to

inquire into the offense in respect to which the search warrant was issued, by the intervention of a grand jury, at or before its opening on the first day.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**§ 811. Maliciously and without probable cause procuring search warrant, a misdemeanor.**—A person, who maliciously and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

**§ 812. Peace officer, exceeding his authority.**—A peace officer, who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

See section 120 of Penal Code.

**§ 813. Person charged with felony supposed to have a dangerous weapon, etc.**—When a person charged with a felony is supposed by the magistrate before whom he is brought, to have upon his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order or the order of the court in which the defendant may be tried.

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## TITLE III.

### OF THE OUTLAWRY OF PERSONS CONVICTED OF TREASON.

**SECTION 814.** When application for outlawry may be made.

815. On what proof to be made.

816. Order that the defendant appear to receive judgment, or be outlawed.

817. Publication of order.

818. Judgment on appearance of defendant, or on his not appearing.

819. Effect of the judgment.

820. Filing judgment-roll, and transcripts thereof.

821. Judgment-roll, of what to consist.

822. Appeal may be at any time taken, by defendant, from judgment.

823. Appeal, how taken, and proceedings thereon.

824. Effect of reversal.

825. Defendant may be arrested to receive judgment, notwithstanding outlawry.

826. No other proceeding for outlawry in criminal cases allowed.

**§ 814. When application for outlawry may be made.**—When, upon a bench warrant issued for the apprehension of a person who has pleaded guilty, or against whom a verdict has been rendered, upon an indictment for treason, it is duly returned that the defendant cannot be found, the district attorney of the country may apply to the court in which the conviction was had, for judgment of outlawry.

**§ 815. On what proof to be made.**—The application must be founded upon the return of the bench warrant, and upon proof, by affidavit, that the defendant has escaped, and on diligent search cannot be found within the county.

§ 816. **Order that the defendant appear to receive judgment, or be outlawed.**—The court, upon being satisfied that the defendant has escaped, and cannot, upon diligent search, be found in the county, must make an order that he appear on the first day of the next term, to receive judgment upon the conviction or be outlawed.

§ 817. **Publication of order.**—The order must be immediately published, once a week for six successive weeks, in a newspaper published in the county, and in the state paper. The expense of the publication is a county charge.

§ 818. **Judgment on appearance of defendant, or on his not appearing.**—If the defendant appear, judgment must be rendered against him upon the conviction. If he do not appear, the court, upon proof of the due publication of the order, must render judgment that the defendant be outlawed, and that all his civil rights be forfeited.

§ 819. **Effect of the judgment.**—The defendant is thereupon deemed civilly dead, and forfeits to the people of this state during his life-time, and no longer, all freehold estate in real property, of which he was seized in his own right, at the time of committing the treason, or at any time thereafter, and all his personal property.

§ 820. **Filing judgment-roll, and transcripts thereof.**—Upon judgment of outlawry, the judgment-roll must be made up, and filed with the clerk of the county in which the conviction was had, and docketed with the same effect as in a civil action. A transcript thereof may also be filed and docketed, with the like effect, in any other county.

§ 821. **Judgment-roll, of what to consist.**—The judgment-roll consists of the several matters prescribed in section 485, except the fifth subdivision; to which must be annexed a certified copy of the order to appear for judgment, the affidavits proving its publication, and a certified copy of the judgment of outlawry.

§ 822. **Appeal may be at any time taken, by defendant, from judgment.**—An appeal may be taken by the defendant, at any time, from a judgment of outlawry.

§ 823. **Appeal, how taken and proceedings thereon.**—The appeal may be taken in person or by counsel, in the same manner, and the proceedings thereon are the same, as upon an appeal from a judgment of conviction on an indictment.

§ 824. **Effect of reversal.**—If the judgment be reversed, on appeal, the defendant is restored to his civil rights.

§ 825. **Defendant may be arrested to receive judgment, notwithstanding outlawry.**—Notwithstanding judgment of outlawry against the defendant, he may be arrested at any time thereafter, to receive judgment upon the conviction.

§ 826. **No other proceeding for outlawry in criminal cases**



**allowed.**—No other proceeding for the outlawry of the defendant in a criminal action, can be had than that provided in this title.

## TITLE IV.

### OF PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.

**CHAPTER** I. Fugitives from another state or territory, into this state.  
II. Fugitives from this state, into another state or territory.

### CHAPTER I.

#### FUGITIVES FROM ANOTHER STATE OR TERRITORY, INTO THIS STATE.

- SECTION** 827. To be delivered up by the governor on demand, etc.  
828. Magistrate, when to issue warrant.  
829. Proceedings for arrest and commitment of the person charged.  
830. When and for what time to be committed.  
831. Certain judges may admit person arrested to bail.  
832. Magistrate to give notice to the district attorney, of the name of the person and the cause of his arrest.  
833. District attorney to give notice to executive authority of the state or territory, etc.  
834. Person arrested to be discharged, unless surrendered within the time limited.  
• 835. Magistrate to return his proceedings to the next court of sessions; proceedings thereon.

**§ 827. To be delivered up by the governor, on demand, etc.**  
—It shall be the duty of the governor, in all cases where, by virtue of a requisition made upon him by the governor of another state or territory, any citizen, inhabitant or temporary resident of this state is to be arrested, as a fugitive from justice (provided that said requisition be accompanied by a duly certified copy of the indictment or information from the authorities of such other state or territory, charging such person with treason, felony or crime in such state or territory), to issue and transmit a warrant for such purpose to the sheriff of the proper county or his undersheriff, or in the cities of this state (except in the city and county of New York, where such warrant shall only be issued to the superintendent or any inspector of police) to the chiefs, inspectors or superintendents of police, and only such officers as are above mentioned, and such assistants as they may designate to act under their direction shall be competent to make service of or execute the same. The governor may direct that any such fugitive be brought before him, and may for cause, by him deemed proper, revoke any warrant issued by him, as herein provided. The officer to whom is directed and intrusted the execution of the governor's warrant must, within thirty days from its date, unless sooner requested, return the same and make return to the governor of all his proceedings had there-

der, and of all facts and circumstances relating thereto. Any officer of this state, or of any city, county, town or village thereof, must upon request of the governor, furnish him with such information as he may desire in regard to any person or matter mentioned in this chapter.

2. Before any officer to whom such warrant shall be directed intrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the governor of this state, such officer must, unless the same be waived, as hereafter stated, take the prisoner or prisoners before a judge of the supreme court, or a county judge, who shall in open court if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment, affidavit or warrant annexed thereto, or in the warrant issued by the governor thereon, he or they may have a writ of *habeas corpus* by filing an affidavit to that effect. Said person or persons arrested may, in writing, consent to waive the right to be taken before said court or a judge thereof at chambers. Such consent or waiver shall be witnessed by the officer intrusted with the execution of the warrant of the governor, and one of the judges aforesaid or a counselor-at-law of this state, and such waiver shall be immediately forwarded to the governor by the officer who executed said warrant. If, after a summary hearing, speedily as may be consistent with justice, the prisoner or prisoners shall be found to be the person or persons indicted or charged against, and mentioned in the requisition, the accompanying papers and the warrant issued by the governor thereon, the court or judge shall order and direct the officer intrusted with the execution of the said warrant of the governor to deliver the prisoner or prisoners into the custody of the agent or agents designated in the requisition and the warrant issued thereon, as agent or agents upon the part of such state to receive him or them; otherwise to be discharged from custody by the court or judge.

Upon such hearing the warrant of the governor shall appear to be defective or improperly executed, it shall be by the court or judge returned to the governor, together with a statement of the defect or defects, for the purpose of being corrected and reissued to the court or judge, and such hearing shall be adjourned for sufficient time for the purpose, and in such interval the prisoner or prisoners shall be held in custody until such hearing be finally disposed of.

It shall not be lawful for any person, agent or officer to remove any person or persons out of this state, upon the claim, ground or pretext that the prisoner or prisoners consent to go, or by reason of his or their willingness to waive the proceedings

afore described, and any officer, agent, person or persons who shall procure, incite or aid in the arrest of any citizen, inhabitant or temporary resident of this state, for the purpose of taking him or sending him to another state, without a requisition first duly had and obtained, and without a warrant duly issued by the governor of this state, served by some officer as in this section provided, and without, except in case of waiver in writing as aforesaid, taking him before a court or judge as aforesaid, unless in pursuance of the provisions of the following sections of this chapter, and any officer, agent, person or persons who shall, by threats or undue influence, persuade any citizen, inhabitant or temporary resident of this state to sign the waiver of his right to go before a court or judge as hereinbefore provided, or who shall do any of the acts declared by this chapter to be unlawful, shall be guilty of a felony, and upon conviction be sentenced to imprisonment in a state prison or penitentiary for the term of one year.

Any willful violation of this act by any of the above named officers shall be deemed a misdemeanor in office.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Amended by chap. 638 of 1886.

This amendment substituted the present for the original section.

See note on Extradition in 7 N. Y. Cr., 411.

The case of *Adriance v. Lagrave*, 59 N. Y., 110, was overruled by *United States v. Rauscher*, 119 U. S., 407.

**Who may be extradited.**—A person, who fled from a sister state into Canada as a fugitive from justice, upon coming into this state may be extradited to the former state. *Matter of Brown*, 4 N. Y. Cr., 576.

A fugitive from justice who, without force, has been enticed into the state by false and fraudulent representations on the part of the complainant, or some one interested in the prosecution, comes voluntarily within the state, and may be arrested and extradited from the state. *Id.*

A person, who has been convicted of crime and escaped before serving out his sentence, is a person "charged in any state with treason, felony or other crime," within the provisions of subd. 2, section 2, art. 4 of the Federal Constitution. *Matter of Hope*, 7 N. Y. Cr., 406.

A prisoner, extradited upon a demand of the Federal government and brought within a state under extradition proceedings, cannot be held in custody for any other cause than that for which he was extradited. *Matter of Reinitz*, 7 N. Y. Cr., 74.

A person, who has been extradited from another to this state to answer a charge of crime against him, and has then served out a term of imprisonment here, cannot, upon his release, be extradited to a third state to serve out an unexpired term of imprisonment in that state. *Matter of Hope*, 7 N. Y. Cr., 406. He has, in such case, the right to a reasonable time to return, if he chooses, to the state from which he was extradited. *Id.*

Where the charge upon which a person has been brought from another state for extradition, cannot be sustained, he must, upon being discharged, be allowed a reasonable time to return to the place whence he was brought. *Matter of Baruch*, 24 Abb. N. C., 109.

**Presence of accused.**—The actual presence of the accused party in the demanding state, at the time of the commission of the alleged offense, is a jurisdictional fact. *Matter of Mitchell*, 4 N. Y. Cr., 600. Such fact must be proved when his extradition is demanded. *Id.*

The fact that a party has been indicted for an offense which, in its own nature, implies the actual presence of the offender within the jurisdiction of the demanding state, is sufficient *prima facie* evidence of his having fled from justice when found in the other state. *Id.* *Leary's case*, 6 Abb. N. C., 44. But this rule does not apply to offenses which, from their own nature,

do not imply the actual presence of the offender within the demanding state. *Id.*

**Proof.**—In order to authorize a warrant of rendition, the fugitive must be demanded by the executive of the state from which he has fled, a copy of the indictment or affidavit before a magistrate charging the offense must be produced, and such copy must be certified as authentic by the executive. *Soloman's Case*, 1 Abb. N. S., 347. An affidavit sworn to before a justice of the peace, and a certificate by the executive that he is such officer, and that his attestation is in due form, is not sufficient in this respect. *Id.*

**Duty of governor.**—The performance of the duty of rendition is imposed upon the governor by this section. *Matter of Scrafford*, 36 St. Rep., 753 ; 59 Hun, 327 ; 12 N. Y. Supp., 947, 948.

The governor has only to issue his warrant to an agent or officer to arrest the party named in the demand. *People ex rel. Nubell v. Byrnes*, 83 Hun, 98 ; 2 N. Y. Cr., 410.

It is a condition precedent to the obligation to surrender that the executive of the state, upon whom the demand is made, be apprised of the facts upon which the duty depends. *People ex rel. Lawrence v. Brady*, 56 N. Y., 182.

Upon the executive of the state in which the accused is found rests the responsibility of determining whether he is a fugitive from the justice of the demanding state. *Matter of Mitchell*, 4 N. Y., Cr., 599 ; *Ex parte Reggel*, 114 U. S., 648. See *Contra*, *People ex rel. Draper v. Pinkerton*, 17 Hun, 199 ; 77 N. Y., 245.

When a copy of the indictment, certified to be authentic by the governor of the state, whence the person charged is shown to have fled, is presented, it is made the absolute duty of the executive to whom this proof shall be made to cause the arrest of the individual so charged. *People ex rel. Nubell v. Byrnes*, 83 Hun, 98 ; 2 N. Y. Cr., 408. He is vested with no authority to examine into the charge, or the sufficiency of the indictment. *Id.* His duty is ministerial. *Id.*

All inquiry into the prisoner's guilt or innocence of the crime is wholly irrelevant in such a proceeding. *Matter of Mitchell*, 4 N. Y. Cr., 596 ; *People ex rel. Lawrence v. Brady*, 56 N. Y., 182.

**Duty of court.**—The court cannot inquire into the truth of the facts recited in the warrant for the rendition of a fugitive from justice. *People ex rel. Draper v. Pinkerton*, 17 Hun, 199.

Where a warrant is issued by the governor for the rendition of a fugitive from justice, the court cannot go behind the warrant and inquire into the truth of the facts recited in it. *Id.*

The recitals in a warrant of the governor of this state for the arrest of a fugitive from justice of another state are to be taken, at least *prima facie*, as true. *Id.*

Where the papers, upon which a warrant of extradition is issued, are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issue have been complied with, and it is sufficient if it recites what the law requires. *People ex rel. Jourdan v. Donohue*, 84 N. Y., 438.

Presumption of regularity in an extradition warrant prevails in the absence of papers under which the warrant was issued by the governor. *Matter of Scrafford*, 36 St. Rep., 748 ; 59 Hun, 320 ; 12 N. Y. Supp., 947, 948.

In such case, the court looks only to the warrant and recitals. *Id.* The recitals in the warrant must be taken to be *prima facie* true and sufficient. *Id.*

Where the judge is of the opinion that the warrant of the Executive is defective, he should return it to the governor, with a statement of the defect or defects, for the purpose of being corrected and returned to him. *Id.*

The misspelling of the defendant's name in the rendition warrant, where he is the person intended, furnishes no ground for his discharge. *Id.*

**Appeal.**—An order, made by a special county judge declaring a rendition warrant issued by the governor insufficient, and discharging the party

named therein from the custody of the sheriff and from further imprisonment and restraint, is appealable to the general term. *Id.*

The notice of appeal in extradition proceedings may be served upon the clerk and the attorney for the defendant. *Id.*

**Habeas corpus.**—When *habeas corpus* from the federal courts an appropriate remedy. *Matter of Reinitz*, 7 N. Y. Cr., 74.

*People ex rel. Post v. Cross*, 48 St. Rep. 545; 135 N. Y. 536.

§ 828. **Magistrate, when to issue warrants.**—A magistrate may issue a warrant as a preliminary proceeding to the issuing of a requisition by the governor of another state or territory upon the governor of this state for the apprehension of a person charged with treason, felony or other crime, who shall flee from justice, and be found within this state.

Amended by chap. 628 of 1886.

This amendment inserted all after the word "warrant" down to the words "for the apprehension," omitted "so" before "charged" and inserted the words "with treason, felony or other crime."

§ 829. **Proceedings for arrest and commitment of the person charged.**—The proceedings for the arrest and commitment of the person charged are in all respects similar to those provided in this Code, for the arrest and commitment of a person charged with a public offense committed in this state; except, that an exemplified copy of an indictment found, or other judicial proceeding had against him, in the state or territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

See notes under section 827, *ante*.

**Proof.**—An affidavit merely embodying a hearsay statement that the prisoner is charged with crime in such other state, and is a fugitive from justice, without presenting an authenticated copy of the charge or indictment in such state, is insufficient. *Matter of Leland*, 7 Abb. N. S. 64.

Where the demand is supported by an affidavit, no less degree of certainty is admissible than is required in an indictment for the same offense. *People ex rel. Lawrence v. Brady*, 56 N. Y. 182. If any distinction exists, the affidavit should be more full and explicit. The offense should be therein distinctly and plainly charged. *Id.*

**Commitment.**—A commitment, in which the only reference to the crime is a statement that the prisoner is "charged with forgery on oath of —," is not sufficient. *Matter of Leland*, 7 Abb. N. S., 64.

§ 830. **When and for what time to be committed.**—If from the examination under such warrant it appears to the satisfaction of the magistrate that the person under arrest is charged in such other state or territory with treason, felony or other crime and has fled from justice, the magistrate, by warrant reciting the accusation, must commit him to the proper custody in his county for a time specified in the warrant, to enable an arrest of the fugitive to be made under the warrant of the governor of this state, which commitment shall not exceed thirty days, exclusive of the day of arrest, on the requisition of the executive authority of the state or territory in which he is charged to have committed the offense, unless he give bail, as provided in the next section, or until he be legally discharged.

§ 2. The provisions of this act shall only apply to criminal actions begun after the time when it takes effect: all criminal actions theretofore begun must be conducted and concluded in the same manner as if this act had not been passed.

§ 3. This act shall take effect immediately.

Am'd ch. 638 of 1886.

This amendment inserted the words "under such warrant," "probable," "to be made," "which commitment shall not exceed thirty days, exclu-

sive of the day of arrest," and "is charged to have," omitted the words "which the magistrate deems reasonable" and substituted "governor" for "executive."

§ 831. **Certain judges may admit person arrested to bail.**—Any judge of any court named in section eight hundred and twenty-seven may in his discretion admit the person arrested to bail by an undertaking, with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, which must not be later than the expiration of thirty days from the date of arrest exclusive of such date, and for his surrender, to be arrested upon the warrant of the governor of this state.

Amended by chap. 638 of 1886.

This amendment substituted the first part of the present section down to the word "admit," and inserted in the original section the words "which must not be later than the expiration of thirty days from the date of arrest exclusive of such date."

§ 832. **Magistrate to give notice to the district attorney, of the name of the person and cause of his arrest.**—Immediately upon the arrest of the person charged, the magistrate must give notice to the district attorney of the county, of the name of the person and the cause of his arrest.

§ 833. **District attorney to give notice to executive authority of the state or territory, etc.**—The district attorney must immediately thereafter give notice to the executive authority of the state or territory, or to the prosecuting attorney, or presiding judge of the criminal court of the city or county therein, having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

§ 834. **Person arrested to be discharged, unless surrendered within the time limited.**—The person arrested must be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking, he be arrested under the warrant of the governor of this state.

§ 835 was repealed by chap. 638 of 1886.

§ 836 was repealed by section 3, chap. 360 of 1882.

Section 51 of Penal Code substituted.

People *ex rel.* Gardenier *v.* Supervisors, etc., 45 St. Rep., 311 ; 134 N.Y., 9; aff'g 29 St. Rep., 455 ; 56 Hun, 17.

§ 837 was repealed by section 3, chap. 360 of 1882.

Section 51 of Penal Code substituted.

People *ex rel.* Gardenier *v.* Supervisors, etc., 45 St. Rep., 311 ; 134 N. Y., 10 ; aff'g 29 St. Rep., 455 ; 56 Hun, 17.

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## TITLE V.

### OF PROCEEDINGS RESPECTING BASTARDS.

#### CHAPTER I. Proceedings before magistrates, respecting bastards.

- II. Appeals from the orders of magistrates, respecting bastards.
- III. Enforcement of the undertaking for the support of the bastard or its mother, or for appearance on appeal.



## CHAPTER I.

## PROCEEDINGS BEFORE MAGISTRATES, RESPECTING BASTARDS.

- SECTION** 838. Definition of a bastard.  
 839. Who are liable for its support.  
 840. When bastard, chargeable to the public, is born or is likely to be born, application to be made to a justice of the peace or police justice.  
 841. Examination by the magistrate, and warrant against the father.  
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 859. Magistrates may reduce amount directed to be paid by the father or mother. County court may reduce or increase it.  
 860. Proceedings against the father or mother, absconding from their place of residence.

**§ 838. Definition of a bastard.**—A bastard is a child who is begotten and born,

1. Out of lawful matrimony;
2. While the husband of its mother was separate from her, for a whole year previous to its birth; or,
3. During the separation of its mother from her husband, pursuant to a judgment of a competent court.

Matter of King, 25 St. Rep., 792; 2 Silv. (Sup. Ct.), 361; 6 N. Y. Supp. 423.

**§ 839. Who are liable for its support.**—The father and mother

of a bastard are liable for its support. In case of their neglect or inability, it must be supported by the county, city or town in which it is born.

Amended by chap. 520, Laws 1904. Takes effect Sept. 1, 1904.

At common law, the putative father was under no legal obligation to support an illegitimate child. *Todd v. Weber*, 95 N. Y., 189.

Matter of King, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp. 423.

**§ 840. When bastard, chargeable to the public, is born, or is likely to be born, application to be made to a justice of the peace or police justice.**—If a woman be delivered of a bastard, or be pregnant of a child likely to be born such, and which is chargeable to a county, city or town, a superintendent of the poor of the county, or an overseer of the poor or other officer of the almshouse of the town or city where the woman is, must apply to a justice of the peace or police justice in the county to inquire into the facts of the case.

Am'd by chap. 327, Laws 1905. Takes effect Sept. 1, 1905.

This amendment inserted the words "where the distinction between town and county poor has been abolished, and where said distinction is maintained."

**Jurisdiction.**—A justice of the peace can only act in such proceedings in his own county. *Sprague v. Eccleston*, 1 Lans., 74.

A justice has no authority to make the preliminary examination, or to issue his warrant for the apprehension of the reputed father of a bastard, of his own motion, or otherwise than upon the application of the officers designated by the statute. *Id.*

An overseer of the poor, who institutes bastardy proceedings, is a party whose relation to the justice will render the proceedings void. *Rivenburgh v. Henness*, 4 Lans., 208.

The purpose of the statute is to compel the father of a bastard child to indemnify the town for the expenses incurred for its support. *People ex rel. Moore v. Beehler*, 43 St. Rep., 91 ; 63 Hun, 44 ; 17 N. Y. Supp., 419.

**Death of child.**—The father of a bastard child cannot, by fleeing from justice and remaining out of the jurisdiction of the court until his offspring dies, thereby thwart the purpose of the statute and escape liability for his misconduct. *Id.*

Notwithstanding the death of the child before the trial, the father is liable to indemnify the town for any expense it has been put to for its support and burial. *Id.*

Matter of King, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

**§ 841. Examination by the magistrate and warrant against the father.**—The magistrate must, by the examination of the woman on oath, and any other testimony which may be offered, ascertain the father of the bastard, and must issue his warrant, directed to a peace officer of the county, commanding him, without delay, to apprehend the father and bring him before the justice for the purpose of having an adjudication as to the filiation of the bastard.

See notes under preceding section.

See notes under section 838. *ante*.

A witness cannot be asked to state the color of a child's eyes or hair in proceedings to charge a person with being its father. *People ex rel. Fuller v. Carney*, 29 Hun, 47 ; 1 N. Y. Cr., 270 ; *Petrie v. Howe*, 4 T. & C., 85.

See *People ex rel. Moore v. Beehler*, 43 St. Rep., 91 ; 63 Hun, 44 ; 17 N. Y. Supp., 419 ; Matter of King, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

**§ 842. Justice designated as a magistrate, and person proceeded against as defendant.**—An officer issuing a warrant or making an examination, as provided in this chapter, is design-

nated as a magistrate, and the person against whom the warrant is issued, as the defendant.

The reference to section 842 of the Code of Criminal Procedure, in *Matter of McGlory v. Henderson*, 6 St. Rep., 763 ; 43 Hun, 441, is incorrect, and means same section in Code of Civil Procedure.

*Matter of King*, 25 St. Rep., 762 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

§ 843. **Warrant, when to be served in another county.**—If the defendant reside in another county than that in which the warrant issued, the magistrate must, by an indorsement thereon, direct the sum in which the defendant shall give security, and the officer must deliver the warrant to a justice of the peace or police justice in the city or town in which the defendant resides or is found. The magistrate to whom it is presented, on proof, under oath, of the signature of the magistrate who issued the warrant, must then indorse a direction thereon, that it be served in the county in which he resides, and the defendant may be arrested in that county accordingly. Upon this proof, the magistrate indorsing the warrant is exempted from liability to a civil or criminal action, though it afterward appear that the warrant was illegally or improperly issued.

*Matter of King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

§ 844. **Magistrate in another county, may take undertaking, etc.**—When the defendant is arrested in another county, he must be taken before the magistrate who indorsed the warrant, or before another magistrate of the same city or county, who may take from the defendant an undertaking, with sufficient sureties, to the effect :

1. That he will indemnify the county, town or city, where the bastard was or is likely to be born, and every other county, town or city, against any expense for the support of the bastard, or of its mother during her confinement and recovery, and to pay the costs of arresting the defendant, and of any order of filiation that may be made, or that the sureties will pay the sum indorsed on the warrant ; or,

2. That the defendant will appear and answer the charge at the next county court of the county where the warrant was issued, and obey its order thereon.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

*Matter of King*, 25 St. Rep. 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

§ 845. **On giving undertaking, defendant to be discharged.**—When either of the undertakings mentioned in the last section is given, the magistrate must discharge the defendant, and must indorse a certificate of the discharge upon the warrant. He must also deliver the warrant, with the undertaking, to the officer, who must return it to the magistrate granting the warrant, by whom the same proceedings must be had, as if he had taken the undertaking.

*Matter of King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

§ 846. **If undertaking not given, defendant to be taken before**

**Magistrate who issued the warrant.**—If the defendant do not give security, as provided in section 844, the officer must take him before the magistrate who issued the warrant.

*Matter of King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 861 ; 6 N. Y. Supp., 423.

§ 847. **Before what magistrate in the same county defendant is to be taken when magistrate issuing warrant is unable to act.**—If, however, the magistrate who issued the warrant be absent or unable to act, the defendant must be taken before the nearest or most accessible magistrate in the same county. The officer must, at the same time, deliver to the magistrate, the warrant with his return indorsed and subscribed by him.

*Matter of King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 861 ; 6 N. Y. Supp., 423.

§ 848. **The magistrate to associate with himself, another magistrate, and they to examine the matter.**—The magistrate before whom the defendant is brought, as provided, in the last two sections, must immediately associate with himself, another justice of the peace or police justice in the same county or city ; and the two magistrates thus associated, must inquire into the charge, and must examine on oath, the woman who is the mother, or pregnant with the bastard in the presence of the defendant, respect to the charge, and hear any testimony which may be offered in relation thereto.

See chap. 241 of 1893, which enables any police justice of the city of Brooklyn to conduct proceedings in bastardy.

Sections 848 to 853, 859, 861, 862, and 863 imperatively require that two magistrates shall be together to conduct the proceedings. *People ex rel. Commissioners v. Dando*, 20 Abb. N. C., 248.

One magistrate alone has no power to act, and his orders are null and void. *Id.* That another magistrate subsequently signs the orders, will not impart validity to them. *Id.*

In an action on a bastardy undertaking, it is error to exclude evidence at the order, in pursuance of which it was given, is void for want of jurisdiction, by reason of the absence of one of the magistrates who should have taken part in the proceedings. *Id.*

Under the Revised Statutes, if the justice first called in did not appear on an adjourned day, another could be substituted by the written stipulation of the parties entered upon the minutes. *People ex rel. Reynolds v. Arnett*, 3 Abb. N. C., 510.

*Matter of King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 3.

§ 849. **Adjournment of examination; security from defendant.**—The magistrates may, on the application of the defendant, for good cause, adjourn the examination, not exceeding thirty days, upon the defendant giving an undertaking, with two sufficient sureties, to the effect that he will appear before the magistrates at the time appointed, or that the sureties will pay the sum mentioned herein, which must be fixed by the magistrates, and which must be a full indemnity for the expense of supporting the bastard and his mother, as provided in section eight hundred and fifty-one. Until the determination by the magistrates, if not admitted to bail, the defendant must be detained in custody of an officer or be committed to the common jail for detention in the same manner as a prisoner arrested in a civil cause.

See notes under preceding section.

**Effect of adjournment.**—The sureties on a bond, given for the appearance of a defendant in a bastardy proceeding, are not discharged from

liability by adjournments of the proceeding after the same is commenced. *People ex rel. Van Aken v. Millham*, 100 N. Y. 273 ; 4 N. Y. Cr., 127.

After the examination in such proceedings has been entered upon, there is no provision for a new bond, nor can the justice exact a new one, and in default thereof order the defendant under arrest. *Id.*

The defendant, having given his bond, is entitled to be at liberty until the close of the examination and the decision thereon. *Id.*

A different rule might apply if, before the commencement of the examination, a postponement to a later day is made. *Id.* In such case, the justice may have the right to take a new bond, as though one had not been given. *Id.*

*Matter of King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

**§ 850. Determination of the case and order of the magistrates.**

—Upon the hearing the magistrates must determine who is the father of the bastard and must proceed as follows:

1. If they determine that the defendant is not the father of the bastard, he must be forthwith discharged.

2. If they determine that he is the father they must make an order of filiation, specifying therein the sum to be paid weekly or otherwise, by the defendant, for the support of the bastard, and if the mother be indigent, the sum to be paid by the defendant for her support during her confinement and recovery, and in case said bastard shall die, that the defendant will pay the necessary funeral expenses.

3. They must certify the reasonable costs of arresting the defendant, and of the order of filiation.

4. They must reduce their proceedings to writing and subscribe them.

Amended by chap. 520, Laws 1904. Takes effect Sept. 1, 1904.

See notes under section 848, *ante*.

See section 873, *post*.

**Order.**—This section does not require that the order shall state to whom the sum for the support of the mother shall be paid. *People ex rel. Crouse v. Leavitt*, 39 St. Rep., 717 ; 15 N. Y. Supp., 619.

It is properly payable to the overseer of the poor of the town. *Id.*

The order of the magistrates is not invalid because it contains inoperative and unnecessary words, or omits what the law implies but does not require to be expressed. *Id.*

The addition of the words “so long as the said child shall continue chargeable to said county,” to the order of filiation, was held, in *People ex rel. Crouse v. Leavitt*, *ante*, to be harmless surplusage.

**Costs.**—By this section, the justices are in a certain case to certify the reasonable costs. *Mayham v. Allen*, 19 St. Rep., 811 ; 50 Hun, 344 ; 8 N. Y. Supp., 100.

This means taxable costs and includes an attorney's fees. *Id.*

See *Matter of King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423 ; *People ex rel. Downs v. Lindsay*, 25 St. Rep., 520 ; 53 Hun, 235 ; 6 N. Y. Supp., 38.

**§ 851. Defendant to pay the costs, and give undertaking for support of, etc., or for appearance at county court.**—

If the defendant be adjudged to be the father, he must immediately pay the amount certified for the costs of the arrest and of the order of filiation, and enter into an undertaking, with sufficient sureties approved by the magistrates, to the effect,

1. That he will pay weekly or otherwise, as may have been ordered, the sum directed for the support of the child, and of the mother during her confinement and recovery, or which may be ordered by the county court of the county ; and that he

will indemnify the county, town or city, where the bastard was or may be born (as the case may be), and every other county, town or city, which may have been or may be put to expense for the support of the bastard, or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the magistrates; or,

2. That he will appear at the next county court of the county, to answer the charge and obey its order thereon, or that the sureties will pay a sum equal to a full indemnity for supporting the bastard and its mother, as provided in the first subdivision of section 844.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See notes under sections 840, 848 and 862, *ante*.

**Undertaking.**—A bond is no longer taken in a bastardy case. The instrument called an undertaking has been substituted for it. *People ex rel. Commissioners v. Dando*, 20 Abb. N. C., 246.

This section requires that the undertaking to be given shall embrace the sum for the support of the mother, in addition to the weekly allowance. *People ex rel. Crouse v. Leavitt*, 39 St. Rep., 717; 15 N. Y. Supp., 619.

Form of undertaking on appeal in bastardy proceedings. *Ramsey v. Childs*, 34 Hun, 329.

The undertaking, in *Tillotson v. Martin*, 40 Hun, 316, was held not to contain any substantial provision in excess of those in the form authorized by this section. See *Cook v. Freudenthal*, 80 N. Y., 202; *Toles v. Adey*, 84 d, 224.

An approval, indorsed upon the undertaking, in the words "the penalty and sureties approved by us," is a sufficient compliance with this section in respect to fixing the amount or sum to be mentioned in the undertaking. *Id.*

See *People ex rel. Downs v. Lindsay*, 25 St. Rep., 519; 53 Hun, 235; 6 N. Y. Supp., 38; *People ex rel. Moore v. Beehler*, 43 St. Rep., 90; 63 Hun, 4; 17 N. Y. Supp., 419; *Matter of King*, 25 St. Rep., 792; 2 Silv. (Sup. Ct.), 361; 6 N. Y. Supp., 423.

**§ 852.—On giving undertaking, defendant to be discharged; otherwise to be committed.**—Upon a compliance with the provisions of the last section, the magistrates must discharge the defendant; but otherwise, they or either of them must, by warrant, commit him to the county jail, or in the city of New York, to the city prison of that city, until he be discharged by the county court of the county, or deliver an undertaking, as prescribed by the last section.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See notes under sections 848 and 850, *ante*.

See *People ex rel. Crouse v. Leavitt*, 39 St. Rep., 717; 15 N. Y. Supp., 619; *Matter of King*, 25 St. Rep., 792; 2 Silv. (Sup. Ct.), 361; 6 N. Y. Supp., 423.

*People ex rel. Downs v. Lindsay*, 25 St. Rep., 519; 53 Hun, 235; 6 N. Y. Supp., 38.

**§ 853. Defendant to remain in custody unless undertaking be given.**—During the examination, and until the defendant is discharged by the magistrate, he must remain in the custody of the officer who arrested him, unless an undertaking have been given for his appearance, as provided in sections 844 and 849; and when committed to prison, he must be actually confined therein.

Amended by chap. 860 of 1882.



This amendment substitutes "magistrate" for "magistrates" and "eight hundred and forty-nine" for "851."

See notes under section 848, *ante*.

Matter of King, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

§ 854. **Proceedings by magistrate when security is given by defendant on arrest out of the county.**—When security taken out of the county, for the appearance of the defendant at the county court, as provided in section 844, is returned to the magistrate who issued the warrant, he must associate with himself another magistrate of the same county, and the magistrates thus associated must proceed as provided in sections 848 to 850, both inclusive.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

Matter of King, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

§ 855. **Examination in such case, and order thereon.**—The examination may be had, and the order of filiation made, in the absence of the defendant, unless, before the order is made, he require of the magistrate issuing the warrant, that the examination be had in his presence, in which case the examination must be had, as if the defendant had originally appeared.

Matter of King, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

§ 856. **Magistrates may compel mother to disclose the father of the bastard. Proceedings, if she refuse.**—In making an examination authorized by this chapter, the magistrate issuing the warrant, or the magistrates making the examination, may compel the mother of a bastard, chargeable to a county, city or town, or a woman pregnant of a child likely to be born such, to disclose the name of the father of the bastard ; or if she refuse to do so, may, by a warrant setting forth the cause thereof, at the expiration of one month from her delivery, if sufficiently recovered, commit her to the county jail, or in the city of New York, to the city prison of that city, until she disclose the name of the father.

See section 838, *ante*.

The justices of the peace may commit the mother of a bastard child to prison for refusing to discover the putative father. *Scott v. Ely*, 4 Wend., 555.

**Mother, a witness.**—The mother of an alleged bastard, who was a married woman at the time of the alleged illicit intercourse and the birth of the child, is not a competent witness to establish the non-access of the husband, nor his absence from the state. *People ex rel. Crandell v. Overseers*, etc. 15 Barb., 286. She is competent to prove the illicit intercourse. *Id.*

The alleged mother cannot be forcibly examined to establish previous pregnancy. *People v. McCoy*, 45 How., 216.

Matter of King, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

§ 857. **If mother possess property, two magistrates may make an order that she pay for the support of the child.**—If the mother of a bastard, chargeable or likely to become chargeable, as provided in section 840, be possessed of property in her own right,

magistrates of the county or city where she is, on the application of any of the officers mentioned in that section, must enter into the matter, and may make an order charging the father with the payment of money weekly, or otherwise, for the support of the bastard.

Section 839, *ante*.

The mother's liability to support the child does not relieve the father from his duty. *People v. Haddock*, 12 Wend., 475 ; *People v. Corbett*, 8 id.,

*People v. King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp.,

**If she do not comply, she must be committed, or discontinue her undertaking.**—If, after service of the order upon the mother, she do not comply therewith, she must be committed to the county jail, or in the city of New York, to the city prison of the county, until she comply, or enter into an undertaking, with two sureties approved by the magistrates, to the effect that she will appear at the next term of the county court of the county, for the matters stated in the order, and obey its order, or that the sureties will pay the sum mentioned in the order, and which must be fixed by the magistrates.

Chapter 880 of 1895. In effect January 1, 1896.

**Magistrates may reduce amount directed to be paid by the father or mother; county court may reduce or increase it.**—

The magistrates, who may have made an order directing the father or mother of a bastard, as provided in sections 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, may, from time to time, for good cause, reduce the amount herein directed to be paid, and upon the application of any of the officers mentioned in section 840, the county court of the county, upon ten days' notice to those officers, or to the father or mother of the bastard, may reduce or increase the amount so directed to be paid.

Chapter 880 of 1895. In effect January 1, 1896.

Sections under section 848, *ante*.

*People v. King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp., 423.

**Proceedings against the father or mother absconding with their child or places of residence.**—If the father or mother of a bastard, or a child likely to be born such, abscond from their place of residence, leaving the bastard chargeable or likely to become chargeable to the public, a superintendent of the poor of the county or an overseer of the poor or other officer of the almshouse of the town or city where the bastard was born, or is likely to be born, may apply to any two magistrates of the city or county where any property, real or personal, of the father or mother may be, for authority to take the same. Upon due proof being made on oath, to the satisfaction of the magistrates, they may issue their warrant, and proceed thereon, in the manner provided in title VIII of this part, in relation to persons absconding with their children chargeable to the public.

*People v. King*, 25 St. Rep., 792 ; 2 Silv. (Sup. Ct.), 361 ; 6 N. Y. Supp.,

## CHAPTER II.

## APPEALS FROM THE ORDERS OF MAGISTRATES, RESPECTING BASTARDS.

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§ 861. Who may appeal, and in what cases. — A person deeming himself aggrieved by the order of two magistrates, made pursuant to the last chapter, may appeal therefrom to the next term of the county court of the county; except that a person who has executed an undertaking to obey an order of filiation, and indemnify the public, as provided in section 851, cannot appeal from any other part of the order mentioned in section 850, than that which fixes the weekly or other allowance to be paid.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See notes under section 848, *ante*.

**Appeal.** — The judgment in a bastardy case, should be reviewed by appeal and not by *certiorari*. *People ex rel. Wright v. Court, etc.*, 9 St. Rep., 607; 45 Hun, 54.

The case of *People ex rel. Fuller v. Carney*, 29 Hun, 47; 1 N. Y. Cr., 370, was decided prior to the amendment of 1884 to section 515, *ante*. No appeal to the general term from an order of the general sessions adjudging the defendant to be the father of a bastard child, was allowed before such amendment. The review was by a writ of *certiorari*.

An appeal to the general sessions from an order of filiation or sustenance destroys the effect of the order as *res adjudicata*. *Stowell v. Overseers, etc.* 5 Denio, 98. A discontinuance of the appeal is no bar to another proceeding. *Id.*

§ 862. **Appeal, how taken.** — When the father or mother of the bastard has entered into an undertaking for appearance at the next term of the county court of the county, as provided in sections 851 and 858, it is an appeal from the order of filiation or maintenance; and no other notice thereof is necessary. In any other case, the appeal is taken, by a written notice of at least ten days before the court, to the magistrates who made the order, and to the party affected thereby, or to the officer at whose instance it was obtained.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

See notes under section 848, *ante*.

**Undertaking.**—A bond, if made according to the statute, is an appeal. *People ex rel. Downs v. Lindsay*, 25 St. Rep., 519; 53 Hun, 235; 6 N. Y. Supp., 38.

But if it does not comply with material provisions of the statute, it cannot operate. *Id.*

The court of sessions has no power to permit the defendant, on appeal, to amend the original, or to file a new, undertaking. *Ramsey v. Childs*, 34 Hun, 329.

An appeal from an order of filiation will be dismissed if the bond does not comply with section 851, *ante*. *People ex rel. Downs v. Lindsay*, *ante*.

A motion to dismiss an appeal on the ground that the undertaking is defective, where it does not comply with the provisions of section 851, *ante*, was granted in *Ramsey v. Childs*, 34 Hun, 329.

§ 863. **Papers to be transmitted by magistrates, to county court.** — The magistrates receiving an undertaking for appearance at the county court, must transmit it to the court, before its opening, with a certified copy of the order appealed from.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

§ 864. **Court to hear the case. Evidence on hearing.**—The court must immediately, or at any other time it may appoint, proceed to hear the allegations and proofs of the parties; and the party in whose favor the order was made, must support it by evidence. If the mother of the bastard be dead or insane, her testimony on the examination before the magistrates is receivable in evidence.

On an appeal to the general sessions from an order of bastardy, the appellant is not entitled to a trial by jury. *Boy v. Targee*, 7 Wend., 358.

§ 865. **Court may affirm, vacate or modify the order or adjourn the hearing till the bastard be born.**—The court may affirm or vacate an order of filiation or maintenance, or may reduce or increase the sum ordered to be paid for the support of the bastard or its mother; and, disregarding defects in form in the order, must amend it according to the fact. If, when the appeal is heard, the bastard be not born, the court may adjourn the hearing, until it be born, and in that case, must take an undertaking from the party appealing, for his appearance, in such sum and with such sureties as the court may deem sufficient.

An attorney cannot be surety. Sup. Ct., rule 5.

§ 866. **If woman be not pregnant, or be married before her delivery, or the child be not born alive, defendant to be discharged.**—If the woman alleged to be pregnant, be not so, or be married before the delivery, or the child be not born alive, the

defendant must be discharged from custody, or from the obligation of his undertaking, either by the court or magistrates, upon that fact being made to appear.

§ 867. **Order of the court, on affirmance.**—If, upon the hearing of the appeal, the county court affirm an order of filiation or maintenance, it must require the defendant to enter into an undertaking, with sufficient sureties, approved by the court, to the effect that he will pay weekly or otherwise, according to the order as made by the magistrates or modified by the court, the sum directed for the support of the bastard, and of the mother during her confinement and recovery; and that he will indemnify the county, and town or city where the bastard was or may be born (as the case may be), and every other county, town or city, which may have been put to expense for the support of the child, or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the court.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

§ 868. **Commitment of defendant, if he fails to give undertaking.**—If on judgment of affirmance, the defendant do not enter into an undertaking, as provided in the last section, he must be committed to the county jail, or in the city of New York, to the city prison of that city, until he does so, or be discharged by the court.

§ 869. **Undertaking for appearance on appeal, when forfeited.**—The undertaking for the appearance of the defendant, at the county court, upon an appeal, is forfeited, by his neglect to appear, or to give the undertaking mentioned in the last two sections, unless he be discharged by the court.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

A bond, given upon an adjournment for the appearance of the person charged, is forfeited by his departure, without leave, from the place of examination on the adjourned day, before the proceedings are closed, and his absence when the order of filiation is made. *People v. Jayne*, 27 Barb., 58.

§ 870. **When mother bound to appear at the county court to proceed as upon an appeal.**—When the mother of a bastard is bound to appear at the county court, or is committed as provided in section 858, the court must proceed in respect to the matter, in the same manner as upon an appeal.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

§ 881. **When the court may make an order against the mother, for the support of the bastard.**—If the court be satisfied that the mother has property in her own right, sufficient to enable her to support the bastard or contribute to its support, it must confirm the order mentioned in section 857, or may vary the sum ordered to be paid weekly or otherwise; or if not, it must discharge her from custody or from the obligation of her undertaking.

§ 872. **Proceedings against the mother, on affirmance or modification of the order of the magistrates.**—If the court

affirm or modify the order, as provided in the last section, it must require the defendant to enter into an undertaking, with sufficient sureties approved by the court, to the effect that she will pay, weekly or otherwise, according to the order, as made by the magistrates or modified by the court, the sum directed for the support of the bastard, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the court. If the undertaking be not given she must be committed in the manner provided in section 868.

§ 873. **Costs on appeal, when awarded and how paid.**—The court must award costs to the party in whose favor an appeal is determined. When awarded against county superintendents or overseers of the poor of a town, not liable for the support of its own poor, they must be paid by the county treasurer, on delivering to him a certified copy of the order and of the taxed costs, and must be charged by him to the town in the same county, liable to support the bastard, or if there be none, to the county. In the city of New York, when costs are awarded upon an appeal, to the person charged as the father or mother of the bastard, they must, upon the production of similar vouchers, be paid by the comptroller of that city, and charged to the appropriation made to the commissioners of charities and corrections thereof.

The prevailing party in a bastardy case in the court of sessions is entitled to taxable costs and no others. *Fellows v. Lane*, 67 How., 425. Such costs are to be taxed by the clerk. *Id.*

Where the order of filiation is vacated on appeal and the defendant discharged on a trial on the merits, the costs are to be governed by section 8073 of the Code of Civil Procedure. *Mayham v. Allen*, 19 St. Rep., 811 ; 50 Hun, 314 ; 3 N. Y. Supp., 100.

§ 874. **Costs on appeal, when awarded and how paid.**—In other cases, the payment of the costs may be enforced by the court, as in a civil action. If the party against whom they are awarded, reside out of the jurisdiction of the court, an action may be brought on the order, by the party entitled to the costs, in which the production of a certified copy of the order and of the taxed costs, is conclusive evidence.

§ 875. **When order of filiation vacated, etc.**—If the court vacate an order of filiation, for any other cause than upon the merits, it must proceed, and may make an original order of filiation, in the manner prescribed in the second subdivision of section 850, or bind the person charged, in an undertaking, in a sum and with sureties approved by the court, to appear at the next term of the county court.

Am'd by chap. 890 of 1895. In effect, January 1, 1895.

§ 876. **If order of filiation be vacated, except on the merits, magistrates may proceed anew.**—If the order be vacated for any other cause than on the merits, and the person charged be bound as provided in the last section, the same proceedings may be



had by the magistrate, for the apprehension of the defendant, and for making an order of filiation, and for the commitment of the defendant for not giving an undertaking, as are authorized in the first instance. And the same proceedings must be subsequently had, in all respects.

**§ 877. Court to inquire into circumstances of father or mother, committed for not giving undertaking to support the bastard.—**

When a person is committed to prison, charged as the father of a bastard, or of a child likely to be born a bastard, and when the mother of a bastard is so committed, for not giving an undertaking to support the bastard, or to indemnify the public, the court must inquire, from time to time, into the circumstances and ability of the father or mother, to support the bastard and to procure security therefor.

**§ 878. A father or mother unable to support the bastard, may be discharged.—**If the court be at any time satisfied that the father or mother is wholly unable to support the bastard, or to contribute to its support, or to procure security therefor, it may, in its discretion order the father or mother to be discharged from imprisonment; but if it shall thereafter at any time appear to the satisfaction of the court of general sessions of the county of New York, or to the county court of any other county, that the defendant has become and is able to contribute to the support of the bastard, and fails so to do, the court may revoke and vacate the aforesaid order discharging the defendant from arrest, and may order him to be rearrested and may require him to give a new undertaking in the manner provided in subdivision one of section eight hundred and fifty-one of the code of criminal procedure, and upon his failure to give such undertaking shall commit him to jail in the manner provided in section eight hundred and fifty-two of the code of criminal procedure.

Amended by chap. 520, Laws 1904. Takes effect Sept. 1, 1904.

**§ 879. Notice before discharge, and examination of the matter.—**Before granting the order, the court must be satisfied that reasonable notice has been given to the overseers of the poor, or to the county superintendents, or chief officers of the almshouse, at whose instance the party was committed, of the intention to apply for a discharge, and must hear the allegations and proofs of the superintendents, overseers or officers, and may examine the party applying on oath respecting the subject of the application.

**§ 880. Party cannot be discharged, but by the court.—**A person committed, as provided in section 877, cannot be discharged from imprisonment, except by the county court of the county.

Am'd by chap. 880 of 1895. In effect, January 1, 1896.

## CHAPTER III

### ENFORCEMENT OF THE UNDERTAKING FOR THE SUPPORT OF THE BASTARD OR ITS MOTHER, OR FOR THE APPEARANCE ON APPEAL.

**SECTION 881. Court to order prosecution of undertaking when forfeited. By whom prosecuted.**

882. In whose name undertaking to be prosecuted.

883. Evidence in the action and measure of damages.

884. For a subsequent breach of undertaking, new action may be brought.

885. Costs, how recovered, when awarded against the plaintiff.

886. Action may be maintained on the order, etc.

**§ 881. Court to order prosecution of undertaking, when forfeited. By whom prosecuted.** If an undertaking for the appear-

ance at the county court, of a person charged as the father or mother of a bastard, be forfeited, the court may order it to be prosecuted; and the sum mentioned therein may be recovered, and when collected, must, except in the city of New York, be paid to the county treasurer, and by him credited to the town in the same county, liable to the support of the bastard, or if there be none, to the county. In the city of New York, the court must order the undertaking to be prosecuted by the commissioners of charities and correction, and when collected, it must be paid into the city treasury. In every other county it must be prosecuted by the district attorney.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**Jurisdiction.**—District courts of the city of New York have jurisdiction of actions, brought in the name of the corporation of New York upon bastardy undertakings. *People ex rel. Commissioners v. Dando*, 20 Abb. N. C., 248.

**Where avails paid.**—Whatever money is collected in an action upon the undertaking, given for the support of the bastard, or its mother, in the name of the overseers of the poor, must be paid to the county treasurer, and by him credited to the town in the same county liable to the support of the bastard. *Tillotson v. Martin*, 40 Hun, 322.

The avails of the recovery upon the undertaking, in the city of New York, go into the city treasury. *People ex rel. Commissioners v. Dando*, 20 Abb. N. C., 248.

See *People v. Fleisch*, 13 Daly, 39.

§ 882. **In whose name undertaking to be prosecuted.**—When an undertaking to obey an order, in relation to the support of a bastard, or of a child likely to be born a bastard, or of its mother, is forfeited, it may be prosecuted in the name of the county superintendents of the county, or the overseers of the poor of the town, which was liable for the support of the bastard, or which may have incurred any expense in support of the bastard, or of its mother, during her confinement and recovery; or in the city of New York, in the name of the corporation of that city.

**In whose name.**—This section authorizes an action upon the undertaking to be brought in the name of the overseers of the poor of the town which was liable for the support of the bastard. *Tillotson v. Martin*, 40 Hun, 321.

The party plaintiff in an action on the undertaking is not the people of the state of New York, but, in the city of New York, the mayor, aldermen and commonalty of the City of New York. *People ex rel. Commissioners v. Dando*, 20 Abb. N. C., 246.

§ 883. **Evidence in the action, and measure of damages.**—In the action mentioned in the last section, it is not necessary to prove the actual payment of money by a county superintendent, overseer of the poor, officer of an alms-house, or other person; but the neglect to pay a sum ordered to be paid by competent authority, for the support of the bastard, or of its mother, is a breach of the undertaking, and the measure of the damages is the sum ordered to be paid, and which was withheld at the time of the commencement of the action, with interest thereon.

**Burden.**—In an action for a breach of the undertaking, the burden is on the defendant to establish his exoneration. *Wallsworth v. Mead*, 9 John., 387.

In an action upon the undertaking, the burden is upon the defendant to show himself exonerated from the payment. *Tillotson v. Martin*, 40 Hun, 821.

It is not necessary to prove upon the trial the actual payment of money by the overseers of the poor. *Id.*

**When money paid recovered back.**—Money, paid by a person charged as the father of an unborn bastard, upon a compromise, may be recovered back upon its appearing that the supposed mother was not in fact pregnant. *Rheel v. Hicks*, 25 N. Y., 289.

**Order conclusive.**—The order of filiation, unless appealed from, is conclusive. *Wallsworth v. Mead*, 9 John., 367.

§ 884. **For a subsequent breach of the undertaking, new action may be brought.**—For a breach of the undertaking, after the recovery of damages or the commencement of an action, another action may, in the same manner, be brought. The money collected upon the undertaking must be paid, and credited, in the manner provided in section 881.

See notes under section 881, *ante*.

§ 885. **Costs, how recovered, when awarded against the plaintiff.**—If, in the action, costs be awarded against the plaintiffs, they may be recovered, as follows:

1. If against the corporation of the city of New York, in the same manner as in any other action;

2. If against county superintendents or overseers of the poor, they must, upon the delivery of a transcript of the judgment, be paid by the county treasurer, and by him charged to the town in the same county, liable for the support of the bastard, or if there be none, to the county.

Taxable costs only are to be allowed, *Ontario Co. v. Moore*, 12 Wend., 273.

§ 886. **Action may be maintained on the order, etc.**—An action may be maintained by the parties authorized by section 882, upon an order made by two magistrates, or by a county court, for the payment of a sum weekly or otherwise, for the support of the bastard or its mother, notwithstanding an undertaking may have been given to comply with the order; and in case of the death of the person against whom the order was made, an action may be maintained thereon against his executors or administrators. But when an undertaking is given to appear at the next term of the county court, no action can be brought on the order until it is affirmed by the court.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

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## TITLE VI.

### OF PROCEEDINGS RESPECTING VAGRANTS.

**SECTION 887.** Who are vagrants.

888. Proceedings before magistrate.

889. Child, how kept.

890. Peace officers, when required by any person, to carry vagrants before a magistrate for examination.

**SECTION 891. Vagrant, when to be convicted. Form of certificate of conviction.**

892. Magistrates to file record of conviction of vagrants. Commitments to poor-house, or prison, etc. Expenses, how charged in certain cases.

893. Children begging, how disposed of.

894. Arrest of vagrants.

895. Private citizen may do so, without warrant.

896. Peace officer may require aid. Duty of persons required to aid him.

897. Neglect or refusal to aid peace officer, without lawful cause, a misdemeanor. Punishment.

898. Magistrate may depute an elector of the county to make arrest of person disguised. If his name be not known, fictitious name may be used.

**§ 887. Who are vagrants.**—The following persons are vagrants:

1. A person who, not having visible means to maintain himself, lives without employment;

2. A person who, being an habitual drunkard, abandons, neglects, or refuses to aid in the support of his family;

3. A person who has contracted an infectious or other disease, in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health;

4. A common prostitute, who has no lawful employment, whereby to maintain herself;

5. A person wandering abroad and begging, or who goes about from door to door, or places himself in the streets, highways, passages, or other public places, to beg or receive alms;

6. A person wandering abroad and lodging in taverns, groceries, ale-houses, watch or station-houses, out-houses, market places, sheds, stables, barns or uninhabited buildings, or in the open air, and not giving a good account of himself;

7. A person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure;

8. Any child between the age of five and fourteen, having sufficient bodily health and mental capacity to attend the public schools, found wandering in the streets and lanes of any city or incorporated village, a truant, without any lawful occupation;

9. Every male person who lives wholly or in part on the earnings of prostitution, or who in any public place solicits for immoral purposes. A male person who lives with or is habitually in the company of a prostitute and has no visible means of support, shall be deemed to be living on the earnings of prostitution.

Added by chap. 281 of 1900.

See section 291 of Penal Code.

This section declares who shall be considered as vagrants. *Matter of McMahon*, 64 How., 286; 1 N. Y. Cr., 58.

This section does not enumerate or define the acts which make a woman a common prostitute. *People ex rel. Duntz v. Coon*, 51 St. Rep., 343; 22 N. Y. Supp., 870.

The term "common prostitute" is well defined and understood in legal nomenclature. *Id.*

The acts establishing the "House of Refuge for Women" and defining the class of persons to be committed thereto are not to be read and construed in connection with the Code of Criminal Procedure and the Penal Code. *Id.*

To bring the child within the provisions of subdivision 8 of this section, it must be alleged that it was found wandering and begging in the street. *Matter of Moses*, 1 N. Y. Cr., 511.

See *People ex rel. Van Heck v. Catholic Protectory*, 101 N. Y., 202; 4 N. Y. Cr., 85; 3 How. N. S., 350; *Matter of Moses*, 66 How., 297, 298; *People ex rel. Mt. Magdalen School, etc., v. Dickson*, 32 St. Rep., 495; 57 Hun, 316; 10 N. Y. Supp., 606.

**887a. Tramp defined.**—A tramp is any person, not blind, over sixteen years of age, and who has not resided in the county in which he may be at any time for a period of six months prior thereto, who

1. Not having visible means to maintain himself, lives without employment; or

2. Wanders abroad and begs, or goes about from door to door, or places himself in the streets, highways, passages or public places to beg or receive alms: or

3. Wanders abroad and lodges in taverns, groceries, ale-houses, watch or station houses, out-houses, market places, sheds, stables, barns, or uninhabited buildings, or in the open air, and does not give a good account of himself.

Added by chap. 664 of 1898. In effect September 1, 1898.

This act does not apply to cities of the first and second class.

**§ 888. Proceedings before magistrate in case of vagrant children.**—When complaint is made to any magistrate by any citizen or peace officer against any vagrant under subdivision eight of the last section, such magistrate must cause a peace officer to bring such child before him for examination, and shall also cause the parent, guardian or master of such child, if the child has any, to be summoned to attend such examination. If thereon the complaint shall be satisfactorily established, the magistrate must require the parent, guardian or master to enter into an engagement in writing to the corporate authorities of the city or village, that he will restrain such child from so wandering about, will keep him in his own premises, or in some lawful occupation and will cause him to be sent to some school at least four months in each year until he becomes fourteen years old. The magistrate may, in his discretion, require security for the faithful performance of such engagement. If the child has no parent, guardian or master, or none can be found, or if the parent, guardian or master refuse or neglect, within a reasonable time, to enter into such engagement, and to give such security, if required, the magistrate shall make the like disposition of such child as is authorized to be made by section two hundred and ninety-one of the Penal Code, of children coming within the descriptions therein mentioned.

Amended by chap. 220 of 1888.

This amendment substituted the latter portion of the present section from the words "if required."

This section expressly authorizes in certain cases the commitment of a vagrant child described in subd. 8 of the preceding section, as provided in section 291 of the Penal Code. *People ex rel. Mt. Magdalen School, etc., v. Dickson*, 82 St. Rep., 497; 57 Hun, 816; 10 N. Y. Supp., 606.

**§ 889. Examination as to residence.**—When complaint is made to any magistrate by any citizen or peace officer against a person under sections one, five or six of section eight hundred and eighty-seven, the magistrate must, upon the examination of such person, cause testimony to be taken as to his residence, and if it appears that such person has not resided in the county for a period of six months prior to his arrest, such magistrate shall not commit such person as a vagrant, as provided by this article; but if he finds that such person is guilty of an offense charged in one of such subdivisions, and such person is not blind or under sixteen years of age, the magistrate shall adjudge him to be a tramp, and commit him to a penitentiary, as required by law. On such examination the uncorroborated testimony of the defendant as to his place of residence shall not be deemed sufficient proof thereof.

Added by chap. 664 of 1898. In effect September 1, 1898.

This act does not apply to cities of the first and second class.

**§ 890. Peace officers when required by any person, to carry vagrant before a magistrate for examination.**—A peace officer must, when required by any person, take a vagrant before a justice of the peace or police justice of the same city, village or town, or before the mayor, recorder or city judge, or judge of the general sessions of the same city, for the purpose of examination.

Prior to the Code, a complaint before the magistrate to the effect that the complainant had heard and believed a person to be a common prostitute, without stating the source of his information, or the grounds of his belief, would not justify the magistrate in proceeding with the trial of the person upon such charge. *People ex rel. Kingsley v. Pratt*, 22 Hun, 300.

**§ 891. Vagrant, when to be convicted ; form of certificate of conviction.**—If the magistrate be satisfied, from the confession of the person so brought before him or by competent testimony, that he is a vagrant, and has resided in the county for a period of six months prior to his arrest, he must convict him, and must make and sign, with his name of office, a certificate substantially in the following form :

“I certify that A. B, having been brought before me, charged with being a vagrant, I have duly examined the charge, and that upon his own confession in my presence (or ‘upon the testimony of C. D,’ et cetera, naming the witnesses), by which it appears that he is a person (pursuing the description contained in the subdivision of section eight hundred and eighty-seven, which is appropriate to the case,) and (if convicted under subdivisions one, five or six of section eight hundred and eighty-seven) that he has resided in the county of ..... for a period of six months immediately prior to his arrest, I have adjudged that he is a vagrant.

“Dated at the town (or city) of ....., the .... day of ....., 18..  
E. F.,

“Justice of the peace of the town of .....,” (or as the case may be.)

Amended by chapter 664 of 1898. In effect September 1, 1898.

(This act does not apply to cities of the first and second-class.)

**Proof.**—The confession spoken of in this section means a plea of guilty, or some acknowledgment tantamount thereto. *Bennac v. People*, 4 Barb., 164. It does not mean an admission deduced by the magistrate argumentatively. *Id.*

**Conviction.**—A summary conviction by a police magistrate, under this section, cannot be set aside on *habeas corpus* or *certiorari* on averments and proof that the fact proved before the magistrate on which the conviction depended were not true. *People ex rel. Danziger v. P. E. House, etc.*, 40 St. Rep., 157; 128 N. Y., 185; *People ex rel. Van Riper v. N. Y. Catholic Protectory*, 11 St. Rep., 155; 106 *id.*, 604.

**§ 892. Certificate to constitute record of conviction, and to be filed ; commitment of vagrants.**—The magistrate must immediately cause the certificate which constitutes the record of conviction, together with the testimony taken before him as to the residence of such vagrant, to be filed in the office of the clerk of the county, and must, by a warrant signed by him, with his name of office, commit the vagrant, if not a notorious offender and a proper object for such relief, to the county poorhouse, if there be one, or to the almshouse or poorhouse of the city, village or town, for not exceeding six months at hard labor, or, if the vagrant be an improper person to be so committed, he must be committed for a like term to the county jail. In those counties of the state where the distinction between county poor and town poor is maintained, the expense of the conviction and maintenance during the commitment of any vagrant committed to any one of the places of confinement above specified, who shall, at the time of such commitment, have obtained a legal settlement in one of the towns of the county in which said persons shall be convicted, shall be a charge upon the town where they may reside at the time of such commitment.

Amended by chapter 664 of 1898. In effect September 1, 1898.

(This act does not apply to cities of the first and second class.)

**Effect of section.**—This section was held, in *People ex rel. Whetlock v.*



Baker, 10 Abb. N. C., 210, not to repeal by implication the existing acts, applicable to particular counties, providing other places for their confinement.

See chap. 53 of 1893, amending chap. 278 of 1881, authorizing such women and girls as are vagrants or convicted of misdemeanors as a first offense, to be sent to the Shelter for Homeless Women in the city of Syracuse.

See chap. 355 of 1893, amending chap. 53 of 1893, authorizing such women and girls as are vagrants or convicted of misdemeanors as a first offense, to be sent to the Shelter for Homeless Women in the city of Syracuse, and to change the name of such corporation.

The confinement of disorderly persons, convicted in the county of Albany, in the Albany county penitentiary is proper and lawful, notwithstanding this section. *People v. Coffee*, 62 How., 445.

It was held, in *Matter of Waters*, 66 How., 173, that this section was repealed or abrogated, so far as the city of New York was concerned by the Consolidation Act. This case was decided before the amendment of 1886. See *Matter of Dorfmann*, 21 Abb. N. C., 297; 1 N. Y. Supp., 154.

**Filing record of conviction.**—This section, as amended by chap. 657 of 1886, provides that, in case of conviction for vagrancy, there must be a filing of a certificate of conviction in the county clerk's office. *Matter of Dorfmann*. *Id.* But, in the city of New York, a failure to so file will not entitle a prisoner to his discharge, because such failure is amendable, and is expressly made no ground for a discharge by section 1601 of the N. Y. City Consolidation Act. *Id.*

For form of order of leave to file record of conviction, *nunc pro tunc*, and of remand of prisoner, see note in 21 Abb. N. C., 298.

§ 893 was repealed by section 5, chap. 220 of 1888.

See *People ex rel. Van Heck v. Catholic Protectory*, 11 St. Rep., 155; 3 How. N. S., 850. This case was decided before repeal of section.

§ 894. **Arrest of vagrants.**—It is the duty of every peace officer of the county, city, village or town, where a person described in the seventh subdivision of section 887 is found, to arrest and take him before a magistrate mentioned in section 888, to be proceeded against as a vagrant.

Amended by chap. 860 of 1882.

This amendment omitted the word "is" after the word "found."

§ 895. **Private citizens may do so without warrant.**—A private citizen of the county may also, without warrant, exercise the powers conferred upon a peace officer by the last section.

§ 896. **Peace officer may require aid. Duty of persons required to aid him.**—In the execution of the duties imposed by section 894, the peace officer may command the aid of as many male inhabitants of his county, city, village or town, as he may think proper; and a citizen so commanded, may provide himself or be provided, with such means and weapons as the officer giving the command may designate.

§ 897. **Neglect to aid peace officer without cause, a misdemeanor. Punishment.**—A person commanded to aid the officer, as prescribed in the last section, and who without lawful cause refuses or neglects to do so, is guilty of a misdemeanor, and is punishable by a fine not exceeding two hundred and fifty dollars, or by imprisonment not exceeding one year, or both.

§ 898. **Magistrate may depute an elector of the county to make arrest of person disguised. If his name be not known, fictitious name may be used.**—A magistrate to whom complaint is made against a person charged as a vagrant, as described in the seventh

subdivision of section 887, may, by a warrant signed by him with his name of office, depute an elector of the county to arrest and bring the vagrant before him, to answer the complaint; and if the name of the person complained of be not known, he may be described in the warrant and in all subsequent proceedings thereon, by a fictitious name.

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## TITLE VII.

### OF PROCEEDINGS RESPECTING DISORDERLY PERSONS.

**SECTION 899.** Who are disorderly persons.

900. On complaint, warrant to be issued.

901. On confession or proof that he is a disorderly person, security to be required.

902. If security given, defendant to be discharged. If not, to be convicted. Form of certificate.

903. Record of conviction to be filed in office of county clerk, etc.

904. Undertaking, when forfeited.

905. How prosecuted, and proceeds how applied.

906. When new security may be required, or defendant committed after recovery on undertaking.

907. When disorderly person may be discharged.

908. Keeper of prison, to return list of disorderly persons, etc.

909. Examination of the case by the court.

910. Court may discharge, or authorize the binding out of disorderly person.

911. Court may also commit him to prison. Nature and duration of imprisonment.

912. Order to procure materials and implements, and to compel him to work.

913. Expense of materials or implements, how paid for, and proceeds of labor, how disposed of.

**§ 899. Who are disorderly persons.**—The following are disorderly persons:

1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means;

2. Persons who threaten to run away, and leave their wives or children a burden upon the public;

3. Persons pretending to tell fortunes, or where lost or stolen goods may be found;

4. Keepers of bawdy houses or houses for the resort of prostitutes, drunkards, tipplers, gamesters, habitual criminals, or other disorderly persons;

5. Persons who have no visible profession or calling, by which to maintain themselves, but who do so, for the most part, by gaming;

6. Jugglers, common showmen and mountebanks, who exhibit or perform for profit, puppet shows, wire or rope dancers, or other idle shows, acts or feats;

7. Persons who keep, in a public highway or place, an apparatus or device for the purpose of gaming, or who go about exhibiting tricks or gaming, therewith ;

8. Persons who play, in a public highway or place, with cards, dice or any other apparatus or device for gaming ;

9. Habitual criminals within the provisions of this Code.

See notes under sections 515 and 749, *ante*.

The reference in *Blitz v. Toovey*, 28 St. Rep., 162 to section 899 of Penal Code is incorrect. It should be to this section of Criminal Code.

The case of *People ex rel. Healey v. Forbes*, 22 St. Rep., 278 ; 52 Hun, 30, was not a proceeding under this section.

**Re-enactment.**—The provisions of the Revised Statutes for dealing with disorderly persons were substantially re-enacted in this section. *People ex rel. Van Houton v. Sadler*, 97 N. Y., 147 ; 3 N. Y. Cr., 473.

These proceedings are instituted and prosecuted by and in behalf of the people, to secure indemnity from the husband for the expense of the wife's support, to which they have been, or may be, subjected because of his failure to provide her with sufficient means. *McQuhae v. Rey*, 52 St. Rep., 484 ; 23 N. Y. Supp., 16.

**Purpose.**—The main purpose of these provisions is to arrest the disorderly practices named, by compelling a disorderly person to give security for his good behavior. *People ex rel. Van Houton v. Sadler*, *ante*.

**Constitutional.**—This title is constitutional. *Duffy v. People*, 6 Hill, 73.

The legislature has power to enlarge the class of persons to be affected by laws against disorderly persons and to be summarily dealt with by magistrates. *People v. Burleigh*, 1 N. Y. Cr., 526.

**Nature of proceeding.**—The proceeding before the magistrate is not strictly a criminal action, but is a special proceeding of a criminal nature under part 6 of this Code. *People ex rel. Scherer v. Walsh*, 83 Hun, 346 ; 67 How., 484 ; 2 N. Y. Cr., 326.

A police justice, when exercising the special jurisdiction conferred upon him by this section, acts as an officer and not as a court of special sessions. *Id.*

**Disorderly conduct.**—None of the subdivisions of this section refer to disorderly conduct. *Matter of McMahon*, 1 N. Y. Cr., 60 ; 64 How., 284.

**Who may prosecute.**—A society, organized under chap. 130 of 1873, may prosecute cases arising under this section. *People ex rel. Balch v. Strickland*, 13 Abb. N. C., 473. The president of such society may prosecute though no formal action has been taken by the society. *Id.*

**Review.**—Provision is made for the review of convictions of disorderly persons. Section 909, *post*.

The case of *People ex rel. Scherer v. Walsh*, 1 N. Y. Cr., 325 ; 83 Hun, 346 ; 67 How., 484, though it was decided after, was determined without reference to, the amendment of 1884 to sections 515 and 749, *ante*. The review, since such amendment, is to be made by appeal.

**Subd. 1.**—It is provided by this section that husbands are required to provide for wives and children according to their means, and that an abandonment of them without adequate support establishes that the husband so abandoning is a disorderly person within the statute. *Bulkley v. Boyce*, 17 St. Rep., 940 ; 48 Hun, 261.

The husband has a right to select a home for his wife, and his judgment, if fairly and in good faith exercised, must govern in so far as to relieve him from the charge of being a disorderly person. *Lutes v. Shelley*, 40 Hun, 201. It is a question for the magistrate, in a proceeding under subd. 1, of this section, to determine from all the circumstances whether the offer of the husband to support his wife is made in good faith. *People v. Harris*, 88 St. Rep., 316.

Such offer, if made in good faith, is a defense to a proceeding of this nature. *Id.*

In defining the words "adequate support," and the words, "according to their means," found in subd. 1 of this section, reference may be had to the rules of law existing before the statute. *Bulkley v. Boyce*, 17 St. Rep. 940 ; 48 Hun, 261.

The fact that the child has voluntarily left its home, does not absolve the father from his obligation to support and maintain it, nor relieve him from liability under this section for a failure to do so. *People ex rel. Balch v. Strickland*, 13 Abb. N. C., 473.

**Subd. 4.**—This section includes all persons who keep a bawdy house or house for the resort of prostitutes. *People v. Miller*, 38 Hun, 84; 3 N. Y. Cr., 480.

Such person is liable to arrest and to be dealt with as a disorderly person, and also to be indicted and punished as a criminal for keeping a house of that character. *Id.*

The common-law remedy by indictment against a person keeping a bawdy house was not abolished or superseded by, or inconsistent with, the provisions of the Code of Criminal Procedure. *People ex rel. Van Houton v. Sadler*, 97 N. Y., 146; 3 N. Y. Cr., 473.

**Subd. 5.**—The keeper of a public saloon, where persons resort for the purpose of playing pool and bagatelle upon the terms at times that the loser should pay for the use of the gaming apparatus, and at other times for the drinks, is a disorderly person under subd. 4 of this section. *People v. Cuyler*, 1 N. Y. Cr., 179; 28 Hun, 465.

See *Blitz v. Toovey*, 28 St. Rep., 162, 9 N. Y. Supp., 440; *Mayor, etc., v. Ehrsam*, 41 St. Rep., 625; 16 N. Y. Supp., 527, *People ex rel. Healey v. Forbes*, 22 St. Rep., 278; 53 Hun, 30; 4 N. Y. Supp. 757; *People v. Harris*, 38 St. Rep., 316; 14 N. Y. Supp., 830; *Breichbiel v. Powles*, 39 St. Rep. 857; *Potter v. M'Alpine*, 3 Dem, 124; *People v. Klock*, 16 St. Rep., 565.

**§ 900. On complaint, warrant to be issued.**—Upon complaint on oath, to a justice of the peace or police justice of a city, village or town, or to the mayor, recorder, city judge or judge of the general sessions of a city, against a person, as being disorderly, the magistrate must issue a warrant, signed by him, with his name of office, requiring a peace officer to arrest the defendant, and bring him before the magistrate for examination.

A police justice of the city of Rochester has, under this section, jurisdiction of the offense of being a disorderly person. *People ex rel. Lichtenstein v. Hodgson*, 35 St. Rep., 981; 12 N. Y. Supp., 699.

The magistrate may, in his discretion, make a reasonable postponement of the hearing of the case, instituted under this section, to enable the complainant to be notified and her witnesses to be summoned, or for the necessary accommodation of other business, and may, pending such postponement, commit the accused to the custody of the sheriff in default of bail. *Id.*

See *People v. Ehrsam*, 41 St. Rep., 625; 16 N. Y. Supp., 527.

**§ 901. On confession or proof that he is a disorderly person, security to be required.**—If the magistrate be satisfied, from the confession of the defendant, or by competent testimony, that he is a disorderly person, he may require that the person charged give security, by a written undertaking, with one or more sureties approved by the magistrate, to the following effect:

1. If he be a person described in the first or second subdivision of section 899, that he will support his wife and children, and will indemnify the county, city, village or town, against their becoming, within one year, chargeable upon the public;

2. In all other cases, that he will be of good behavior for the space of one year;

Or that the sureties will pay the sum mentioned in the undertaking, and which must be fixed by the magistrate.

See notes under section 891, *ante*.

**Undertaking.**—This section expressly authorizes a magistrate to require

an offender to give security to be of good behavior. *Matter of McMahon*, 64 How., 288 ; 1 N. Y. Cr., 61.

The character of the undertaking is provided for, but its form, except as to the terms of the obligations to be assumed by it, is not prescribed by this section. *Lutes v. Shelley*, 40 Hun, 198.

It is properly made in the name of the people. *Id.*

The undertaking, given by a disorderly person, for refusing to support his wife, must comply strictly with the terms and conditions of the order made under this section, otherwise it will be void. *Commissioners, etc., v. Hammill*, 33 Hun, 348.

Where the order required him to give security in the sum of \$250, for his good behavior, and a bond was taken in the sum of \$500, it was held to be void. *Id.*

The fact that the instrument is unsealed, while the law calls for an undertaking, is of no importance. *Id.*

An undertaking, under this section, given by a husband to support his wife, is not rendered void by the insertion of the words "according to his means." *Bulkley v. Boyce*, 17 St. Rep., 940 ; 48 Hun, 261.

**Jury trial.**—There is no right to trial by jury. *Duffy v. People*, 1 Hill 855 ; 6 id., 75.

**Remedy.**—If the disorderly person gives the security required, he cannot be punished. *People ex rel. Van Houton v. Sadler*, 97 N. Y., 147 ; 8 N. Y. Cr., 473. If the security is not given, he may be committed to the county jail for not exceeding six months, from which he may be discharged at any time upon giving security. *Id.*

A bond, given under this section, is an indemnity bond. *Breichbiel v. Powles*, 39 St. Rep., 857.

Only the amount actually paid out for the support of the wife and children can be recovered thereon. *Id.*

No order can be made under this section for a specified weekly sum, to be paid by the convicted person in support of his wife. *People v. Ehrsam*, 41 St. Rep., 626 ; 16 N. Y. Supp., 527, 528.

It is no defense to a proceeding under this section that the defendant has brought an action of divorce against the complainant, in which he has appealed from a judgment against him to the court of appeals and that he has paid her a gross sum, awarded to her in that action, for alimony. *People v. Mitchell*, 2 T. & C., 172.

See *People v. Harris*, 38 St. Rep., 816 ; 14 N. Y. Supp., 880 ; *People ex rel. Balch v. Strickland*, 13 Abb. N. C., 476.

**§ 902. If security given, defendant to be discharged. If not, to be convicted. Form of certificate.**—If the undertaking be given, the defendant must be discharged. But if not, the magistrate must convict him as a disorderly person, and must make and sign with his name of office, a certificate in substantially the following form :

" I certify, that A. B., having been brought before me charged with being a disorderly person, I have duly examined the charge, and that upon his own confession in my presence [or 'upon the testimony of C. D.,' etc., naming the witnesses], by which it appears that he is a [pursuing the description contained in the subdivision of section 899, which is appropriate to the case], I have adjudged that he is a disorderly person.

" Dated at the town [or 'city'] of —, the                      day of                      ,  
18                      .

" E. F.,

" Justice of the peace of the town  
of                      , " [or as the case may be].

See notes under preceding section.

See *People v. Ehrsam*, 41 St. Rep., 625 ; 16 N. Y. Supp., 527.



**903. Certificate to constitute a record of conviction, and to be filed; commitment thereon.**—The magistrate must immediately cause a certificate, which constitutes the record of conviction, to be filed in the office of the clerk of the county, and must, by a warrant signed by him in his name of office, commit the defendant to the county jail, or in the city of New York, to the city prison or penitentiary of that city, or in the county of Kings, to the penitentiary of that county, or in the county of Monroe, to the penitentiary of that county, for not exceeding six months of hard labor, or until he gives the security prescribed in section nine hundred and one.

Am'd by ch. 302, Laws 1902. Took effect April 2, 1902.

Amended by chap. 860 of 1882.

This amendment made special provision for the county of Kings.

See notes under section 901, *ante*.

**Re-enactment.**—Title 7 of this Code, entitled "Of proceedings respecting disorderly persons," of which this section forms a part, is a substantial reenactment of title 5, of chap. 20, part 1, R. S., entitled, "Of disorderly persons." *Matter of Wachter*, 62 How., 352.

**Confinement.**—A person convicted before a justice of the peace in any county "as a disorderly person," may be sentenced to the Albany penitentiary. *Id.*

The confinement of vagrants, convicted before a justice or other magistrate in the city or county of Albany, in the Albany county penitentiary is proper and lawful notwithstanding this section. *People v. Coffee*, 62 How.,

See *People v. Ehrsam*, 41 St. Rep., 625; 16 N. Y. Supp., 527.

**§ 904. Undertaking, when forfeited.**—The undertaking mentioned in section 901 is forfeited, by the commission of any of the acts which constitute the person by whom it was given a disorderly person, and in the case of a person described in the tenth and eighth subdivisions of section 899, by his playing or betting, at one time or setting, for money or property exceeding the value of two dollars and fifty cents.

**What constitutes forfeiture.**—The acts, specified in this section as constituting a forfeiture of an undertaking, contemplate and must mean, wherein the conditions prescribed by a statute is contained. *Breichbiel v. Powles*, 39 St. Rep., 857.

In an action upon the undertaking, the burden is with the plaintiff to establish a breach of the condition of the bond. *Lutes v. Shelley*, 40 Hun,

The undertaking, mentioned in section 901, *ante*, is forfeited by the commission of any of the acts which constitute the person, by whom it was given, a disorderly person. *Bulkley v. Boyce*, 17 St. Rep., 940; 48 Hun,

The undertaking is forfeited when the husband fails and neglects to provide for the wife according to his means. *Id.*

Also, when he abandons wife and children without adequate support. *Id.*

When he threatens to run away and leave them a burden upon the public. *Id.*

To maintain an action upon a recognizance given upon the conviction of a person as a disorderly person for neglecting to support his wife and children, it must be made to appear that, subsequent to the giving of the bond, he has been guilty of such neglect. *People v. Ehrsam*, 41 St. Rep., 626; 16 N. Y. Supp., 527.

The conviction is not evidence of a subsequent breach of the condition of the undertaking. *Id.*

An undertaking, given under section 901, *ante*, by a husband for support of wife and children is forfeited only by proof of his failure to do so. *Id.*

This proof can be rebutted by showing that he had offered to support his wife, if she would live with him. *Id.*



It is a defense, in an action on the undertaking, that the woman, alleged to have been abandoned or left unprovided for by the principal, was not in fact his wife. *Duffy v. People*, 6 Hill, 75.

The failure to pay the weekly sum specified in the order of convictions is a breach of the undertaking given under sections 1455 and 1456 of the Consolidation Act. *People v. Ehrsam*, 41 St. Rep., 625 ; 16 N. Y. Supp., 5527.

The conviction of a husband as a disorderly person under sections 1455 and 1456 of the Consolidation Act of the city of New York is conclusive that an shall support his wife by payment of the specified sum to the commissioners of charities and corrections, and no offer to furnish any other support for the period of one year can be received as a substitute for compliance with the magistrate's order. *Id.*

**§ 905. How prosecuted, and proceeds how applied.**—When an undertaking is forfeited, it may be prosecuted, in the name of the county superintendents of the poor, or the overseers of the poor of the town, or in the city of New York, in the name of the corporation of that city, and the sum collected in the action must be paid into the county or city treasury, as the case may be, for the benefit of the poor.

In case the defendant is an Indian, it must be prosecuted in the name of the people of the state of New York by the attorney-general, or at his request by the district attorney of the county, and the sum collected in the action, must be paid into the state treasury, for the benefit of the Indian poor.

Am'd by Chap. 165, L. of 1901, taking effect September 1, 1901.

The case of *People v. Pettit*, 3 Hun, 416, was reversed in 74 N. Y. 320.

See *Lutes v. Shelley*, 40 Hun, 199; *Duffy v. People*, 6 Hill, 75.

**§ 906. When new security may be required, or defendant committed after recovery on undertaking.**—Upon a recovery on the undertaking, the court in which it is had may require from the defendant new security, in the manner provided in section 901, or if he fail to give it, may commit him in the manner provided in section 903.

This section does not necessarily require that the court, entertaining an action upon the undertaking, shall possess the power to extend its judgment to relief beyond such recovery. *Lutes v. Shelley*, 40 Hun, 199.

**§ 907. Defendant committed for not giving security; how discharged.**—A person committed as a disorderly person, on failure to give security, may be discharged by the committing magistrate, or any two justices of the peace, or police justices or magistrates, or the county judge of the county, upon giving security as originally required, pursuant to section 901.

Amended by chap. 394 of 1884.

This amendment substituted after the words "police justices" the words "or the county judge of" for the word "in."

See notes under section 901, *ante*.

**§ 908. Keeper of prison, to return list of disorderly persons, etc.**—The keeper of every prison to which disorderly persons may be committed, must return to the county court of the county, on the first day of each term, a list of the persons so committed and then in custody, with the nature of the offense of each, the name of the magistrate by whom he was committed, and the term of his imprisonment.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**§ 909. Examination of the case by the court.**—The county court must thereupon inquire into the circumstances of each case, and hear any proof that may be offered, and must examine the record of conviction, which is evidence of the facts contained in it, until disproved.

**§ 910. Court may discharge, or authorize the binding out of disorderly person.**—The court may discharge a person so committed from imprisonment, either absolutely or upon his giving security as provided in section 901, or if he be a minor, may authorize the county superintendents of the poor, or the overseers of the poor of the town, or in the city of New York, commissioners of charities and corrections, to bind him out in some lawful calling as a servant, apprentice, mariner or otherwise, until he be of age; or if he be of age, to contract for his service with any person, as a laborer, servant, apprentice, mariner or otherwise, for not exceeding one year. The binding out or contract, pursuant to this section, has the same effect as the indenture of an apprentice, with his own consent and that of his parents, and subjects the person bound out or contracted, to the same control of his master and of the county court of the county, as if he were bound as an apprentice.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**§ 911. Court may also commit him to prison. Nature and duration of imprisonment.**—The court may also, in its discretion, order a person convicted as a disorderly person, to be kept in the county jail, or in the city of New York, in the city prison or penitentiary of that city, for a term not exceeding six months at hard labor.

**§ 912. Order to procure materials and implements, and to compel him to work.**—If there be no means provided in the prison, for employing the offender at hard labor, the court may direct the keeper to furnish him such employment as it may specify, and for that purpose, to purchase materials and implements, not exceeding a prescribed value, and to compel the offender to perform the work allotted to him. The expenses incurred in carrying the order into effect, must be paid to the keeper by the county treasurer, upon the delivery to him of the order of the court, and an account under the oath of the keeper, of the materials and implements furnished.

**§ 913. Expenses of materials or implements, how paid for, and proceeds of labor, how disposed of.**—The keeper must sell the produce of the labor of the offender, and must account for the cost of the materials or implements purchased, and for one-half of the surplus to the board of supervisors, and pay it into the county treasury, and pay the other half of the surplus to the person by whom it was earned on his discharge from imprisonment. He must also account to the court, when required, for the materials or implements purchased, and for the disposition of the proceeds of the labor of the offender.

## TITLE VIII

### OF PROCEEDINGS REPRESENTING THE SUPPORT OF POOR PERSONS.

**SECTION 914.** Who may be compelled to support poor relatives.

915. Order to compel a person to support a poor relative, etc.

916. Court to hear the case, and make order of support.

917. Support, when to be apportioned among different relatives.

918. Order, to prescribe time during which support is to continue, or may be indefinite. When and how order may be varied.

919. Costs, by whom to be paid, and how enforced.

920. Action on the order, on failure to comply, therewith.

921. Proceedings against absconding parents, leaving children chargeable to public, etc.

922. Seizure of their property. Transfer thereof, when void.

923. Warrant and seizure, when confirmed or discharged. Direction of the court thereon.

924. Warrant, in what cases to be discharged.

925. Sale of the property seized, and application of its proceeds.

926. Powers of superintendent of poor.

§ 914. **Who may be compelled to support poor relatives.**—The father, mother and children, if of sufficient ability, of a poor person who is insane, blind, old, lame, impotent or decrepit, so as to be unable by work to maintain himself, must at their own charge, relieve and maintain him in a manner to be approved by the overseers of the poor of the town where he is, or in The City of New York, by the commissioners of public charities. If such poor person be insane, he shall be maintained in the manner prescribed by the insanity law. The father, mother, husband, wife or children of a poor insane person legally committed to and confined in an institution supported in whole or in part by the State, shall be liable, if of sufficient ability, for the support and maintenance of such insane person from the time of his reception in such institution.

Am'd, ch. 399 of 1898. In effect April 22, 1898.

See notes under section 920, *post*.

The case of *Norton v. Rhodes*, 18 Barb., 100, was overruled in *Goodale v. Lawrence*, 88 N. Y., 516.

**Re-enactment.**—This title embodies substantially the provisions of prior statutes on the subject. *Herendeen v. DeWitt*, 17 St. Rep., 298; 49 Hun. 55; 1 N. Y. Supp., 469.

**Who liable.**—This statute provides a particular scheme for the support and maintenance of a particular class of persons unable to maintain themselves, viz., of persons who have relatives within prescribed degrees, who are of sufficient ability to relieve and maintain them. *Matter of Weaver v. Benjamin*, 45 St. Rep., 96; 18 N. Y. Supp., 630, 631.

At common law, children were not bound to support their parents, but under the provisions of this section children may be compelled to support indigent parents. *Ulrich v. Ulrich*, 42 St. Rep. 217; 17 N. Y. Supp., 722.

Under this title, the child is bound to aid in the support of a parent if he is a poor person and unable to maintain himself, and, if he fails to do so, the court of sessions may compel him. *Stevens v. Cheney*, 36 Hun. 2.

At common law, no legal duty rests upon a child to support his indigent parent. *Herendeen v. DeWitt*, *ante*. Until proceedings to charge him with such support are taken as provided by statute, he is not liable therefor. *Id*.

A grandchild is liable to support grandparents. *Ex parte Hunt*, 5 Cow., 284.

A husband is not bound to maintain his wife's bastard children born before their marriage. *Minden v. Cox*, 7 Cow. 235.

**In what place.**—The specified relatives are under an absolute duty, at their own charge, to support the persons described, not in the poor-house, nor even through the agency of, but only in a manner to be approved by the poor authorities of town or county. *Matter of Weaver v. Benjamin*, 45 St. Rep., 97; 18 N. Y. Supp., 630, 631. This scheme is outside of the general provisions of the statute for the care and relief of the poor, who are,

or who become, a public charge.—Id. Its purpose is to prevent these persons from becoming a public charge. Id. They are not to be made and marked as public paupers by being consigned to the poor-house of the county. Id.

The court of sessions has no power to prescribe the place where the poor person shall be supported, nor any of the conditions of such support, except that the manner of it shall be such as is approved by the overseer or superintendent of the poor. Id.

Whatever power there is over that support is vested in the overseers or superintendents of the poor; the sessions can only declare the duty to support, and in default to fix the sum to be paid. Id.

**§ 915. Order to compel a person to support poor relatives, et cetera.**—If a relative of a poor person fail to relieve and maintain him, as provided in the last section, the overseers of the poor of the town where he is, or in the city of New York, the commissioner of public charities may apply to the court of general sessions of the county of New York, or to the county court of any other county where the poor person dwells, for an order to compel such relief upon at least five days written notice, served personally or by leaving it at the last place of residence of the person to whom it is directed, in case of his absence, with a person of suitable age and discretion. If such poor person be insane and legally committed to and confined in an institution supported in whole or in part by the state, and his relatives refuse or neglect to pay for his support and maintenance therein, application may be made by the treasurer of such institution in the manner provided in this section, for an order directing the relatives liable therefor to make such payment.

Amended by chap. 520, Laws 1904. Takes effect Sept. 1, 1904.

**§ 916. Court to hear the case and make order of support.**—At the time appointed in the notice, the court, or a judge thereof, must proceed summarily to hear the allegations and proofs of the parties, and must order such of the relatives of the poor person mentioned in section nine hundred and fourteen, as were served with the notice and are of sufficient ability, to relieve and maintain him, specifying in the order the sum to be paid weekly for his support, and requiring it to be paid by the father, or if there be none, or if he be not of sufficient ability, then by the children, or if there be none, or if they be not of sufficient ability, then by the mother. If the application be made to secure an order compelling relatives to pay for the maintenance of insane poor persons committed to and confined in an institution supported in whole or in part by the state such order shall specify the sum to be paid for his maintenance by his relatives liable therefor, from the time of his reception in such institution to the time of making such order, and also the sum to be paid weekly for his future maintenance in such institution. The relatives served with such notice shall be deemed to be of sufficient ability, unless the contrary shall affirmatively appear to the satisfaction of the court or a judge thereof.

Am'd, chap. 399 of 1898. In effect April 22, 1898.

**§ 917. Support: when to be apportioned among different relatives.**—If it appear that any such relative is unable to wholly maintain the poor person or to pay for his maintenance if confined in a state institution for the insane, but is able to contribute toward his support, the court, or a judge thereof, may direct two or more relatives of different degrees, to maintain him or to pay for his maintenance in such an institution if insane, prescribing the proportion which each must contribute for that purpose; and if it appear that the relatives are not of sufficient ability wholly to maintain him, or to pay for his maintenance in such institution, if insane, but are able to contribute something, the court, or a judge thereof, must direct the sum, in proportion to their ability, which they shall pay weekly for that purpose. If it appears that the relatives who are liable for the maintenance of an insane poor person confined in a state institution for the insane are not able to pay the whole amount due for such maintenance from the time of such poor person's admission to such institution, the court, or a judge thereof, must direct the sum to be paid for such maintenance, in proportion to the ability of the relatives liable therefor.

Am'd, chap. 399 of 1898. In effect April 22, 1898.

**Contribution.**—In case that one of two persons equally liable is unable to contribute his entire proportion of the support of their indigent relative, the court of sessions is authorized to require him to contribute according to

his ability, and to require the other to pay the residue. *Stone v. Burgess*, 47 N. Y., 521.

An order for the support of a poor person may direct two out of five children to furnish the support, and those two in unequal amounts. *Stone v. Burgess*, 2 Lans., 439.

**Action.**—Either person charged by the order is liable on default and the amount of his contribution may be recovered in a separate action. *Id.*

**In whose name.**—Where the poor are a charge upon the county, the action to enforce such support is properly brought by the superintendent of the poor. *Id.*

See *Herendeen v. DeWitt*, 17 St. Rep., 298; 1 N. Y. Supp., 469; 49 Hun, 55.

§ 918. **Order to prescribe time during which support is to continue, or may be indefinite: when and how order may be varied.**—The order may specify the time during which the relatives must maintain the poor person, or during which any of the sums directed by the court, or a judge thereof are to be paid, or it may be indefinite or until the further order of the court, or a judge thereof. If the order be for payment of a weekly sum for the maintenance of an insane poor person in a state institution, the order shall specify that such sum shall be paid as long as such insane poor person is maintained in such institution. The court, or a judge thereof, may from time to time vary the order, as circumstances may require, on the application either of any relative affected by it, or of an officer on whose application the order was made, upon ten days' written notice.

Am'd, chap. 399 of 1898. In effect April 22, 1898.

See *Matter of Weaver v. Benjamin*, 45 St. Rep., 97; 18 N. Y. Supp., 631; *Herendeen v. DeWitt*, 17 St. Rep., 298; 49 Hun, 55; 1 N. Y. Supp., 469.

§ 919. **Costs by whom to be paid and how enforced.**—The costs and expenses of the application must be ascertained by the court, and paid by the relatives against whom the order is made; and the payment thereof, and obedience to the order of maintenance, and to any order for the payment of money may be enforced by attachment.

See *Herendeen v. DeWitt*, 17 St. Rep., 298; 1 N. Y. Supp., 469; 49 Hun, 55.

§ 920. **Action on the order on failure to comply therewith**—If a relative, required by an order of the court, or a judge thereof, to relieve or maintain a poor person, neglect to do so in the manner approved by the officers mentioned in section nine hundred and fourteen, and neglect to pay to them weekly the sum prescribed by the court, or a judge thereof, the officers may maintain an action against the relative, and recover therein the sum prescribed by the court, or a judge thereof, for every week the order has been disobeyed, to the time of the recovery, with costs, for the use of the poor. If the order directs a relative to pay for the maintenance of an insane poor person in a state institution, and such relative refuses or neglects to pay the amount specified therein, an action may be brought by the treasurer of such institution in its corporate name to recover the amount due to such institution by virtue of such order.

Am'd, ch. 399 of 1898. In effect April 22, 1898.

See notes under section 914, *ante*.

**Place of support.**—Under such order, the relative may provide for the support at such place, and in such manner, as he shall deem proper, provided the place and manner are approved by the proper officers. *Duel v. Lamb*, 1 T. & C., 66. It is not, until he has neglected or refused to do thus, that he is liable for the sum directed to be paid. *Id.*

The court of sessions has no authority to prescribe the place or manner of support. *Id.* Whatever power there is over that support is vested in the overseers or superintendents of the poor. *Id.*; *Converse v. McArthur*, 17 Barb., 410.

If the indigent person leaves without the fault of the supporting party, and the latter is ready and willing to receive him back and support him, his duty, under the order, is fully discharged. *Duel v. Lamb*, 1 T. & C., 69; *Converse v. McArthur*, 17 Barb., 410.

See *Herendeen v. DeWitt*, 17 St. Rep., 298; 49 Hun, 55; 1 N. Y. Supp., 469.



**§ 921. Parents leaving children chargeable upon the public.**—When the father, or the mother being a widow or living separate from her husband, absconds from the children, or a husband from his wife, leaving any of them chargeable or likely to become chargeable upon the public, the officers mentioned in section nine hundred and fourteen may apply to any two justices of the peace or police justices in the county in which any real or personal property of the father, mother or husband is situated, for a warrant to seize the same. Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officers so applying to take and seize the property of the person so absconding. Whenever any child shall be committed to an institution pursuant to any provision of law, any criminal court or magistrate may issue a warrant for the arrest of the father of the child, and examine into his ability to maintain such child in whole or in part; and if satisfied that such father is able to contribute toward the support of the child, then such court or magistrate shall, by order, require the weekly payment by such father of such sum, and in such manner as shall be in said order directed, towards the maintenance of such child in such institution, which amount when paid shall be credited by the institution to the city, town or county against any sums due to it therefrom on account of the maintenance of the child.

Am'd by chap. 220 of 1888, which added the last sentence of the present section, again am'd by chap. 13, L. 1903, which placed it in the hands of a court or magistrate, and which takes effect Sept. 1, 1903.

See note under section 923, *post*.

This section, in case of a commitment of a child to an institution under the Penal Code, authorizes a magistrate to order the father to pay a sum for the child's support which is to be credited by the institution to the city, town or county against any sum due for maintenance. *People ex rel. St. Magdalen School, etc. v. Dickson*, 32 St. Rep., 496; 57 Hun, 315; 10 N. Y. Supp., 605.

**§ 922. Seizure of their property. Transfer thereof, when void.**—The officers so applying may seize and take the property, wherever it may be found in the same county; and are vested with all the right and title thereto, which the person absconding then had. The sale or transfer of any personal property, left in the county from which he absconded, made after the issuing of the warrant, whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next county court of the county where they reside, there to be filed.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**§ 923. Warrant and seizure, when confirmed or discharged. Direction of the court thereon.**—The court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and



profits of the real property, if any, are to be applied toward the maintenance of the children or wife of the person absconding.

The court of sessions is to inquire into the merits of the case. *People ex rel. Reed v. Overseers, etc.*, 23 Barb., 236. The officers must produce evidence to establish the case, and the party whose property is seized may contest the matter. *Id.*

§ 924. **Warrant, in what cases to be discharged.**—If the party against whom the warrant issued, return and support the wife or children so abandoned, or give security satisfactory to any two justices of the peace, or police justices in the city, village or town, to the overseers of the poor of the town, or in the city of New York, to the commissioners of charities and corrections, that the wife or children so abandoned shall not be chargeable to the town or county, then the warrant must be discharged by an order of the magistrates, and the property taken by virtue thereof restored to the party.

§ 925. **Sale of the property seized, and application of its proceeds.**—The officers must sell at public auction the property ordered to be sold, and receive the rents and profits of the real property of the person absconding, and in those cities, villages or towns which are required to support their own poor, the officers charged therewith must apply the same to the support of the wife or children so abandoned; and for that purpose must draw on the county treasurer, or in the city of New York, upon the comptroller, for the proceeds as directed by special statutes. They must also account to the county court of the county, for all money so received by them, and for the application thereof, from time to time, and may be compelled by that court to render that account at any time.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

§ 926. **Powers of superintendents of poor.**—In those counties where all the poor are a charge upon the county, the superintendents of the poor are vested with the same powers, as are given by this title to the overseers of the poor of a town, in respect to compelling relatives to maintain poor persons, and in respect to the seizure of the property of a parent absconding and abandoning his family; and are entitled to the same remedies in their names, and must perform the duties required by this title, of overseers, and are subject to the same obligations and control.

**Superintendents of poor.**—This section gives to the superintendents of the poor of those counties in which all the poor are a county charge the powers given to the overseers of the towns by the preceding sections of this title. *Matter of Weaver v. Benjamin*, 45 St. Rep., 97; 18 N. Y. Supp., 631.

The application to compel relatives to maintain poor persons should be made by the county superintendent, where all the poor are a charge upon the county. *Matter of Tillotson v. Smith*, 12 St. Rep., 332.

But where the proceedings do not contemplate the support of the poor person in the county house, but by the relative in his own house, the overseers of the poor of the town are the proper parties to make the application. *Id.*

## TITLE IX.

## OF PROCEEDINGS RESPECTING MASTERS, APPRENTICES AND SERVANTS.

- SECTION 927.** Complaint against apprentice or servant, for absenting himself, or refusing to serve, or for a misdemeanor or ill behavior.
928. Warrant, when complaint is made in the absence of the defendant.
929. Warrant, by whom and how executed.
930. Hearing the complaint, and committing or discharging the defendant.
931. Complaint against the master, for cruelty, misuse or violation of duty.
932. Hearing the complaint and dismissing it or discharging the apprentice or servant.
933. Preceding sections, not applicable to apprentice with whom money is received or agreed for.
934. Complaint against master in such case, and direction thereon.
935. If complaint not compromised, the master to be held to appear at county court.
936. Proceedings thereon and order of the court.
937. Complaint by master against clerk or apprentice, where money is paid or agreed for. Clerk or apprentice, when held to appear at county court.
938. Proceedings thereon, and order of the court.
939. Repealed.
940. Repealed.

§ 927. Complaint against apprentice or servant, for absenting himself, or refusing to serve, or for a misdemeanor or ill behavior.—If an apprentice or servant, lawfully bound to service as prescribed by special statutes, willfully absent himself therefrom, without the leave of his master, or refuse to serve according to his duty, or be guilty of any misdemeanor or ill behavior, his master may make complaint of the facts under oath, before a justice of the peace or police justice in the county, or before the mayor, recorder or city judge of the city where he resides.

See chap. 284 of 1893, amending chap. 934 of 1871, in reference to apprentices and employers.

Two classes of proceedings are provided for by this title; one to be taken by the master, the other by apprentices and servants. *Matter of Killoran v. Barton*, 26 Hun, 648; 14 W. Dig., 490.

§ 928. Warrant, when complaint is made in the absence of the defendant.—If the complaint be made in the absence of the defendant, and the facts be proved to the satisfaction of the magistrate, he must issue a warrant, signed by him, with his name of office, to a peace officer of the county or city, commanding him to arrest the defendant and bring him before the magistrate forthwith, or at a specified time and place, to answer the complaint.

§ 929. Warrant, by whom and how executed.—The peace

officer must accordingly execute the warrant, by arresting the defendant and taking him before the magistrate.

§ 930. **Hearing the complaint, and committing or discharging the defendant.**—The magistrate must immediately, or at a time to which he may, for good cause adjourn the matter, proceed to hear the allegations and proofs of the parties, and if the complaint appear to be well founded, must commit the defendant to the county jail, or in the city of New York, to the city prison of that city, for not exceeding one month, at hard labor, where he must be confined in a room with no other person; or may, by a certificate, signed by him with his name of office, discharge the defendant from the service of his master, and the master from all obligations to the defendant.

§ 931. **Complaints against the master for cruelty, misuse or violation of duty.**—If a master be guilty of cruelty, misuse, refusal of necessary provisions or clothing, or any other violation of duty toward his apprentice or servant, as prescribed by special statutes, or by the indenture or contract of service, the apprentice or servant may make complaint on oath, to any of the magistrates mentioned in section 927, who must summon the defendant before him, at a specified time and place.

**Special proceeding.**—A proceeding under this section is a special proceeding. *Matter of Killoran v. Barton*, 26 Hun, 648; 14 W. Dig., 490.

**Summons.**—By this section, it is provided that the magistrate must summon the defendant before him at a specified time and place. *Id.*

No provision is made for a warrant of arrest, nor, in terms, for a conviction or judgment. *Id.*

**Appeal.**—By section 749, *ante*, the right of appeal is given in words which do not include cases where only a certificate is to be made by a magistrate. *Id.*

Where an apprentice or servant makes a complaint to a magistrate, under this section, accusing his master of cruelty or any other violation of duty, the decision of the magistrate thereon is not reviewable on appeal. *Id.*

The case of *Matter of Killoran v. Barton*, *ante*, was decided before the amendment of 1884 to sections 515 and 749, *ante*. By such amendment, provision was made for appeals in special proceedings of a criminal nature.

§ 932. **Hearing the complaint, and dismissing it or discharging the apprentice or servant.**—The magistrate must immediately or at a time to which he may, for good cause, adjourn the matter, proceed to hear the allegations and proofs of the parties, and if the complaint be well founded, must, by a certificate under his hands, with his name of office, discharge the apprentice or servant from the service of his master; or if not, he must, by a similar certificate, dismiss the complaint.

See notes under preceding section.

§ 933. **Preceding sections, not applicable to apprentice with whom money is received or agreed for.**—The preceding sections of this title do not extend to an apprentice, whose master has received, or is entitled to receive, a sum of money with him, as a compensation for his instruction.

§ 934. **Complaint against master in such case, and direction thereon.**—Where money is paid or agreed to be paid, on binding

out a clerk or apprentice, he may make the complaint mentioned in section 931, and the magistrate to whom it is made must examine it, as provided in section 932, and on such examination, may make such order and direction between the parties, as the justice of the case may require.

This section provides for a case other than those named and included in sections 931 and 932, *ante*. Matter of Killoran v. Barton, 26 Hun, 649 ; 14 W. Dig. 490.

**§ 935. If complaint not compromised, the master to be held to appear at county court.**—If, in the case mentioned in the last section, the complaint cannot be compromised, the magistrate must take a written undertaking from the master, for his appearance at the next term of the county court of the county, in a sum, and with sureties approved by him.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

See Matter of Killoran v. Barton, 26 Hun, 649; 14 W. Dig. 490.

**§ 936. Proceedings thereon, and order of the court.**—Upon hearing the parties, the court may, by an order entered upon the minutes, direct that the clerk or apprentice be discharged from service, and that the money paid or agreed for in binding him out, be refunded, if paid, to the person who advanced it, or his personal representatives, or if not paid, that it be discharged, and that any security given therefor be delivered up or canceled.

**§ 937. Complaint by master against clerk or apprentice, where money is paid or agreed for. Clerk or apprentice when held to appear at county court.**—The master of a clerk or apprentice, where money is paid or agreed for on binding him out, may make the complaint mentioned in section 927, and the magistrate to whom it is made must proceed thereupon, as provided in sections 928 to 930, both inclusive, and may discharge the complaint, or if in his opinion it will be well founded, may take a written undertaking in a sum and with sureties to be approved by him, for the appearance of the clerk or apprentice at the next term of the county clerk of the county.

Am'd by chap. 880 of 1895. In effect January 1, 1896.

**§ 938. Proceedings thereon, and order of the court.**—Upon hearing the parties, the court may proceed as provided in section 936, and may punish the clerk or apprentice, by fine or imprisonment, or both, as for a misdemeanor.

**§ 939.** Repealed by chap. 272 of 1896. To take effect October 1, 1896.

**§ 940.** Repealed by chap. 272 of 1896. To take effect October 1, 1896.

## TITLE X.

## OF CRIMINAL STATISTICS.

**SECTION 941.** District attorney to furnish statement to clerk.

942. Clerk of court of special sessions in the city and county of New York to furnish statement to secretary of state.

943. Clerk to furnish statement to secretary of state.

944. Penalty for neglect.

945. Secretary of state to report to legislature.

946. Secretary of state to furnish forms.

§ 941. **Statement of district attorney.**—Within ten days after the adjournment of any criminal court of record in this state, the district attorney of the county in which the court shall be held, shall furnish to the clerk of the county a certified statement containing the names of all persons convicted of crime in said court; the crime for which convicted; whether the conviction was upon a trial or upon a plea of guilty and whether sentence was suspended or the defendant placed on probation; the cases in which counsel were assigned by the court to defend the defendant; the sex, age, nativity, residence and occupation of the defendant; whether married or single; the degree of education and religious instruction; whether parents are living or dead; whether temperate or intemperate, and whether before convicted or not of any crime, and any other information regarding them as may seem to him expedient. If necessary in order to obtain information of these facts, the defendant may be interrogated upon oath in court by the district attorney before judgment is pronounced. He shall also furnish to the clerk of the court a certified statement containing the names of all probation officers appointed by the court, with their address and date of appointment.

Amended by L. 1901, ch. 372. To take effect Sept. 1, 1901.

§ 942. **Statement of clerk of court of special sessions in New York.**—The clerk or the deputy clerk of the court of special sessions in the city and county of New York shall on or before the first day of February, eighteen hundred and ninety-five, and quarterly thereafter, transmit to the secretary of state a tabulated and certified statement, in the form prescribed by the secretary of state, containing the name of every person convicted of a crime, of every person against whom sentence was suspended, and of every person placed on probation in such court, after October thirty-first, eighteen hundred and ninety-four, and since the date of the closing of each last preceding quarterly report; a description of the offense of which such person was convicted; whether the conviction was upon a trial or upon a plea of guilty; and the date of the conviction; and also a certified statement containing the names of all probation officers appointed by the court, with their address and date of appointment. The police clerks of the city magistrates of the city of New York shall on or before February first, nineteen hundred and one, and annually thereafter, transmit to the secretary of state, a tabulated statement made from their records, showing the number of males and females convicted of crime during each month, in the preceding quarter in the several courts of such city magistrates; the number convicted of each offense, the number sentenced, the number fined, the number of those against whom sentence was suspended, and the number placed on probation; and shall also furnish a certified statement containing the names of all probation officers appointed by the

strates, with their address and date of appointment. Such reports shall be in the form prescribed by the secretary of

enacted by L. 1901, ch. 372. To take effect Sept. 1, 1901.

**§ 43. Statements to secretary of state.**—On or before the first of February, eighteen hundred and ninety-five, and quarterly thereafter, the clerk of each county shall transmit to the secretary of state a tabulated and certified statement, in the form prescribed by the secretary of state, of all the matters contained in the statements filed with such clerks by the district attorney of such county on or after October thirty-first, eighteen hundred and ninety-four; and the name of each person shown to be convicted by a court of special sessions by the certificate of conviction filed with him by the clerk of the court of special sessions after October thirty-first, eighteen hundred and ninety-four, and since the date of the filing of each last preceding quarterly report made after October thirty-first, eighteen hundred and ninety-four, and showing the offense for which each person was so convicted; whether the conviction was upon a trial or upon a plea of guilty; the sentence imposed, whether the sentence was suspended, and whether the defendant was placed on probation. Said certified statement shall contain the names of all probation officers appointed by said courts of special sessions, with their address and the date of their appointment.

enacted by L. 1901, ch. 372. To take effect Sept. 1, 1901.

**§ 44. Id.**—For every neglect of any justice, magistrate or clerk to comply with the requirements of this title, he shall forfeit the sum of fifty dollars, to be recovered by a civil action in the name of the people of the state.

**§ 45.** The secretary of state shall, on or before March first, in each year, cause all the information and statistics contained in the foregoing certified statements made to him by the several county clerks, to be compiled and tabulated in convenient form for reference, and so arranged that each fact shall appear under its appropriate column or heading, and subdivided according to the crime or offense charged, and transmit the same to the legislature.

**§ 46. Secretary of state to furnish forms.**—The secretary of state shall cause this title to be published with forms and instructions for the performance of the duties therein prescribed, and copies thereof to be furnished annually to each county clerk. The forms furnished by the secretary of state as herein provided, shall contain in tabulated form, the nature of the offense upon which a conviction was had, the court before which the defendant was convicted, the character of the sentence imposed, the cases where the defendant had been previously convicted, the cases where sentence was suspended, the cases where the defendant was placed upon probation, and the cases where the probation was revoked, together with the age, sex, nativity and residence of the defendant. And a sufficient number of copies of this title, of such instructions, and of the forms to be used by the district attorney, the clerk or deputy clerk of the court of special sessions of the city and county of New York, shall also be furnished to each clerk to enable him to furnish at least one copy thereof annually to the district attorney, and the clerk of the court of special sessions of the city and county of New York and the county clerk shall distribute the copies of this title and of such forms and instructions accordingly, and when said county clerk is not a salaried officer his disbursement and compensation for his services under this act shall be a county charge. The expense of the secretary of state in publishing this title and distributing copies thereof, and of such forms and instructions as are herein required, shall be paid by the treasurer of the state, upon the warrant of the comptroller, from moneys in the treasury not otherwise appropriated.

enacted by L. 1901, ch. 372. To take effect Sept. 1, 1901.



## TITLE XI.

MISCELLANEOUS PROVISIONS, RESPECTING SPECIAL PROCEEDINGS  
OF A CRIMINAL NATURE.

**SECTION 950.** Parties to a special proceeding, how designated.

951. Provisions respecting entitling affidavits, applicable.

952. Courts and magistrates to issue subpoenas, and punish disobedience of witnesses.

§ 950. **Parties to a special proceeding, how designated.**—The party prosecuting a special proceeding of a criminal nature, is designated in this Code, as the complainant, and the adverse party as the defendant.

See *People ex rel. Scherer v. Walsh*, 33 Hun, 346 ; 67 How., 484 ; 2 N. Y. Cr., 326.

*Matter of Killoran v. Barton*, 26 Hun, 648 ; 14 W. Dig., 490.

§ 951. **Provisions respecting entitling affidavits, applicable.**—The provisions of this Code, in respect to entitling affidavits in a criminal action, are applicable to special proceedings of a criminal nature.

See *People ex rel. Scherer v. Walsh*, 33 Hun, 346 ; 67 How., 484 ; 2 N. Y. Cr., 326.

§ 952. **Courts and magistrates to issue subpoenas, and punish disobedience of witnesses.**—All courts and magistrates having before them special proceedings of a criminal nature, may issue subpoenas for witnesses, and punish their disobedience in the same manner as in criminal actions.

See *People ex rel. Scherer v. Walsh*, 33 Hun, 346 ; 67 How., 484 ; 2 N. Y. Cr., 326.

GENERAL PROVISIONS AND DEFINITIONS APPLI-  
CABLE TO THIS CODE.

**SECTION 953.** Abatement of nuisance.

954. No part of this Code retroactive, unless expressly so declared.

955. Repealed.

956. Repealed.

957. Repealed.

958. Definition of "signature."

959. Definition of "magistrate."

960. Definition of "peace officer."

961. Definition of "county court."

962. To what actions and proceedings this Code applies.

963. When Code to take effect.

§ 953. **Abatement of nuisance.**—Where a person is convicted of keeping or maintaining a public nuisance, and sentenced to punishment, the court may in its judgment, in addition to or in place of other punishment, direct that the nuisance be abated, and issue an order to the sheriff of the proper county to execute the judgment as therein directed.

In cases of nuisances, the court, upon conviction, is authorized to order that the nuisance be abated. *Syracuse, etc., v. People*, 66 Barb., 25.

The usual and customary means, employed to abate a bawdy house as a nuisance, are set in motion by the courts which administer the criminal law, whose machinery is sufficient to give to the community full relief in

in case, and, at the same time, administer such punishment as will prevent recurrence of the evil. *Anderson v. Doty*, 88 Hun, 168.

§ 954. **No part of this Code retroactive, unless expressly so declared.**—No part of this Code is retroactive, unless expressly so declared.

§ 955 was repealed by chap. 677 of 1892.

§ 956 was repealed by chap. 677 of 1892.

§ 957 was repealed by chap. 677 of 1892.

§ 958. **Definition of "signature."**—The term "signature" includes a mark, when the person cannot write; his name being written near it, and the mark being witnessed by a person who writes his own name as a witness, except to an affidavit or deposition, or a paper executed before a judicial officer; in which case the attestation of the officer is sufficient.

§ 959. **Definition of "magistrate."**—Unless when otherwise provided, the term "magistrate" signifies any one of the magistrates mentioned in section 147.

§ 960. **Definition of "peace officer."**—Unless when otherwise provided, the term "peace officer" signifies any one of the officers mentioned in section 154.

§ 961. **Definition of "county court."**—The term "county court" includes "the court of general sessions in the city and county of New York," wherever such inclusion does not conflict with other provisions of this Code.

Am'd by chap. 880 of 1895. In effect, January 1, 1895.

§ 962. **To what actions and proceedings this Code applies.**—This Code applies to criminal actions, and to all other proceedings in criminal cases which are herein provided for, from the time when it takes effect; but all such actions and proceedings, heretofore commenced, must be conducted in the same manner as if this Code had not been passed; except that if in any local statute confined, by its terms, to a town or village or to a county or city other than the city and county of New York, any proceeding is prescribed, in addition to those prescribed by this Code and not inconsistent with it, the same shall remain unaffected by it.

See section 719 of Penal Code.

The case of *People v. Bork*, 31 Hun, 360; 2 N. Y. Cr., 56, was reversed in N. Y., 188; 2 N. Y. Cr., 177.

**Application.**—The Code of Criminal Procedure applies simply to procedure. *People v. Dowling*, 1 N. Y. Cr., 530.

This provision does not relate to the organization of the court. *Ostrander v. People*, 29 Hun, 513; 1 N. Y. Cr., 282; 17 W. Dig., 373.

This section simply preserves the existing rules of procedure in pending cases. *People v. Bork*, 96 N. Y., 188; 2 N. Y. Cr., 183.

**Object.**—The general object and design of this Code were to collect the various statutes relating to the subject and to furnish a uniform, harmonious and comprehensive system of criminal practice, to apply to and govern all criminal proceedings thereafter instituted in any of the courts of the state. *People v. Hovey*, 92 N. Y., 558; 1 N. Y. Cr., 286.

The direction in this section that criminal actions and proceedings therefore commenced "must be conducted in the same manner," etc., has no reference to the organization of criminal courts, but to the proceedings in

such courts. *People v. Bork*, 96 N. Y., 188, 197; 2 N. Y. Cr., 177; *Ostrander v. People*, 29 Hun, 513, 519; 1 N. Y. Cr., 282.

**Before Code.**—Where an indictment is found prior to the time the Code of Criminal Procedure took effect, its provisions do not apply to the case. *Ostrander v. People*, 28 Hun, 48.

Where an indictment is found prior to September 1, 1881, the review of the judgment is governed by the laws in force before the Code of Criminal Procedure took effect. *People v. Augsbury*, 2 N. Y. Cr., 561.

Where all the indictments were filed before the Code of Criminal Procedure became law, a motion to dismiss the indictments and discharge the defendant from imprisonment must be disposed of by the rules and practice as they existed previous to the enactment of the said Code. *People v. Beckwith*, 2 N. Y. Cr., 29; *People v. Smith*, *id.*, 45.

An indictment, found before the Code of Criminal Procedure went into effect, is to be construed without regard to the provisions of that act. *Jefferson v. People*, 101 N. Y., 20; 3 N. Y. Cr., 575.

All indictments, filed previous to the time of the taking effect of the Code of Criminal Procedure, must be governed by the previously existing practice and procedure. *People v. Beckwith*, 2 N. Y. Cr., 29; *People v. Smith*, *id.*, 45.

All criminal actions and proceedings, commenced prior to the enactment of this Code, must be conducted in the same manner as though the same had not been passed. *People ex rel. Sherwin v. Mead*, 28 Hun, 231; 64 How., 41; 15 W. Dig., 552.

Where an indictment was found prior to the enactment of this Code, the provisions of sections 301 and 302, as to the form of bench warrants, do not apply. *People ex rel. Sherwin v. Mead*, 92 N. Y., 415; 1 N. Y. Cr., 423.

**After Code.**—This section applies the Code to all criminal actions and proceedings, therein provided for, from the time it takes effect. *People v. Holmes*, 2 St. Rep., 676; 5 N. Y. Cr., 130; 41 Hun, 56.

Where the indictment is found after the Code of Criminal Procedure was enacted and took effect, the proceedings are governed by its provisions. *People v. Petrea*, 92 N. Y., 128; 1 N. Y. Cr., 244; 65 How., 59.

**Appeal.**—The suing out of a writ of error after the passage of this Code is not within the saving clause of this section. *McKeon v. People*, 1 N. Y. Cr., 456; 16 W. Dig., 347; 94 N. Y., 648.

A conviction after the passage of this Code, upon an indictment found prior to that time, cannot be reviewed by writ of error, but only by appeal. *Id.*

Where the indictment was found and the proceedings were had prior to September 1, 1881, all further proceedings in the case must be conducted as though the Code had not been passed. *Willett v. People*, 27 Hun, 469, 470. The review in such case must be made under, and by virtue of, a writ of error. *Id.*

See *People v. Petrea*, 30 Hun, 112; 1 N. Y. Cr., 214; *People v. McMahon*, 1 N. Y. Cr., 64; 64 How., 285; *People v. Sessions*, 62 *id.*, 418; 10 Abb. N. C., 192.

§ 963. **When Code to take effect.**—This Code shall take effect on the first day of September, 1881. When construed in connection with other statutes, it must be deemed to have been enacted on the fourth day of January, eighteen hundred and eighty-one, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code.

**Time.**—The Code of Criminal Procedure took effect, September 1, 1881. *Willett v. People*, 27 Hun, 469, 470; *People v. Welch*, 1 N. Y. Cr., 488.

It was the intention of the codifiers that this and the Penal Code should go into effect at the same time, but the legislature determined otherwise. *Matter of McMahon*, 1 N. Y. Cr., 63; 64 How., 284.

**Construction.**—When this Code is construed in connection with other statutes, it must be deemed to have been enacted on January 4, 1881, so that any statute enacted after that day is to have the same effect as though enacted after this Code. *Matter of Ramscar*, 1 N. Y. Cr., 88; 10 Abb. N. C., 442; 63 How., 285; *Matter of McMahon*, 1 N. Y. Cr., 63; 64 How., 284; *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr., 440.

See *People v. Sessions*, 62 How., 418; 10 Abb. N. C., 192.





# APPENDIX TO

## Silvernail's Code of Criminal Procedure

THE SECTIONS ARE INDICATED BY HEAVY FACE FIGURES.

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*Annotations of Decisions reported up to June 1, 1905, relating to the provisions of the Criminal Code.*

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**2. Criminal Code.**—The Penal and Criminal Codes should not be deemed to have changed the rules, or the procedure, which previously existed, unless the language of their provisions clearly compels the courts so to hold. *People v. Wilson*, 151 N. Y. 403; *aff'g*, 7 A. D. 326; 40 S. 107; *People v. Palmer*, 109 N. Y. 117; *People v. Adler*, 140 *id.* 335.

**4.** By this section, all crimes must be prosecuted by indictment, except where proceedings are had for removal of certain officers and crimes arising in the militia or in the land or naval forces, and such crimes as are hereinafter or in special statutes specified as cognizable by courts of special sessions and police courts. *Steinert v. Sobey*, 14 A. D. 505; 78 S. R. 146; 44 S. 146.

**7. Object.**—The object of this code was to promote substantial justice in securing to the accused a fair trial upon an intelligible accusation, and in preventing the escape of a guilty person through technicalities, which are without merit, with respect to the procedure preliminary to or upon the trial. *People v. Adler*, 55 St. Rep. 669; 140 N. Y. 331; *aff'g*, 53 St. Rep. 936.

**8.** Where a defendant in a court of special sessions undertakes to procure counsel and procures an adjournment for that purpose, he is not entitled of right to further delay on the adjourned day on the ground of absence of counsel, especially where no excuse is shown for such absence. *People v. Hilde-*



brandt (Co. Ct. 1896), 16 Misc. 195. While it is the practice of magistrates empowered to hold courts of special sessions to inform the defendant, when arraigned, of his right to counsel and to give him time to procure counsel, if he so desires, yet it has been held that an omission by the magistrate, holding such a court, to inform the defendant of his right to counsel was not error. *Id.* The right of confrontation provided by subdivision 3 is not violated by reading of testimony on second trial taken on the first trial in the presence of the accused represented by counsel exercising the full right of cross-examination. *People v. Elliott*, 172 N. Y. 146; 17 N. Y. Crim. Rep. 30.

9. Where a defendant relies upon an adjudication of the matters in controversy in a former suit, he is not confined to the record alone, but may show by extrinsic proof what particular matters were litigated, provided the matters sought to be shown were within the issues tried. *People ex rel. Hunt v. Markell*, 84 S. R. 766 (50 S. 766); *Rake v. Pope*, 7 Ala. 161; *Williams v. State*, 13 Tex. App. 285, 288; *Com. v. Sutherland*, 109 Mass. 342. The plea of a former conviction is a good plea in bar, however irregular the proceedings before the justice may have been. *People ex rel. Hunt v. Markell*, *supra*; *State v. George*, 53 Ind. 434; *Brinkman v. State*, 57 Ind. 76.

10. See *Matter of Taylor*, 60 St. Rep. 144; 8 Misc. 159; 28 Supp. 500, which was affirmed by the general term in 59 St. Rep. 887, but the latter judgment was reversed in 62 St. Rep. 175; 143 N. Y. 219.

**Crimination.**—No one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which, evidence of its commission or of his connection with it may be obtained. *People ex rel. Taylor v. Forbes*, 62 St. Rep. 179; 143 N. Y. 219; *rev'g* 59 St. Rep. 887, which *aff'd*, 60 *id.* 136; *People v. Mather*, 4 Wend. 230; *People v. Hackley*, 24 N. Y. 84; *People v. Sharp*, 12 St. Rep. 217; 107 N. Y. 427. Nothing short of absolute immunity from prosecution can take the place of such privilege. *Id.* He does not, by answering the general questions as to his connection with the affair, waive this privilege. *Id.*

Though a person may be wholly innocent of crime and assert his innocence, he is still entitled to the protection against revealing any fact which tends to charge him with crime.

People ex rel. Taylor v. Seaman, 59 St. Rep. 462; 8 Misc. 154. Where he believes that the answers to the questions will tend to criminate himself, he has the right, as matter of law, upon testifying to such belief, to refuse to answer such questions. *Id.* But it is not enough for the witness to throw himself upon his privilege. *Id.*

A witness shall not be compelled in any proceeding to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures. Matter of Attorney General, 21 Misc. 101; 81 S. R. 20; 47 S. 20.

**Identification.**—It is not error, in a criminal action, for the court to compel the defendant to stand up for identification. People v. Gardner, 63 St. Rep. 21; 144 N. Y. 119; 38 N. E. Rep. 1003; modifying and affirming 57 St. Rep. 18; 73 Hun, 11; 25 Supp. 1072.

**Privilege.**—The witness, in his silence is behind the shield of the Constitution and enjoys absolute protection against every species of judicial compulsion as a witness to self accusation of crime, unless the statute affords him absolute immunity from punishment for any crime which his testimony called for might be competent as tending to prove, or unless it is so perfectly clear and plain and to preclude all reasonable doubt that the answer cannot possibly tend in any degree to subject him to the peril of a criminal prosecution. People v. Lewis (Sup. Ct. O. & T. 1895), 70 S. R. 482; 14 Misc. 264.

Where a person, who is indicted for forging a note which he has paid and taken up before the indictment was found, is served with a subpoena duces tecum to produce the note before the grand jury, but before the return of the subpoena, voluntarily at the request of the district attorney, surrendered the note, and it is put in evidence before the grand jury, he, by surrendering the note, waives his right to withdraw it from evidence. People v. Sebring (Sup. Ct. O. & T. 1895), 69 S. R. 612; 14 Misc. 31. Whenever an accused person sees fit to put himself in the position of a witness, he is in precisely the same situation as any other witness, and the opposing party has the same right to cross-examine him as he would any other witness. *Id.*

**Testimony against self.**—Where, upon the trial of an indictment, defendant's books of account, which had been seized and brought into court, were introduced into evidence without any objection on his part on the ground that they were introduced against his will, there is no compulsion within the meaning of the constitutional provision, declaring that no person, in a criminal action, shall be compelled to testify

against himself. *People v. Spiegel*, 62 St. Rep. 136; 143 N. Y. 107; 38 N. E. Rep. 284; aff'g 56 St. Rep. 727; 75 Hun, 161; 26 Supp. 1041.

**11. Special Sessions.**—This section defines the courts of this state having original jurisdiction. *People ex rel. Kenney v. Cornell*, 57 St. Rep. 844; 27 N. Y. Supp. 857. A court of a justice of the peace is not to be found in the enumeration. *Id.* The court of special sessions has no jurisdiction to entertain an application for a warrant. *Id.*

For all the purposes of their action, courts of special sessions are, by this section of the Code, now made courts of record, except as to the provisions of the Constitution providing for the removal of magistrates who may hold such courts. *People ex rel. Dunnigan v. Webster* (Sup. Ct. Sp. T. 1895), 71 S. R. 676; 14 Misc. 617.

**11a.** Added by chap. 372, Laws 1901. Amended by chap. 613, Laws 1903, which apparently supersedes chap. 274, Laws 1903. Amended chap. 508, Laws 1904. Amended by chap. 656, Laws 1905.

**39.** See notes under sec. 874 of Criminal Code.

**Civil action pending.**—Court of general sessions has jurisdiction to try an indictment for perjury, though the action or proceeding in which it is alleged the offense was committed, is pending and undetermined. *People v. Hayes*, 54 St. Rep. 184, 188; 24 N. Y. Supp. 194; aff'd, 56 St. Rep. 456; 140 N. Y. 484.

If the defendant desires to await the determination of the civil action, he should make a proper application to that effect before entering upon the trial of the indictment. *Id.*

**39. Courts of Sessions.**—This section defines the jurisdiction of courts of sessions. *People ex rel. Crouse v. Sup'rs, etc.*, 53 St. Rep. 796; 70 Hun, 560; 24 N. Y. Supp. 796; aff'd, 54 St. Rep. 934.

The court of sessions is a court possessing superior criminal jurisdiction and common law powers. *People ex rel. Forsyth v. Court of Sessions, etc.* 57 St. Rep. 404; 141 N. Y. 288; rev'g 50 St. Rep. 234; *People v. Bradner*, 10 St. Rep. 667; 107 N. Y. 1.

Subdivision 3 of this section provides that courts of sessions shall have jurisdiction to hear and determine appeals from orders of justices of the peace under the provisions of law respecting the support of bastards. *People ex rel. Crouse v. Sup'rs, etc. id.*

**44.** Amended by chap. 387, Laws 1902.

**45.** Where order convening county court was neither published for three weeks before the term or for four weeks pre-

vious to time of holding first term, the court is not organized and an indictment found is invalid. *People v. Nugent*, 15 N. Y. Crim. Rep. 312; 57 App. Div. 542.

**55.** See Laws 1895, chap. 880, sec. 2.

**56.** See Laws 1895, chap. 880, sec. 2. Sec. 26 amended by chap. 560, Laws 1901, also by chap. 249, Laws 1902.

Presumptions and inferences will not be indulged in to confer jurisdiction in the court of special sessions. *People v. McLaughlin*, 15 N. Y. Crim. Rep. 337; 57 App. Div. 454. Magistrates of New York city has no jurisdiction to try charge of misdemeanor for speeding automobile. *People v. Patterson*, 16 N. Y. Crim. Rep. 508, 38 Misc. 79. Sub. 26 amended by chap. 560, Laws 1901; also by chap. 249, Laws 1902. Sub. 36 added by chap. 92, Laws 1903. Subs. 36 and 37 become 37 and 38.

See *People ex rel. O'Brien v. Woodworth*, 60 St. Rep. 767; 78 Hun, 586; 29 Supp. 211.

See *People ex rel. Shortell v. Markell*, 20 Misc. 149; 79 S. R. 904, 908; 45 S. 904, 908.

**Assault.**—Assault in the third degree is one of the crimes enumerated in section 56 of the Code of Criminal Procedure. *People v. Barry*, 12 N. Y. Cr. 357; 78 S. R. 913; 44 S. 913.

**Common prostitute.**—See *People v. Carter* (Sup. Ct. 4 D. 1895), 68 S. R. 584; 88 Hun, 314.

**Subd. 16.**—Amended by chap. 279, Laws 1905.

**Subd. 27.**—Amended by chap. 656, Laws 1905.

**Subd. 27.**—See *Rutherford v. Krause*, 60 S. R. 680; 8 Misc. 549; 29 S. 787; 24 C. P. 1.

**Subd. 33.—Excise Law.**—The court of special sessions has jurisdiction to hear and determine a violation of sec. 31, chap. 401 of 1892, known as the former excise law, for selling lager beer without a license, subject to the provisions of sections 57 and 58 above. *People v. Freileweh* (Sup. Ct. 3 D. 1896), 11 A. D. 409; 76 S. R. 373; 42 S. 373.

**Subd. 36.**—The crime of being a common prostitute is, under this section, triable only in a court of special sessions, except where the case is, pursuant to the next section, certified to the grand jury. *People v. Cowie* (Sup. Ct. 3 D. 1895), 69 S. R. 83; 88 Hun, 498.

**Cruelty to Animals.**—Administering poison is cruelty to animals within the meaning of this section, and of such offense the court of special sessions has exclusive jurisdiction in the first instance. *People ex rel. Knatt v. Davy*, 65 S. R. 162; 32 S. 106.

**Disturbance of worship.**—Section 274 defines the offense of one who willfully disturbs an assemblage met for religious worship as a misdemeanor, and leaves its punishment open to

the provisions concerning misdemeanors in general. *Steinert v. Sobey*, 14 A. D. 505; 78 S. R. 146; 44 S. 146. It is not necessary that the offense should be prosecuted by indictment, and a justice of the peace has power to try a person who is brought before him charged with that offense. *Id.*

**Jurisdiction.**—This section does not give courts of special sessions jurisdiction over offenses enumerated in section 322 of the Penal Code. *People v. Upson*, 61 St. Rep. 158; 79 Hun, 87; 29 Supp. 615.

A court of special sessions does not lose jurisdiction from the fact that the trial before it, having commenced on Saturday, was continued into Sunday. *People v. Luhrs*, 61 St. Rep. 348; 79 Hun, 415; 29 Supp. 789.

Though the maximum punishment prescribed for an offense exceeds that within the power of a court of special sessions to impose, such court is vested with exclusive cognizance thereof in the first instance, if it is directly given by the statute. *People ex rel. Knatt v. Davy*, 65 St. Rep. 162; 32 Supp. 106.

**Jury.**—The right of trial by jury does not apply to the petty offenses triable before a court of special sessions. *People v. Levy*, 24 Misc. 469; 87 S. R. 643; 53 S. 643; 13 N. Y. Cr. 269.

A person, charged with a misdemeanor triable in a court of special sessions, is not entitled, under sec. 2, art. 1 of state Constitution, to a jury trial as a matter of right. *People v. Wolf*, 24 Misc. 94; 87 S. R. 296; 53 S. 296; 13 N. Y. Cr. 261.

**Sabbath breaking.**—Sabbath breaking is not enumerated among the offenses of which a court of special sessions, outside of New York and Albany, has jurisdiction. *Erbe v. Monteverde* (Sup. Ct. Sp. T. 1895), 68 S. R. 476; 13 Misc. 404.

**Special Sessions of Rochester.**—Section 265 of chap. 14 of 1880, as amended by chap. 28 of 1894, defines the jurisdiction and powers of the court of special sessions of the city of Rochester.

**Subd. 37.**—This subdivision describes a misdemeanor not included in the preceding subdivisions of this section, and which, by the provisions of section 211, post, is triable at the election of the defendant by a jury after indictment. *People v. Burns*, 19 Misc. 680.

57. See *People v. Cowie* (Sup. Ct. 3 D. 1895), 69 S. R. 83; 88 Hun, 498.

**Certificate.**—In *People v. Shaver*, 37 A. D. 21; 89 S. R. 701; 55 S. 701, a defendant was brought before a magistrate on the charge under sec. 31 of chap. 401 of 1892. He made no objection to the jurisdiction of the court, but plead not guilty, and obtained an adjournment in order to procure a certificate that

the case was a proper one to be prosecuted by an indictment. It was held that the objection was waived by the defendant's failure to take that objection before pleading.

Application for certificate that it is reasonable that the charge of misdemeanor made at special sessions shall be prosecuted by indictment, is addressed largely to the discretion of the court. *People v. Levy*, 24 Misc. 469; 87 S. R. 643; 53 S. 643; 13 N. Y. Cr. 269. The reasons which would justify such a certificate must be something more than the mere preference of the defendant for a jury trial. *Id.* A prosecution by indictment will not be ordered on the ground of a conflict of evidence, involving the credibility of witnesses, or on an allegation that defendant is not guilty of the charge. *Id.*

**Duty of magistrate.**—When the defendant is brought before the magistrate, it is the latter's duty to inform him of his rights under sections 57 and 58 of the Criminal Code. *People v. Barry*, 12 N. Y. Cr. 357; 78 S. R. 913; 44 S. 913. A denial, on the latter day, to grant, on demand, the privilege, is reversible error. *Id.*

**Indictment.**—In cases where courts of special sessions have in the first instance, exclusive jurisdiction to hear and determine charges for misdemeanors within their respective counties, prosecution by indictment is permitted only when the certificate, as provided in this section, has been made. *People ex rel. Knatt v. Davy*, 65 St. Rep. 162; 32 Supp. 106.

Supreme court has no authority to inquire by indictment of a case which involves one of the minor crimes, the exclusive jurisdiction of which is conferred upon a court of special sessions by this section of the Criminal Code, except where the certificate provided by section 57 is obtained. *People v. Knatt*, 156 N. Y. 302; 13 N. Y. Cr. 92. Such question is sufficiently raised by objection to jurisdiction at the commencement of the trial, and by motion in arrest of judgment, but such objection can be raised by demurrer. *Id.*

Section 35 of the Liquor Tax Law, as amended by chapter 312 of 1897, subdivision 2, gives courts of special sessions exclusive jurisdiction to try and determine complaints for violation of section 40 of the Liquor Tax Law. *People v. Mulkins*, 25 Misc. 599. It does not contain any reference to sections 56, 57 or 58 of the Code of Criminal Procedure, so that the defendant cannot claim any privilege under the provisions of either of those sections, unless the language of the section is broad enough to embrace a complaint for intoxication in a public place. *Id.*



**Jury.**—A person charged with a misdemeanor has no constitutional right to a trial by jury. *People v. Wade*, 26 Misc. 585. Courts of special sessions in the city of New York have exclusive jurisdiction for the trial of cases and of misdemeanors, unless for reasonable cause they are divested of that jurisdiction. *Id.* As a necessary prerequisite to the removal of a case from the special sessions, the judge shall certify that it is reasonable that the charge should be prosecuted by indictment. *Id.*

**58. Adjournment.**—When a person is brought before a magistrate charged with a crime, triable only by the magistrate sitting as a court of special sessions, and asks that the case be presented to the grand jury, he has, under this section, an absolute right to an adjournment to enable him to procure a judge's certificate that it is reasonable that the charge be prosecuted by indictment. *People v. Cowie* (Sup. Ct. 3 D. 1895), 69 S. R. 83; 88 Hun, 498.

**60.** See Laws 1895, chap. 880, sec. 2.

**62. Application.**—The sections, that are applicable to proceedings in courts of special sessions, are enumerated in this section. *People v. Polhemus* (Sup. Ct. 3 D. 1896), 8 A. D. 133; 40 S. 491.

**63.** The powers and jurisdiction of the recorder's court of the city of Corning are defined in sec. 1, tit. 7, chap. 58, of 1890, as amended by chap. 217 of 1894.

Chap. 211 of 1895 amends the charter of the city of Ithaca in relation to acting recorder.

**64.** Amended chap. 563, Laws 1904.

**65.** Amended chap. 563, Laws 1904.

**66.** Repealed chap. 563, Laws 1904.

**67.** Repealed chap. 563, Laws 1904.

**74.** See *People v. Van Houten* (Ct. Sess. 1895), 69 S. R. 265; 13 Misc. 603.

**84. Information.**—An information, under this section, was held insufficient in *Hewitt v. Newburger*, 57 St. Rep. 821; 141 N. Y. 538; rev'g, 48 St. Rep. 811; 20 N. Y. Supp. 913.

The utter failure of an information and warrant to aver the unlawful and criminal intent which constitutes the crime, is fatal. *Id.* If the charge is under section 663 of the Penal Code, the information should aver that the defendant unlawfully and willfully threatened to do the act specified. *Id.* Where it is the intention to charge the defendant under section 639 of Penal Code, the information must allege that the defendant willfully or maliciously threatened to do the act set forth. *Id.*

Where the information and proceedings before the justice are sufficient to comply with the provisions of this and the following sections, the justice is justified upon the presentment of the complaint, information and affidavits in issuing a warrant to bring the accused before him in proceedings for "security to keep the peace." *Palmer v. Palmer* (Sup. Ct. 4 D. 1896), 8 A. D. 331, 335; 40 S. 829.

**132. Removal.**—The legislature has by law prescribed the general term of the supreme court as the court to be vested with the power, granted by sec. 18, art. 6 of the Constitution, and it is the only court vested with such power. *Matter of Prescott*, 60 St. Rep. 391; 77 Hun, 518; 28 Supp. 928.

**133. Procedure.**—These sections, secs. 699, et seq. relate to proceedings in criminal actions prosecuted by indictment and prescribe the procedure from indictment to final judgment in such cases. *People ex rel. Comrs. v. Cullen*, 151 N. Y. 54.

**134. In several counties.**—Where the crime of grand larceny was committed partly in one and partly in another county, the case falls within the provisions of this section, and the jurisdiction is in either county. *People v. Wicks* (Sup. Ct. 4 D. 1896, 11 A. D. 539; 76 S. R. 630; 42 S. 630.

Where some of the fraudulent acts and pretenses, alleged in the indictment, were made and performed in one, though others were made and performed in another county, the offense is partly committed in the former county, and the court has jurisdiction in that county. *People v. Peckens*, 153 N. Y. 578; 12 N. Y. Cr. 433.

Where the indictment directly charges that not only were parts of the crime, namely, the formation of the intent to commit it, evidenced by the act of conspiracy and combination, and the further act of deliberation thereon, committed by the defendants in the city and county of New York, but that certain other acts, namely, the preparation of the plans and means for the consummation of the murder, and the inveigling of the deceased from this county to the place where the crime was finally completed, began here, it alleges that the crime was partly committed in this city and county, and the courts of either county have jurisdiction. *People v. Thorn*, 21 Misc. 130; 12 N. Y. Cr. 2; 81 S. R. 46; 47 S. 46; *People v. Crotty*, 9 S. 937; *People v. Dimick*, 107 N. Y. 15; 14 N. E. 178; and *People v. Wicks*, 11 A. D. 539; 42 S. 630.

As to indictment for larceny in the county in which the accused acquired the property as bailee, although the appropriation took place in another county. See *People v. Mitchell*, 49 App. Div. 531; 168 N. Y. 604. Power to change place of

trial for convenience of witnesses on application of defendant where crime is committed in two counties. *People v. Mitchell*, 168 N. Y. 604.

**139. Concurrent jurisdiction.**—State courts have criminal jurisdiction, in the absence of any prohibition in the Federal Constitution or laws, over the navigable waters within state limits. *People v. Welch*, 57 St. Rep. 392; 141 N. Y. 266; *aff'g*, 57 St. Rep. 42; 74 Hun, 474; 26 N. Y. Supp. 694.

**142. Limitations.**—The statute of Limitations cannot avail a defendant on a motion to set aside an indictment in a conspiracy action, even though the concoction of the corrupt agreement is alleged to have taken place at a date not within two years, where such conspiracy is a continuous crime, existing within the two years, in active operation, as to overt acts. *People v. Willis*, 23 Misc. 568; 86 S. R. 808; 52 S. 808; 13 N. Y. Cr. 255.

In a prosecution for rape committed prior to 1892, neither the presence nor the absence of consent would have been material, except as to the degree merely, and the statute of limitations would have been five years instead of two. *People v. Nelson*, 153 N. Y. 90-4; 12 N. Y. Cr. 368; *People v. Austin*, 63 App. Div. 382; 16 N. Y. Crim. Rep. 12.

**144.** See *People v. Oishei*, 12 N. Y. Cr. 362; 79 S. R. 49, 50; 45 S. 49, 50.

**Details.**—Information need not state the names of the persons to whom sales were made, or that their names were unknown. *People v. Polhemus* (Sup. Ct. 3 D. 1896), 8 A. D. 133; 40 S. 491.

It is not necessary to state in the information the precise time at which the crime was committed. *Id.*

**Information and belief.**—Complaint for a warrant for selling intoxicating liquor, without a license, entirely upon information and belief, gives the magistrate no authority to order the defendant's arrest. *People v. Cramer*, 12 N. Y. Cr. 469; 81 S. R. 1039; 47 S. 1039.

**Insufficient.**—Where the information does not apprise the defendant of the exact charge against him, and the charge is so indefinitely made that it would not be available as a plea in bar to a subsequent charge made against him for the same offense, it does not specify the crime charged with sufficient accuracy to comply with the requirements of this section. *People v. Olmstead*, 56 S. R. 311; 74 Hun, 323; 26 Supp. 818.

In case of the insufficiency of the information, it is not enough that the warant states the crime charged. *Id.*

An information, which does not set forth both the time and place, when and where the crime is alleged to have been committed, is insufficient. *Id.*

**Magistrate.**—The magistrate, when he receives an information, holds no court. *People ex rel. Kenney v. Cornell*, 57 St. Rep. 844; 27 N. Y. Supp. 857.

**Not public.**—A magistrate is not bound to admit the public when he entertains an information and application for the issue of a warrant. *Id.*

**Special Sessions.**—A court of special sessions has no jurisdiction to entertain an application for a warrant. *People ex rel. Kenney v. Cornell*, 57 St. Rep. 844; 27 N. Y. Supp. 859.

**Village ordinance.**—Where a village ordinance imposes only a penalty for the violation, neither information nor warrant need allege that the defendant had willfully and unlawfully done the act charged. *People v. Garabed*, 12 N. Y. Cr. 294; 79 S. R. 827; 45 S. 827.

**Sufficiency.**—While informations, lodged before committing magistrates, are not expected to be drawn with the technical accuracy that an indictment should be, *Hewitt v. Newburger*, 48 St. Rep. 811; 20 N. Y. Supp. 913; yet they should state with sufficient accuracy the crime charged. *People v. Olmstead*, 56 St. Rep. 311; 74 Hun, 323; 26 N. Y. Supp. 818.

The court of special sessions has power and authority to pass upon the sufficiency of the information; and where the information is insufficient to cause the defendant to be placed upon trial, a motion to dismiss and to discharge him should be granted. *People v. Pillion*, 60 St. Rep. 810; 78 Hun, 74; 29 Supp. 267; *People v. Olmstead*, 56 St. Rep. 311; 74 Hun, 323; *People v. West*, 8 St. Rep. 713; 106 N. Y. 293; *People v. Dumar*, 11 St. Rep. 19; 106 N. Y. 502; *People v. Stark*, 49 St. Rep. 899; 136 N. Y. 538.

**Warrant.**—An information must be made setting forth the facts tending to establish the commission of the crime and the guilt of the defendant, in order to authorize the issuing of a warrant. *People v. Burns*, 19 Misc. 680.

145. Information which states that defendant struck complainant in the face with his fists, knocked him down and kicked him, insufficient for a conviction. *People v. Hiley*, 15 N. Y. Crim. Rep. 254; 33 Misc. 168.

146. **Magistrates.**—This section enumerates the magistrates who have power to issue an order of arrest. *People ex rel. Kenny v. Cornell*, 57 S. R. 844; 27 Supp. 859.

148. See *People v. Polhamus* (Sup. Ct. 3 D. 1896), 8 A. D. 133; 40 S. 491; 17 N. Y. Crim. Rep. 479.

Provision is made for the issuing of warrants upon information laid before a magistrate. *People ex rel. Gunn v. Webster*, 58 St. Rep. 225; 75 Hun, 278; 26 N. Y. Supp. 1007.

It is not an offense against the statute to sell or give away strong or spiritous liquors, unless it is done in the manner prohibited by statute, and a complaint which specifies no mode of sale or gift within the prohibition, charges no criminal act. *People ex rel. Lotz v. Norton*, 58 St. Rep. 736; 76 Hun, 7; 27 N. Y. Supp. 851.

Proof necessary for warrant for perjury. *People v. McGirr*, 39 Misc. 471. Sufficient information of use of rooms for gambling, public may be excluded from investigation. *People ex rel. Lewisohn v. Wyatt*, 39 Misc. 456; 17 N. Y. Crim. Rep. 166; see *People ex rel. Sandman v. Tuthill*, 79 App. Div. 24; *Simis v. Alwang*, 61 App. Div. 426; 15 N. Y. Crim. Rep. 467.

**150. Office of warrant.**—The warrant has fulfilled its office when it has brought the defendant into court. *People v. Olmstead*, 56 St. Rep. 311; 74 Hun, 323; 26 N. Y. Supp. 818. This is its only function. *Id.* See *McKelvey v. Marsh*, 63 App. Div. 396.

**151. Command.**—Warrants issued under this section, command the peace officer, to whom they are directed, forthwith to arrest the person named therein and bring him before the magistrate. *People ex rel. Gunn v. Webster*, 58 St. Rep. 225; 75 Hun, 278; 26 N. Y. Supp. 1007.

In each warrant for the arrest of a person on a criminal charge, there is inserted a direction to bring the defendant before the magistrate issuing the warrant, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county. *People ex rel. Lotz v. Norton*, 58 St. Rep. 736; 76 Hun, 7; 27 N. Y. Supp. 851.

There is no authority for the substitution of a second magistrate to hold the court after its organization. *Id.*

**Jurisdiction.**—When an arrest is made, the person arrested must at once be taken before the magistrate. *Id.*

Where a justice shows a warrant returnable before himself for a misdemeanor committed in an adjoining town and fails to order defendant taken before a proper magistrate he has no jurisdiction of the case. *People v. McLaughlin*, 15 N. Y. Crim. Rep. 337.

**154. Arrest without a warrant.**—A person, who is intoxicated in a public place may, under sec. 35, chap. 401 of 1892, and the above sections of the Code of Criminal Procedure, be arrested by a police officer without a warrant. *People v.*

Doyle (Sup. Ct. 3 D. 1896), 11 A. D. 447; 76 S. R. 319; 42 S. 319.

**Deputy sheriff.**—A deputy sheriff, in the execution of criminal process, acts as peace officer of the county. *Deyoe v. Ewen*, 53 St. Rep. 610; 70 Hun, 545; 24 N. Y. Supp. 373; *Deyoe v. Woodworth*, 63 St. Rep. 733; 144 N. Y. 448; *aff'g*, 53 St. Rep. 613.

An agreement by an applicant for the appointment as a deputy to pay to the sheriff a portion of the fees received by him as such peace officer, is a misdemeanor and void. *Id.*

**Peace officers.**—The officers and agents of all duly incorporated societies for the prevention of cruelty to animals or children are declared to be peace officers, within the provisions of section 154 of the Code of Criminal Procedure. *Fox v. Mohawk & H. R. Humane Soc.*, 20 Misc. 461; 80 S. R. 232; 46 S. 232.

**156. Effect of denial of.**—The denial of defendant's privilege to give bail before a magistrate in the county of his arrest, does not affect the validity of his subsequent trial and conviction. *People v. Eberspacher*, 61 St. Rep. 501; 79 Hun, 410; 29 Supp. 796; *People v. Rowe*, 4 Park. Cr. 253; *Adriance v. Lagrave*, 59 N. Y. 110; *Ex parte Lagrave*, 45 How. 301.

**164.** See notes under section 151, ante.

**165. Duty of officer.**—It is the duty of a police officer, after arresting a person, to take him without unnecessary delay before a magistrate. *Pastor v. Regan*, 62 St. Rep. 205; 9 Misc. 547; 30 Supp. 657.

**Proof.**—A police officer or any other person may not cause the arrest of any one on a mere allegation of information and belief. *Matter of Blum*, 62 St. Rep. 78; 9 Misc. 571; 30 Supp. 396. But the defendant may, by his own act, confer jurisdiction. *Id.* The case of *People ex rel. Kingsley v. Pratt*, 22 Hun, 300, was held not to be in point, as it involved the exercise of special summary powers vested in the magistrate. *Id.*

**168.** See *People ex rel. Gunn v. Webster*, 58 St. Rep. 225; 75 Hun, 278; 26 N. Y. Supp. 1007.

**Justification.**—If a police officer provokes, or incites to, a breach of the peace, he cannot justify an arrest. *People v. Dailey*, 57 St. Rep. 10; 73 Hun, 16; 25 N. Y. Supp. 1050.

**170. Arrest.**—But, where the offense committed is of the grade of misdemeanor, the officer may only arrest the defendant where it is committed or attempted in his presence, and, where not so committed, he must apply for a warrant, which cannot be executed at night or on Sunday without the di-



rection of the magistrate indorsed on the warrant. *People v. Howard* (Ct. Sp. Sess. 1896), 69 S. R. 608; 13 Misc. 763. Unless the magistrate becomes satisfied that the offender intends to make an effort to escape, or secretes himself, or that some other good cause exists, it is the evident purpose of the law that he should not direct the arrest for a misdemeanor at night or on Sunday. *Id.*

**177. Entrance.**—No officer has a right to force an entrance into any premises for the purpose of effecting an arrest for a misdemeanor, which he may have reason to suspect is being committed thereon. *Parks v. Gilligan* (N. Y. C. C. Sp. T. 1895), 70 S. R. 174; 14 Misc. 121. But he may peaceably enter plaintiff's premises for the purpose of effecting an arrest for a violation of the excise law, which offense he has reason to believe is being committed, and, in case he is assaulted without just cause while endeavoring to make such an arrest, he may apprehend the party assaulting him for interfering with him in the discharge of his duties as an officer. *Id.*

**Without a warrant.**—Provision is made for arrests without a warrant in certain cases by a peace officer. *People ex rel. Gunn v. Webster*, 58 St. Rep. 225; 75 Hun, 278; 26 N. Y. Supp. 1007. The right to arrest without a warrant existed at common law, and is now authorized by this section. *People v. Wilson*, 56 St. Rep. 828; 141 N. Y. 185. Under this section a constable has authority to arrest the defendant for an offense under section 448 of the Penal Code, if committed in his presence, without a warrant. *People v. Barber*, 56 St. Rep. 304; 74 Hun, 368; 26 N. Y. Supp. 417.

For mere misdemeanor, after its commission, an arrest can only be made upon a warrant from a magistrate. *People v. Howard* (Ct. Sp. Sess. 1895), 69 S. R. 608; 13 Misc. 763.

This section of the Code allows a peace officer to arrest a person for a crime committed or attempted in his presence, but does not apply to a case under section 89, post. *People v. Fuerst* (Ct. Sess. 1895), 69 S. R. 205; 13 Misc. 304.

It is the duty of police commissioners, whose attention is called to the matter, to suppress the playing of base ball games on Sundays, and to arrest the parties engaging in such sport and to have them taken before a proper magistrate to be dealt with as the law provides, the same as in other cases of arrest for crimes committed in the presence of an officer. *Matter of Rupp*, 33 A. D. 468; 87 S. R. 927; 53 S. 927.

Where a person lawfully arrested without a warrant is brought before the magistrate, it is unnecessary for the latter to then issue a warrant. *People v. Mulkins*, 25 Misc. 599;

People ex rel. Gunn v. Webster, 75 Hun, 281; People v. Burns, 19 Misc. 681.

Where an arrest is made without warrant for an offense of which a justice of the peace has exclusive jurisdiction, no written information need be made or filed nor a warrant issued by the justice, where the defendant pleads guilty upon being brought before him. People v. Burns, 19 Misc. 680.

Where an arrest without a warrant is made on the ground that the person arrested had been disorderly and had committed an assault, it is unlawful if he was not committing any crime, and was not disorderly at the time he was arrested. Carpenter v. Penn. R. Co., 13 A. D. 328; 77 S. R. 203; 43 S. 203.

To arrest "with or without warrant," means with warrant where warrant is required by law, and without warrant only where it is not so required. Greater N. Y. Athletic Club v. Wurster, 19 Misc. 443; 77 S. R. 703; 43 S. 703. If a prize fight or any indecency, or anything violating the criminal law be brought out in a theatre, it is the right of any citizen and the duty of any policeman present, to arrest everyone participating in the offence. Id.

**Warrant.**—Before a party is placed on trial in a court of special sessions, or in a police court, he should be charged by an information, clear and definite, and the charge should be followed by a warrant specifically stating the time alleged. People v. James (Sup. Ct. 4 D. 1896), 11 A. D. 609; 77 S. R. 315; 43 S. 315.

Officer's duty to arrest keeper of disorderly house. People v. Glennon, 78 App. Div. 271. As to when the question as to the propriety of an arrest by a peace officer, believing a person has committed a felony, is one for the jury. See Thompson v. Fisk, 50 App. Div. 71.

**183. Private Persons.**—Provision is made for arrests without a warrant in certain cases by private persons. People ex rel. Gunn v. Webster, 58 St. Rep. 225; 75 Hun, 278; 26 N. Y. Supp. 1007.

In one sense, every citizen is a policeman, having power to arrest any person who commits a crime in his presence, or any person who has committed a felony, though not in his presence. Woodhull v. Mayor, etc. 59 St. Rep. 193.

**188. Application.**—These sections are not applicable to cases of which the justice of the peace has exclusive jurisdiction. People v. Burns, 19 Misc. 680; 12 N. Y. Cr. 247; 78 S. R. (44 S.), 1106; People v. Cook, 45 Hun, 34, 36; People v. Giles, 12 A. D. 495.

**Jurisdiction.**—There is no marked distinction between the power of a magistrate to hold on examination, and that of a court which has acquired jurisdiction of the charge to try. *People v. Eberspacker*, 61 St. Rep. 501; 79 Hun, 410; 29 Supp. 796.

**Without warrant.**—It is not the duty of the magistrate, even though a person is delivered into his custody charged with a crime, to then issue a warrant, or to enter upon a preliminary examination to determine whether he was properly arrested without a warrant before he can acquire jurisdiction. *People ex rel. Gunn v. Webster*, 58 St. Rep. 225; 75 Hun, 278; 26 N. Y. Supp. 1007.

As to the right of a magistrate to adjourn examination of defendant accused of committing theft in England when witnesses have not yet returned from said country and defendant fails to explain possession. See *Matter of Blair*, 35 Misc. 175; *People v. McKenna*, 62 App. Div. 327; 15 N. Y. Crim. Rep. 87.

204. See L. 1895, chap. 880, sec. 2.

See *Matter of Ramsdale v. Supervisors* (Sup. Ct. 4 D. 1896), 8 A. D. 550, 552.

This section does not apply to the procedure authorized by part V, relating to courts of special sessions and police courts. *People v. Giles*, 152 N. Y. 136; 46 N. E. 326; rev'g, 12 A. D. 495; 76 S. R. 769; 42 S. 749.

**Sub. 5.**—Has reference to preliminary examination only. *People v. Hines*, 15 N. Y. Crim. Rep. 327; 57 App. Div. 419.

205. Committing magistrate or clerk must exhibit complaint to prisoner's attorney on demand. The fact that attorney appeared for prisoner at time of arrest is of no importance. *People ex rel. Fuller*, 15 N. Y. Crim. Rep. 344.

208. **Commitment.**—If an accused demands an examination, the magistrate may not commit him to answer to a court having cognizance of the crime, unless "it appears that a crime has been committed, and that there is sufficient cause to believe the defendant guilty thereof." *Matter of Henry* (Sup. Ct. Sp. T. 1895), 69 S. R. 590; 13 Misc. 734. It is not necessary that the evidence be conclusive or sufficient to secure a conviction upon a trial. *Id.*

See *People ex rel. Fleischman v. Fox*, 15 N. Y. Crim. Rep. 373; 34 Misc. 82.

211. See *People v. Barry*, 12 N. Y. Cr. 357; 78 S. R. 913; 44 S. 913.

## CODE OF CRIMINAL PROCEDURE

**Subd. 37 of sec. 56.**—Subdivision 37 of section 56 of Criminal Code describes a misdemeanor not included in preceding subdivision of said section, and which, by the provisions of this section, is triable at the election of the defence by a jury after indictment. *People v. Burns*, 19 Misc. 680.

**213. Re-submission.**—The court has power to set aside indictment on the ground that the evidence taken before grand jury was insufficient. *People v. Vaughan* (Kings Ct. 1897), 19 Misc. 298; 76 S. R. 959; 42 S. 959. But, where the defendants have been guilty of laches in making the motion and the district attorney asserts that he has evidence in possession sufficient to warrant the belief that defendants would be convicted, the dismissal of the indictment should be without prejudice to a resubmission of the case to the grand jury. *Id.*

**214. Commitment.**—The fact as to whether the defendant was brought on a warrant, or by an officer who had arrested him without a warrant, is not required to be specified in commitment. *People ex rel. Gunn v. Webster*, 58 St. R. 225; 75 Hun, 278; 26 N.Y. Supp. 1007.

A commitment reciting that the defendant was held "upon charge of burglary in the third degree," is in compliance with the provisions of this section. *People ex rel. Sullivan v. Sloane*, 14 N. Y. Cr. 52; 39 A. D. 265; 90 S. R. (56 S.), 90; *People v. Johnson*, 110 N. Y. 134; 17 N. E. 684.

A commitment reciting that the defendant was held "upon charge of grand larceny in the first degree," is in compliance with the provisions of this section. *Id.*

**215.** See *People ex rel. Troy v. Pettit* (Erie S. T. 1897) Misc. 280; 78 S. R. 256; 44 S. 256.

**Appearance.**—A magistrate has no authority to require a witness to give an undertaking with sureties for his appearance, unless he believes him to be an accomplice of the crime charged. *People ex rel. Troy v. Pettit* (Erie S. T. 1897) Misc. 280; 78 S. R. 256; 44 S. 256.

**221.** See L. 1895, chap. 880, sec. 2. Amended chap. 100, Laws 1904.

**223. Designation.**—The objection that the designation of trial term by the justices of the appellate division was not in strict compliance with the provisions of the Constitution and the statute at the time of making the designation, is not available as a ground of attack upon the regularity of the indictment found, at such term, by a grand jury selected and organized under the forms of law. *People v. Youngs*, 151 N. Y.

**Jurisdiction.**—The grand jury has jurisdiction to find indictments for assault in the first degree, committed within

boundaries of the county for which it is acting. *People v. Rockhill*, 55 St. Rep. 683; 26 N. Y. Supp. 222.

**229. Whence selected.**—Under chapter 374 of 1881, the grand jury of the court is properly selected from the towns in the jury district in which such court is held. *People v. Sebring* (Sup. Ct. O. & T. 1895), 69 S. R. 612; 14 Misc. 31.

**238. Dismissal.**—A motion made to the trial court to dismiss an indictment for murder, on the ground, among others, that certain persons not officers of the law, had issued and distributed to each person on the grand jury list a circular letter advising them as to their duties and on other questions alleged to be prejudicial to the defendant, is properly denied, where it appears that there was no proof that any man was on the panel who was not a legally constituted juror, or even an allegation that the evidence given before the jury was incompetent in its nature or insufficient, if believed, to warrant the indictment. *People v. Shea*, 69 S. R. 320; 147 N. Y. 78.

A person held to answer a charge for crime may challenge an individual grand juror, but no challenge is allowed to the panel or to the array of the grand jury. *People v. Brogstrom*, 178 N. Y. 254; 18 N. Y. Crim. Rep. 259.

**248. Charge.**—It is the duty of the court to charge the grand jury and to explain their duties in such manner and to such extent as in its discretion is deemed best. *People v. Shea*, 69 S. R. 320; 147 N. Y. 78.

**250.** See *People v. Lytle* (Sup. Ct. 4 D. 1896), 7 A. D. 553; 558; 40 S. 153.

**254.** See *People v. Flaherty*, 61 St. Rep. 198; 79 Hun, 48; 29 Supp. 641.

**Indictment.**—An indictment must charge the crime of which the defendant is accused. *People v. Klipfel*, 160 N. Y. 371.

**255.** As to witnesses under twelve years of age. See *People v. Sexton*, 42 Misc. 312; 18 N. Y. Crim. Rep. 58.

**256. Inspect minutes.**—It is within the power of the court, upon an indictment for murder in the first degree, to entertain a motion to inspect the minutes of the grand jury, and it is addressed to its discretion. *People v. Molineux*, 27 Misc. 60; *People v. Naughton*, 38 How. 430; *Eighmy v. People*, 79 N. Y. 546 (560); *People v. Bellows*, 1 How. N. S. 149. And the fact that the defendant was indicted without having had a preliminary examination before a magistrate furnishes a strong inducement to the court to look upon the application with favor. *People v. Molineux*, ante; *People v. Naughton*, ante; *People v. Bellows*, ante. The defendant should be permitted to inspect the minutes of the grand jury without first showing the court extraordinary cause or necessity therefor. *People v. Molineux*, ante. The defendant must show cause which shall be suffi-

the judgment of the court. *Id.* If the indictment is without sufficient legal evidence to sustain it, it is not valid in contemplation of law, and cannot stand.

*Clark*, 8 N. Y. Cr. 169; *People v. Brickner*, *id.* 221; *Met. Trac. Co.*, 12 *id.* 405.

**evidence.**—The grand jury should use the best judgment they have, and should not receive evidence, known and proved by them to be improper and illegal. *People v. ...*, 14 N. Y. Cr. 6; 27 Misc. 79; 92 S. R. (58 S.) 155.

If the legal evidence before the grand jury is such that, disregarding the improper evidence, the indictment would still be found; if the jury were not influenced to find the indictment by the improper evidence, but by the legal evidence before them, then the court should permit the indictment to stand and the defendant to be tried thereon. *Id.*

—If the legal evidence before the grand jury is such that, regarding the improper evidence, the indictment would still be found; if the jury were not influenced to find the indictment by the improper evidence, but by the legal evidence before them, then the court should permit the indictment to stand and the defendant to be tried thereon. *People v. ...*, 27 Misc. 79; *People v. Willis*, 23 Misc. 568; *People v. ...*, 24 *id.* 361; *People v. Petrea*, 92 N. Y. 128; *People v. ...*, 8 N. Y. Cr. 169; *People v. Lindenborn*, 23 Misc. 568; *People v. Brickner*, 8 N. Y. Cr. 217; *People v. Vaughan*, 298; 11 N. Y. Cr. 388.

**indictment.**—The grand jury ought to find an indictment, if the evidence, in their judgment, if unexplained and uncontradicted, warrants a conviction by a trial jury. *People v. ...*, 23 Misc. 568; 86 S. R. 808; 52 S. 808; 13 N. Y. Cr. 255.

**direction.**—The direction contained in this provision, that the grand jury ought to do under certain circumstances, does not impose upon the court the duty, or even the right, to review their action, or criticise their judgment if they have failed to find an indictment. *People v. Faris*, 213; 12 N. Y. Cr. 310; 79 S. R. 911; 45 S. 911.

**dismissal.**—An indictment will not be dismissed because of insufficient legal evidence before the grand jury, if there is sufficient evidence given which, if unexplained, would warrant a conviction. *People v. Winant*, 24 Misc. 361; 87 S. R. 695.

**independent evidence.**—The fact that the defendant had previously testified, before the same grand jury upon their indictment, to a charge made against a third person, to acts which he had, at dates other than those charged in the indictment, made illegal sales of liquor, and that he was keeping a disorderly house at a date several weeks later than the



time charged in the indictments at bar, does not justify dismissal of the indictments, where the uncontradicted testimony of a district attorney alleges that independent evidence was presented to a grand jury sufficient to justify the indictment of the defendant for certain illegal sales of liquor and for keeping a disorderly house. *People v. Hayes*, 28 Misc. S. R. (59 S.), 761. The court will presume that the jury have done their duty and did not permit themselves to be influenced by matters which were not properly before them.

It is not the duty of the court to dismiss an indictment for lack of proof even of the mere fact that improper evidence was submitted to a grand jury. *Id.* If the legal evidence before them was such that disregarding the improper evidence the indictment would still have been found; if the jury was not influenced to find the indictment by the improper evidence, but by the legal evidence before them, the indictment should be sustained. *Id.*; *People v. Molineux*, 27 Misc. 79, 81.

**Quantum.**—This section defines the quantum of evidence required to find an indictment, and an indictment without legal evidence or upon insufficient evidence is invalid. *People v. Vaughan* (Kings Co. Ct. 1897), 19 Misc. 298; 76 S. 142 S. 959; *People v. Brickner*, 8 N. Y. Cr. 221; *People v. Price*, 6 *id.* 143.

**Two Indictments.**—The fact that a grand jury, which heard two indictments against the accused, for the forgery of separate notes negotiated by him at one time to the satisfaction of the grand jury, heard the evidence of such person as to both the forgeries at one examination, does not, it seems, render the second indictment illegal. *People v. Rutherford*, 47 A. D. 209.

The grand jury is forbidden to find an indictment without legal evidence which proves the crime so that the defendant would be convicted. *People v. Stern*, 15 N. Y. Crim. Rep. 455; 26 Misc. 455.

**260. Jurisdiction.**—The grand jury may at any time inquire into a crime which has been committed in the county, and if a definite action be taken by indictment, every inferior tribunal is immediately ousted of jurisdiction, and it makes no difference whether the inferior tribunal has acquired jurisdiction of the case. *People v. Molineux*, 26 Misc. 589.

**262. Inspection.**—In the absence of a statutory limitation, the right of the district attorney to an inspection and examination of all papers and documents in the custody or under the control of a city magistrate or of the clerk of a city magistrate court is absolute, and any such limitation claimed must be shown.

matively established. *People ex rel. Gardiner v. Olmstead*, Misc. 346; 89 S. R. 472; 55 S. 472; 13 N. Y. Cr. 406.

The mere presence in the grand jury room of an adviser or any advisers other than those prescribed in this section, is imperative ground for setting aside the indictment. *People v. Gardiner*, 14 N. Y. Crim. Rep. 519.

**264.** Amended by chap. 286, Laws 1905.

**268.** See *People v. Winner*, 61 St. Rep. 786; 80 Hun. 130; 30 App. 54, and notes under section 315, post.

**271. Re-submission.**—An order for the resubmission of a charge to the grand jury is not necessary, in the absence of a dismissal by the prior grand jury; there can be no dismissal of the charge unless the grand jury consider it and take some action upon it. *People v. Sebring* (Sup. Ct. O. & T. 1895), 69 S. R. 612; 14 Misc. 31.

This section directs the names of the witnesses examined before the grand jury must be endorsed upon the indictment before it is presented to the court. *People v. Shea*, 69 St. Rep. 20; 147 N. Y. 78. Court must direct such names to be furnished to defendant, if not so endorsed. *Id.* When omission, no ground for new trial. *Id.*

**272.** See *People v. Spencer*, 14 N. Y. Crim. Rep. 151.

**273.** See *People v. Peckens*, 153 N. Y. 576, 587; *People v. Lannel*, 16 N. Y. Crim. Rep. 266; 35 Misc. 483.

**275.** See *People v. Flaherty*, 61 St. Rep. 198; 79 Hun. 48; 29 App. 641; *People v. Herlihy*, 16 N. Y. Crim. Rep. 33; 35 Misc. 76; *People v. Corbalis*, 178 N. Y. 516.

**Duplicity.**—Under this section, it will hardly do to allege an act in violation of law by a sale to two persons jointly, and to prove the sale to one independent of the other, and, having given such proof of the act constituting the crime, the party is permitted to prove another additional act, especially under a statute which declares that each and every violation of any of its provisions "shall be construed to constitute a separate and complete offense," and subject the party accused of a violation to a penalty for each violation on the same day, or on different days," to a penalty. *People v. Huffman*, 24 A. D. 233; 82 S. R. 482; 48 S. 2; *People v. Krank*, 110 N. Y. 433; 22 N. E. 242; *People v. Carbineau*, 115 N. Y. 433; 22 N. E. 271, which was commented upon in *People v. Wilson*, 151 N. Y. 409; 45 N. E. 862.

**False pretense.**—An indictment for obtaining property by false pretenses is sufficient, if it states and negatives one false pretense; and if proved, the materiality and influence of it is a question for a jury, unless it clearly appears to be immaterial. *People v. Peckens*, 153 N. Y. 576, 586; 12 N. Y. Cr. 433. The purpose of the averment of pretenses in the indictments is

only to give the defendant notice of what may be proved against him. *Id.* The mode of obtaining property may not be pleaded. *Id.*

**Fraud.**—If a person through the fraudulent representations of another delivered to him a chattel intending to pass the property in it, the latter could not be indicted for larceny, but only for obtaining the chattel under false pretenses. *People v. Sumner*, 33 A. D. 338; 87 S. R. 817; 53 S. 817.

Where the presentation by two coroners of one fraudulent bill for inquests has attached to it separate statements of the inquests held by each which contain fraudulent items, it constitutes but a single offense for which both coroners may be jointly prosecuted. *People v. Coombs*, 36 A. D. 284; 89 S. R. 276; 55 S. 276. It is not necessary that the indictment should negative every defense or exculpation of the crime. *Id.* It is sufficient that it averred that the particular service charged for was not rendered, and the statement in the account that certain inquests were held by the appellant was an essential part of the description of the service. *Id.*

See notes under section 317, Penal Code.

**Indictment.**—An indictment must contain “a plain and concise statement of the act constituting the crime.” *People v. Polhamus* (Sup. Ct. 3 D. 1896), 8 A. D. 133; 40 S. 491.

This section provides that the indictment must contain a plain statement of the act constituting the crime, without unnecessary repetition. *People v. Evans*, 53 St. Rep. 591, 594; 69 Hun, 226; 23 N. Y. Supp. 717.

The settled rule of criminal pleadings requires that all the elements which enter into the definition of an offense must be stated in the indictment. *People v. Stone*, 65 St. Rep. 673; 81 Hun, 130; 32 Supp. 511. So, the recognized and well-established rules of criminal pleading require, in a case under chap. 437 of 1890, an allegation of the name of the person to whom the offer to sell was made, if known; if not known, then an allegation that they were offered to a person whose name was unknown. *Id.*; *People v. Burns*, 25 St. Rep. 97; 53 Hun, 274; 6 Sup. 611; 7 N. Y. Cr. 92; *People v. Gregg*, 35 St. Rep. 757; 59 Hun, 107; 13 Supp. 114; *People v. Pillion*, 60 St. Rep. 810; 78 Hun, 74; 29 Supp. 267; *People v. Olmstead*, 56 St. Rep. 311; 74 Hun, 323; 26 Supp. 818; *People v. Dumar*, 11 St. Rep. 106; 106 N. Y. 502; *People v. Stark*, 49 St. Rep. 680; 136 N. Y. 51.

Under 437 of 1890, an indictment, which makes no direct allegation that the required certificate was not printed on, or attached to, the packages of fertilizer alleged to have been offered for sale, is insufficient. *People v. Stone*, ante.

The office of an indictment is to apprise the defendant of the nature of the crime with the commission of which he stands charged, and if it avers the offense as the statute defines it, stating all the circumstances which constitute such offense, it fulfills its office and answers every requirement. *People v. Drayton*, 41 A. D. 40; 92 S. R. (58 S.), 439; *Phelps v. People*, 72 N. Y. 334.

A count in an indictment, which alleges the writing of a contract over a genuine signature, sufficiently charges the crime of forgery. *People v. Drayton*, ante.

An indictment must contain a plain and concise statement of the act constituting the crime. *People v. Klipfel*, 160 N. Y. 371. "House of ill fame" sufficient pleading. *People v. Herlihy*, 35 Misc. 33.

An indictment against a city official, under section 1551 of the charter of the City of New York, charging that he approved bills for city work knowing that the requirements of sections 413 and 419, in certain specified respects, had not been complied with, is insufficient where there is nothing to show that if all the acts charged had been performed the city could have been defrauded, notwithstanding the general allegation that each of the acts charged was done willfully and with intent to commit a fraud upon the city. *People v. Kane*, 161 N. Y. 380.

Inferences cannot be made a substitute for an averment of the principal or material facts in an indictment. *Id.* The indictment must positively allege the commission of an offense, and the acts constituting it. *Id.*

An indictment must, at least, state the crime which the defendant has attempted to commit; in other words, that the indictment for an attempt to commit a crime is not sufficient, unless it avers facts showing the particular crime which was attempted. *Id.*

**Insufficient.**—Where, under section 527 of the Penal Code, there is no averment in the indictment that the scheme, which the defendant abetted, was to sell or exchange, or offer to sell or exchange, "counterfeit" money, or what purported to be counterfeit money, and there is no reference whatever in the indictment to that purpose, the offense stated in the section is not alleged. *People v. Albow*, 55 St. Rep. 253.

**Larceny.**—An indictment for larceny at common law cannot be upheld by proof only of the procurement of property by false or fraudulent representations. *People v. Sumner*, 33 A. D. 338; 87 S. R. 817; 53 S. 817.

Under an indictment for grand larceny charging that the prisoner "feloniously did steal, take and carry away" \$1,000, the property of another, it is competent for the prosecution to

give evidence of larceny by trick and device, and according to all the cases, the test of the sufficiency of the proof to sustain the charge in the indictment is, did the complainant intend to pass title to the money mentioned in the indictment, or did he give that sum of money into the possession of the defendant for a special purpose to be applied to that purpose only, and did the defendant, instead of so applying the money, appropriate it to his own use? *People v. Sumner*, 33 A. D. 338; 87 S. R. 817; 53 S. 817.

Under an indictment for grand larceny in the second degree as a second offense, the defendant cannot be found guilty as charged in the indictment unless the jury found that the defendant not only committed the larceny alleged in the indictment, but was also convicted of the former offense as alleged. *People v. Reilly*, 25 Misc. 45; 87 R. S. 1005; 53 S. 1005.

The ordinary form of indictment for larceny is not sufficient to reach an offense for defrauding under the "green goods" game. *People v. Livingstone*, 47 A. D. 283; *People v. Dumar*, 106 N. Y. 502. The pretense charged is not that the money to be given by the defendants was counterfeit, but genuine. *People v. Livingstone*, ante. Though it may not have been the sole inducement upon which the prosecutor parted with his money, still it must have been an inducing cause to some extent. *Id.*; *People ex rel. Phelps v. O. & T.* 83 N. Y. 436.

**No change.**—This Code has not changed a procedure in framing indictments which was previously sanctioned, unless its language either expressly or impliedly, does so. *People v. Adler*, 55 St. Rep. 669; 140 N. Y. 331; aff'g, 53 St. Rep. 936.

An indictment for auditing a false claim against a city is defective, if it fails to state that it was the duty of defendant to audit such bills. *People v. Gleason*, 59 St. Rep. 147; 75 Hun, 572; 27 N. Y. Supp. 670

**Statute.**—An indictment is not insufficient by reason of an imperfection in matter or form which does not tend to the prejudice of the substantial rights of the defendant upon the merits. *People v. Lovejoy*, 89 S. R. 543; 55 S. 543; 13 N. Y. Cr. 411. A check is sufficiently described in an indictment as a paper purporting to be a check for a certain sum of money, alleging its value, and to whom it belongs. *Id.* In a prosecution for larceny, it is competent for the prosecution to show, on the question of intent, that the act in question formed part of a series of similar occurrences within reasonable limits as to date. *Id.*

**Sufficient.**—If the indictment states the offense as the statute defines it, the averment is sufficient. *People v. Rockhill*,

55 St. Rep. 681; 26 N. Y. Supp. 222; *Phelps v. People*, 72 N. Y. 344, 349; *People v. Weldon*, 20 St. Rep. 112; 111 N. Y. 569, 574.

No essential element of the crime can be omitted from the indictment without destroying the whole pleading. *People v. Albow*, 55 St. Rep. 253; 140 N. Y. 130; rev'g, 53 St. Rep. 809; 71 Hun, 123; 24 N. Y. Supp. 519. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially or by way of recital. *Id.*

An indictment, framed under section 218 of the Penal Code, was held sufficient in *People v. Barber*, 56 St. Rep. 304; 74 Hun, 368; 26 N. Y. Supp. 417.

An indictment for assault in the first degree, which charges that defendant, at a specified time and place, feloniously and with intent to kill, assaulted two persons named, with a loaded fire-arm, and did discharge said loaded fire-arm toward and at said persons, and did thereby hit and seriously wound them, contains a sufficient statement of the act constituting the crime within the meaning of this section. *People v. Rockhill*, ante.

An indictment, which alleges that the defendant presented a claim for the payment of a loss whereby it was claimed by the defendant that he had sustained damage by fire to the extent of a specified sum, and that the company was justly indebted to him by reason of such loss and contract of insurance in a certain sum, and denies such amount of loss and indebtedness, sufficiently charges an offense under section 579 of the Penal Code. *People v. Spiegel*, 56 St. Rep. 727; 75 Hun, 161; 26 N. Y. Supp. 1041.

An indictment is now good if it contains sufficient averments to inform the defendant of the nature of the accusation against him and enables him to prepare his defense, and when the record may be admitted as a bar to a second prosecution for the same offense. *People v. Willis*, 158 N. Y. 392; *Pontius v. People*, 82 N. Y. 339; *People v. Peckens*, 153 id. 576. No indictment is insufficient by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant. *People v. Willis*, ante. Neither presumptions of law nor matters of which judicial notice is taken need be stated in the indictment. *Id.*

See *People v. Thorn*, 21 Misc. 130; 12 N. Y. Cr. 236; 81 S. R. 46; 47 S. 46.

Where an indictment contains different counts, each of which technically describes a different offense, but it is ap-



parent from the general tenor of the indictment that each count relates to the same transaction, and that the introduction of separate counts is not for the purpose of proving distinct offenses, and where, as in this case, the acts of conspiracy were manifestly initiatory to, and were merged into and consummated by, the crime of murder, such an indictment is good. *People v. Thorn*, 21 Misc. 130; 12 N. Y. Cr. 236; 81 S. R. 46; 47 S. 46. Where there is a conspiracy to commit a felony, and such crime is subsequently consummated pursuant to the conspiracy, the conspiracy merges in the felony, so as to prevent a prosecution for the conspiracy itself as an independent crime. *Id.*; *People v. McKane*, 143 N. Y. 455; 38 N. E. 950; and *People v. Wicks*, 11 A. D. 539; 42 S. 630.

276. See notes under the preceding section.

**Abortion.**—Where an indictment for abortion contains two counts, one charging the commission of the offense by the use of instruments, and the other, by administering a drug or medicine, and there is no evidence that one of the means charged had been used, the defendant is entitled to have the jury so instructed upon request, and a general verdict of guilty will not render the error of a refusal harmless. *People v. Van Zile*, 62 St. Rep. 357; 143 N. Y. 368; 38 N. E. Rep. 880.

**Assault.**—Though an indictment for an assault in the second degree upon a police officer does not state facts showing that the officer assaulted was engaged in the lawful discharge of his duties, the court will not reverse a conviction where it appears that the prisoner was convicted only of an assault in the third degree. *People v. Doyle* (Sup. Ct. 3 D. 1896), 11 A. D. 447; 76 S. R. 319; 42 S. 319.

**Bribery.**—Where an indictment contains counts charging bribery followed by a count charging extortion, and the latter count contains a reference to the preceding counts which, if permitted to be employed, renders it insufficient, and, upon the trial, the prosecution elects to go to the jury upon the extortion count alone, but, with the consent of the defendant, the other counts are retained for the purpose of reference, and the trial results in a disagreement of the jury, the court has the power, on a subsequent trial of the indictment, to refuse to strike out the bribery counts, and may retain such portion thereto as is necessary to explain the reference in the counts for extortion. *People v. McLaughlin*, 150 N. Y. 365.

**Conspiracy.**—The defendants cannot be convicted of conspiracy unless proof is given on the part of the people sufficient to establish to the satisfaction of the jury one or more

of the specific overt acts charged. *People v. Willis*, 158 N. Y. 392. See, also, *People v. Rathbun*, 44 Misc. 88.

**False Pretenses.**—In cases of indictment under section 566 of the Penal Code, it is unnecessary for the people to allege the value of the instrument which the complainant was induced to sign by the false pretense of the defendant. *People v. Jeffery*, 63 St. Rep. 588; 82 Hun, 409; 31 Supp. 267.

An indictment for false pretenses, under section 528 of the Penal Code, should state, with reasonable certainty, the representations actually made, the falsity thereof, and the facts intended to be relied upon to establish such falsity. *People v. Winner*, 61 St. Rep. 783; 80 Hun, 130; 30 Supp. 54.

**Forgery.**—An indictment, which alleges that the defendant, being an attorney of the supreme court, did wrongfully and unlawfully, with intent to deceive, "alter and falsify the order and decree of the surrogate of Erie county;" setting out in full the order of the surrogate, and containing the usual formal allegations required in forgery indictments, is sufficient to charge a crime under this section. *People v. Oishei*, 12 N. Y. Cr. 362; 79 S. R. 49; 45 S. 49.

**Form.**—This section contains a form of indictment under the Code. *People v. Rockhill*, 55 St. Rep. 683; 22 N. Y. Supp. 222.

**Larceny.**—Where an indictment, in addition to the allegations necessary to establish the offense of grand larceny, contains allegations of conspiracy, it cannot be said to charge separate crimes, when the acts of conspiracy were manifestly initiatory of, and were merged into and consummated by, the crime of larceny. *People v. Wicks* (Sup. Ct. 4 D. 1896), 11 A. D. 539; 76 S. R. 630; 42 S. 630.

**Murder.**—An indictment in common law form, stating the facts constituting the crime and charging the killing to have been done willfully, feloniously and with malice aforethought, is sufficient to sustain a conviction of murder in the first degree, if the proof as to the manner of the commission of the crime brings it within one of the statutory definitions. *People v. Constantino*, 153 N. Y. 24; 13 N. Y. Cr. 390.

**Statute.**—If there is an exception, not in the enacting clause, but in a subsequent clause or statute, the indictment need not negative it, but it is a matter of defense to be shown by the defendant. *People v. Crotty*, 12 N. Y. Cr. 473; 81 S. R. 845; 47 S. 845.

An indictment for larceny, under subdivision 2, section 528 of Penal Code, is sufficient where it alleges that the defendant, while having in his possession as "servant, agent, attorney and

bailee" the money in question, appropriated it to his own use. It is not necessary that the indictment should set forth the facts showing the agreement by which said relations were created. *People v. Dorthy*, 13 N. Y. Cr. 173; 80 S. R. 970; 46 S. 970.

In framing an indictment on a statute, all the circumstances which constitute the definition of the crime in the statute, so as to bring the accused precisely within it, must be stated. *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354. But no other description of the manner in which the offense was committed is necessary than that contained in the statute. *Id.*

An indictment for a statutory offense is sufficient when it charges the offense as the statute defines it. *People v. Flaherty*, 61 St. Rep. 198; 79 Hun, 48; 29 Supp. 641; *Phelps v. People*, 72 N. Y. 334; *Tully v. People*, 67 *id.* 15. When a crime has a general name, it is desirable, for certainty, that it be inserted in the indictment, as well as the act which constitutes it. *People v. Flaherty*, ante.

**Usury.**—In order to constitute a good plea of taking usury under this section, the allegations of the indictment must charge the usurious agreement, specifying its terms, and the particular facts relied upon to bring it within the prohibitive clause of the section. *People v. Hubbard*, 63 St. Rep. 399; 10 Misc. 104; 31 Supp. 114.

278. See *People v. Rockhill*, 55 St. Rep. 683 26 N. Y. Supp. 222; *People ex rel. Young v. Hannan*, 61 St. Rep. 726; 9 Misc. 600; 30 Supp. 370; *People v. O'Malley*, 52 App. Div. 46; *People v. Frazier*, 16 N. Y. Crim. Rep. 226; 36 App. Div. 280.

An indictment of one count which, in terms, charges the defendant with the crime of auditing and allowing, as a public officer, a false and fraudulent claim, is not bad for duplicity, because, in addition to stating acts constituting the crime charged, it also states acts constituting the crime of fraudulently presenting a false account to a public officer for allowance. *People v. Klipfel*, 160 N. Y. 371.

The fact that an indictment in one count describes more than one crime does not render it bad for duplicity, provided only one crime is charged. *People v. Klipfel*, ante.

**Duplicity.**—An indictment containing but one count and charging therein two distinct crimes, is bad for duplicity. *People v. Klipfel*, 160 N. Y. 371. The objection not only may, but must be taken by demurrer. *Id.*; *People v. Tower*, 135 *id.* 457.

**Excise.**—A deposition charging a violation of section 31 of chapter 401 of 1892, may properly charge separate and distinct offenses. *People v. Shaver*, 37 A. D. 21; 89 S. R. 701; 55 S. 701.

**Forgery.**—An indictment, which charges, in the same count, the offense of uttering forged paper and also inducing another person to commit the crime of forgery, is defective. *Id.*

An indictment, which alleges, in one count, the forging of an instrument with intent to defraud a certain person by offering it to him in payment of goods purchased, charges but one offense and contains only the plain and concise statement of the act constituting the crime, which the statute requires. *People v. Altman*, 70 S. R. 66; 147 N. Y. 473.

**Fraudulent demand.**—An indictment, which charges that defendant is a public officer, authorized to take part in the auditing of accounts against the county, and that he corruptly and dishonestly aided in the adoption of a resolution, allowing the fraudulent demand set forth in the indictment, and directing its payment by the auditor; and also charges in the same count, that he did, knowingly and corruptly, present such fraudulent claim to the auditor for payment, is bad for duplicity. It charges two offenses in one count, one under section 165, the other under section 672 of the Penal Code. *People v. Stock*, 21 Misc. 147; 12 N. Y. Cr. 420; 81 S. R. 96; 47 S. 96.

Although the presentation of a claim by a supervisor to the auditor, if it were fraudulent, were a crime within the provisions of section 672 of the Penal Code, and not within the provisions of section 165, under which he was indicted, yet the fact that certain of the defendant's acts alleged in the indictment, when standing alone, constituted a crime under section 672, did not render the indictment demurrable under this and section 279, where those acts were essential ingredients of the crime specified in section 165. *People v. Coombs* 36 A. D. 284; 89 S. R. 276; 55 S. 276.

**Larceny.**—Grand Larceny and the crime of receiving stolen goods, knowing them to have been stolen, are separate, distinct and independent offenses, requiring different kinds of proof. *People v. Kerns* (Sup. Ct. 4 D. 1896), 7 A. D. 535; 40 S. 243; *People v. Baker*, 3 Hill, 159; *Hawker v. People*, 75 N. Y. 490; *People v. Bruno*, 6 Parker, 664; *People v. O'Brien*, 53 Hun, 496. If more than one crime is charged in the indictment, the defendant may demur to the indictment for that reason. *People v. Kerns*, ante. If the objection is not taken by demurrer, it is waived. *Id.*; *People v. McCarthy*, 110 N. Y. 309; *People v. Upton*, 38 Hun, 107.

**Murder.**—An indictment for murder in the first degree, which sets forth that by certain means the death of the deceased was accomplished, and that from the wounds and injuries which he received he died, charges but one crime and in one form. *People v. Connors* (Ct. Sess. 1895), 70 S. R. 169; 13 Misc. 582.

**One crime.**—An indictment drawn under sections 508 and 688 of the Penal Code, is for but one crime, but, to determine its grade, it is competent to prove, when charged, that the defendant has been guilty of a previous offense. *People v. Reilly*, 97 S. R. 18; 63 S. 18.

**Same crime.**—Where the accusation is of the commission of a certain crime, and the indictment sets forth two or more offenses of the same nature, based upon the same or a continuous set of facts, either of which offenses make him guilty of the same crime, it is not within the inhibition of this and the following section. *Id.*

**Separate counts.**—An indictment which, in separate counts, charges the crime to have been committed in one, or the other, manner, is sufficient. *People v. Adler*, 55 St. Rep. 669; 140 N. Y. 331; *aff'g* 53 St. Rep. 936.

This section provides that the indictment must charge but one crime, and in but one form; but it is permitted, by the next section, to charge the crime in the separate counts to have been committed in a different manner, or by different means, or where the acts complained of may constitute separate crimes, to charge the different crimes in separate counts. *People v. Sebring* (Sup. Ct. O. & T. 1895), 69 S. R. 612; 14 Misc. 31.

Under the law prior to the enactment of the Code of Criminal Procedure, the joinder of separate and distinct misdemeanors were allowable, when followed by a single sentence. *People v. Polhamus* (Sup. Ct. 3 D. 1896), 8 A. D. 133; 40 S. 491; *Polinsky v. People*, 73 N. Y. 69. This rule has been changed by the Code, so far as indictments are concerned, by the provisions of the above section. *Id.* This section is not made applicable to proceedings in courts of special sessions. *Id.*

See *People v. Wilson* (Sup. Ct. 1 D. 1896), 7 A. D. 326, 335; 40 S. 107.

The effect of these provisions of the Code of Criminal Procedure is to permit a continuance of the former practice of joining different crimes by separate counts when they all relate to the same transaction. *People v. Wilson*, 151 N. Y. 403; *aff'g* 7 A. D. 326; 40 S. 107.

**Two offenses.**—In *People v. Tower*, 48 St. Rep. 438; 135 N. Y. 57, the indictment, in a single count, charged the defendant with forging a note and with uttering the same. It was held that the indictment was bad for charging two distinct offenses in a single count. In other words, it would be a violation of the Code to unite two offenses in a single count in an indictment. See *People v. Adler*, ante.

9. See *People ex rel. Young v. Hannan*, 61 St. Rep. 726; 135 Misc. 600; 30 Supp. 370. Election between charge of rape and assault. See *People v. Adams*, 16 N. Y. Crim. Rep. 454; 10 App. Div. 166.

See annotations under preceding section of this Code.

**“May” defined.**—The other provisions of the Code in relation to indictments prohibit the use, in this section, of the word “may” as “must,” and render the ordinary, permissive meaning of the word to be proper meaning to be given to it. See *People v. Rockhill*, 55 St. Rep. 683; 26 N. Y. Supp. 222.

**Counts.**—The principle that, where there are several counts, each of which are good, each founded upon the same transaction but varying in some detail to meet the proof which may be offered, and there is a general verdict of guilty on all the counts, the conviction will not be reversed because of a defective count, has no application, where the offense is properly charged in all the counts, and there is no defective count. See *People v. Van Zile*, 62 St. Rep. 357; 143 N. Y. 368; 38 N. Y. Rep. 380.

The effect of the provision of this section, that, “where the offense complained of may constitute different crimes, such offenses may be charged in separate counts, constituting an exception to the provisions of section 278, that the indictment shall charge but one crime,” is to permit a continuance of the former practice of joining different crimes by separate counts, where they all relate to the same transaction. *People v. Condon*, 151 N. Y. 403; 45 N. E. 862; *People v. Huffman*, 24 App. Div. 233; 82 S. R. 482; 48 S. 482.

This section permits the crime “to be charged in separate counts to have been committed in different manner, or by different means,” or where the same acts constitute different offenses they may be set out in the indictment in separate counts. *People v. Stock*, 21 Misc. 147; 12 N. Y. Cr. 420; 81 App. Div. 96; 47 S. 96; *People v. Wilson*, ante; *People v. Adler*, 16 N. Y. 331; 35 N. E. 644.

In this state, whether the people shall be required to elect between offenses is largely in the discretion of the trial court. *People v. Hart*, 84 S. R. 574; 50 S. 574; *People v. Baker*, 3 Hill, 159;



*People v. Austin*, 1 Park. R. 154; *Nelson v. People*, 23 N. Y. 293, 297; *People v. Wright*, 136 N. Y. 625, 631; 32 N. E. 629.

**Murder.**—Where an indictment for homicide charges the crime to have been committed in but one way, and that by violence, it does not come under this section. *People v. Connors* (Ct. Sess. 1895), 70 S. R. 169; 13 Misc. 582.

**280. Time.**—It is not necessary to state in an indictment the precise time at which the crime was committed. *People v. Polhamus* (Sup. Ct. 3 D. 1896), 8 A. D. 133; 40 S. 491.

Under an indictment charging defendant with having sexual intercourse with a female under sixteen years of age, time is not a material ingredient of the felony charged, except that the act charged as a crime must have been committed before the girl became sixteen years of age. *People v. Flaherty*, 84 S. R. 574; 50 S. 574.

Where the deposition alleges sales of liquors within three months, to other parties not named, it is not necessary to state the precise time at which, or the names of the persons to whom, such sales were made. *People v. Shaver*, 37 A. D. 21; 89 S. R. 701; 55 S. 701.

**282. Sufficient.**—An indictment for grand larceny in the second degree which charges the defendant with stealing "one hundred and fifty dollars of the kind of money or the denomination of which is to this grand jury unknown," is sufficient. *People v. Spencer*, 27 Misc. 491; 92 S. R. (58 S.) 1127.

The allegation must be deemed equivalent to saying that the defendant stole one hundred and fifty dollars in money of lawful value and that the grand jury do not know whether the money was in bills, gold or silver, or what was the size of the bills or coin. *Id.*

Testimony that defendant had a wife living at the time of his marriage with abducted female is incompetent. *People v. Cerami*, 101 App. Div. 366.

**283. Statute.**—This section does not require that the words used in the statute need be strictly pursued in an indictment, but the indictment is good if it follows the language of the statute defining the crime. *People v. Cleary* (Ct. Sess. 1895), 70 S. R. 209; 13 Misc. 546.

See *People v. Flaherty*, 61 St. Rep. 198; 79 Hun, 48; 29 Supp. 641.

**284, subd. 6.**—This subdivision provides that an indictment shall be held sufficient, when the act or omission, charged as the crime is plainly and concisely set forth. *People v. Evans*, 53 St. Rep. 591, 594; 69 Hun, 226; 23 N. Y. Supp. 717.

It is not necessary that the offense should be charged in the language of the statute, but it is sufficient if the criminal act is set forth by words which plainly describe the offense, though words other than those of the statute are used. *People v. Helmer*, 13 A. D. 426; 77 S. R. 642; 43 S. 642.

Court has no power to amend indictment for abandoning child under 14 by inserting statement that child was under 6 years of age. *People v. Trank*, 88 App. Div. 294.

**Sufficient.**—An indictment is sufficient if the act or omission charged as a crime is plainly and concisely set forth with such a degree of certainty as to enable the court to pronounce judgment according to the right of the case. *People v. Helmer*, 154 N. Y. 596; 13 N. Y. Cr. 1. No indictment is insufficient by reason of any imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant, upon the merits. *Id.*

See *People v. Rockhill*, 55 St. Rep. 684; 26 N. Y. Supp. 222; *People v. Evans*, 53 St. Rep. 591; 69 Hun, 226; 23 N. Y. Supp. 717.

See *People v. Peckens*, 153 N. Y. 576, 587.

**285. Matter of form.**—No indictment is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of an imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits. *People v. Spencer*, 27 Misc. 491; 92 S. R. (58 S.) 1127.

If it can be understood from the indictment that the act constituting the crime is plainly and concisely set forth and with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case, the indictment is sufficient. *Id.*

An indictment which is sufficient to inform the defendant of the nature of the accusation against him; to enable him to prepare his defense; to leave the court in no doubt as to the act for which it should inflict punishment, in event of conviction; to admit of the record as a bar to a second prosecution for the same offense, meets the requirements of the Code. *Id.*

**Compensation.**—The intention was to limit the aggregate compensation of counsel, continuously employed in the case, to the sum of \$500. *People ex rel. Czaki v. Coler*, 44 A. D. 183; 94 S. R. (60 S.) 656.

The section refers to services rendered by counsel in pursuance of an assignment in a case where the offense charged

in the indictment is punishable by death, or on appeal from a judgment of death. *Id.*

The limitation of the sum to \$500 is for services extending through the whole case and in all its stages, and there is no authority to grant more than \$500 and expenses to the counsel who conducts the defense at the trial and argues the appeal. *Id.*

Actual expenses on the appeal may be allowed under the original appointment, but nothing more. *Id.*

When services are rendered by counsel, assigned by the court, on an appeal from a judgment of death, the court by which the appeal is finally determined may allow such counsel his personal and incidental expenses and reasonable compensation for his services in such court, not exceeding the sum of \$500. *People v. Barone*, 161 N. Y. 475.

The failure of counsel for defendant on appeal in a capital case, to aid the court by causing a case to be made so as to simplify and shorten the examination of the record, may properly be considered in passing upon his application for compensation under this section. *Id.*

Upon appeal in a case in which the indictment was found after the amendment of 1897, a case should be made, settled and signed, containing only so much of the evidence and proceedings as is material to the questions to be raised, and it is improper to bring up a transcript of the stenographer's minutes. *Id.*

**Sufficient.**—Where an imperfection in failing to charge two crimes, arising from one act, in separate counts, if any exists in such case, is not such as to prejudice the defendant, the indictment is sufficient under this section. *People v. Rockhill*, 55 St. Rep. 683; 26 N. Y. Supp. 222.

See *People v. Flaherty*, 61 St. Rep. 198; 79 Hun, 48; 29 Supp. 641. See *People v. Mosier*, 16 N. Y. Crim. Rep. 540.

286. See *People v. Flaherty*, 61 St. Rep. 198; 79 Hun, 49; 29 Supp. 641.

289. This section dispenses with an averment connecting the defendant with the defamatory words, but not with proof. *People ex rel. Paddock v. Carroll*, 48 App. Div. 201; 14 N. Y. Crim. Rep. 402.

293. **Variance.**—Under this section, the variance between the indictment and the proof, in that the former charged that the claim was presented to the auditor of the city, while the proof tended to show that the claim was submitted for action to the second deputy auditor, could have been cured by an

amendment to the indictment. *People v. Coombs*, 36 A. D. 1; 89 S. R. 276; 55 S. 276.

Court has no power to amend indictment for abandoning child under 14 by inserting statement that child was under 6 years of age. *People v. Trank*, 88 App. Div. 294.

**308. Allowance.**—Legislature intended to limit the aggregate amount to be allowed to counsel assigned by the court to defend a person indicted for an offense punishable by death to the sum of \$500, regardless of the number of counsel assigned, and also to allow the personal and incidental expenses of the counsel. *People v. Heiselbetz*, 85 S. R. 685; 51 S. 685; 15 N. Y. Cr. 223. See 26 Misc. 100. See note, 15 Crim. Rep. 523.

It is constitutional, and the statute is not limited to an attorney assigned at the arraignment of the offender. *People ex rel. Acritelli v. Grout*, 87 App. Div. 193. Allowance to counsel. *People v. Di Medicis*, 39 Misc. Rep. 438; 17 N. Y. Crim. Rep. 163. No allowance to attorney defending a prisoner charged with murder where after the assignment he is found sane and committed to a state hospital. *People ex rel. Muller v. Coler*, 15 N. Y. Crim. Rep. 460. Employment of additional counsel by lawyer assigned not within meaning of words "personal and incidental expenses." *Matter of Waldheimer*, 15 N. Y. Crim. Rep. 381; 84 App. Div. 366. See *Limis v. Wang*, 61 App. Div. 426; *People ex rel. Muller v. Coler*, 61 App. Div. 538; *People ex rel. Cantwell v. Coler*, 15 N. Y. Crim. Rep. 320; 61 App. Div. 598; *People v. Fuller*, 15 N. Y. Crim. Rep. 473; 35 Misc. 189; *People v. Montgomery*, 101 App. Div. 338.

**313.** *People v. Winner*, 61 St. Rep. 786; 80 Hun, 130; 30 App. 54, and note under section 315, post.

The requirement that the court "must" set aside an indictment "in either of the following cases, but in no other," does not interfere with the discretionary power of the court to set aside an indictment for other sufficient reasons. *People v. Thomas*, 32 Misc. 170; 15 N. Y. Crim. Rep. 81; 100 St. Rep. 11. See, also, *People v. Glen*, 64 App. Div. 167; *People v. Montgomery*, 36 Misc. Rep. 326; 16 N. Y. Crim. Rep. 221. The fact that no order or permission has been obtained from the court to present the matter a second time to the grand jury, is no ground for setting aside an indictment. *People v. O'Connor*, 31 Misc. 668; 15 N. Y. Crim. Rep. 132. Motion to dismiss indictment may be entertained on other grounds than those specified in section. *People v. Glen*, 173 N. Y. 395; 17 N. Y. Crim. Rep. 225; affg. 64 App. Div. 167. Presence of attorney-general in grand jury-room. *People v. Kramer*, 15 N. Y. Crim. Rep. 257; 33 Misc. 209. This section does not authorize the

court to set aside an indictment on the ground that incompetent evidence was given before the grand jury. *People v. Sexton*, 42 Misc. 312.

**Dismissal.**—A motion to set aside or quash an indictment is restricted, excepting constitutional defects, to grounds specified in this section of the Criminal Code. *People v. Willis*, 23 Misc. 568; 86 S. R. 808; 52 S. 808; 13 N. Y. Cr. 255. Section 671 of such Code is merely a substitute for a *nolle prosequi* under the old practice. *Id.*

Motion made by defendants before trial to dismiss an indictment, except where constitutional rights of the defendants were affected, is limited to the two grounds specified in this section. *People v. Winant*, 24 Misc. 361; 87 S. R. 695; 53 S. 695.

**Motion to set aside indictment.**—On a motion to set aside an indictment, no other grounds than those specified can be considered. *People v. Rutherford*, 47 A. D. 209.

A motion to set aside an indictment can be made only in the two cases mentioned in this section. *People v. Rutherford*, 47 A. D. 209.

An order denying a motion to set aside an indictment made upon a ground not specified in that section is not appealable. *People v. Rutherford*, 47 A. D. 209.

This section is not exclusive and a County Court may set aside an indictment when it appears that it was not found on illegal or insufficient evidence. *People v. Bills*, 44 Misc. 348.

**321. Special Sessions.**—The provisions as to demurrers are not made applicable to proceedings in courts of special sessions. *People v. Polhamus* (Sup. Ct. 3 D. 1896), 8 A. D. 133; 40 S. 491; *People v. Scannel*, 16 N. Y. Crim. Rep. 266; 35 Misc. 483.

**323. Assignment.**—See *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354.

Though the provisions of section 2, article 6 of the Constitution, and of section 232 of the Code of Civil Procedure, limit the justice of the appellate division of the supreme court to assigning justices of the department in which the appellate division is located to the duty of holding trial terms therein, yet, if a justice of a department is assigned by the justice of another appellate division to hold a trial term in their department, by an assignment purporting to be made under the above section, such formal assignment is in effect a mere invitation; it may be accepted or declined, but if accepted by a justice, he has jurisdiction to hold the term, provided he is not a member of an appellate division, by force of section 6, article 6 of the Constitution. *People v. Herrmann*, 140 N. Y. 190.

**Different counts.**—An indictment which, charging the defendant with the crime of forgery in the second degree, sets forth the different means, by which it was committed, in different counts, is not demurrable. *People v. Adler*, 55 St. Rep. 569; 140 N. Y. 331; aff'g 53 St. Rep. 936.

**Ground of.**—It is ground of demurrer, under this section, if the indictment does not substantially conform to the requirements of sections 275 and 276, ante. *People v. Stone*, 55 St. Rep. 673; 85 Hun, 130; 32 Supp. 511.

**Joint sale.**—An indictment, which charges that on a specified day two persons named "willfully and maliciously, wrongfully and unlawfully did sell and cause to be sold, distilled, etc., liquors, ale, beer, and wine in quantities of less than five gallons at a time by retail to be drank on the premises, to A, B, and divers other persons, etc.," charges a joint sale to the persons named, etc., and is not demurrable as joining two crimes. *People v. Schmidt*, 19 Misc. 458; 12 N. Y. Cr. 282; 78 S. R. (44 S.) 607.

**Sub. 3.** As to demurrer to indictment for receiving stolen property. See *People v. Hartwell*, 15 N. Y. Crim. Rep. 377; 166 N. Y. 361.

The objection that an indictment charges more than one crime, viz., a conspiracy as well as false pretenses, in violation of subd. 3, cannot be raised on an appeal from a judgment of conviction, but only on demurrer. *People v. Wiechers*, 94 App. Div. 19.

327. See *People v. Gluckman*, 15 N. Y. Crim. Rep. 441.

**331. When taken.**—This section of the Code excepts from its provisions that the objections mentioned in section 323, post, can be raised only by demurrer, but provides that the objection that the facts stated do not constitute a crime may be taken at the trial, under the plea of not guilty, and in arrest of judgment. *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354.

Where no demurrer to indictment, discussion limited to objections that the court had no jurisdiction over the subject of indictment and that the facts stated did not constitute a crime. *People v. Goslin*, 16 N. Y. Crim. Rep. 55; 67 App. Div. 16.

**332. Former acquittal.**—The plea of former acquittal is not sustained, unless there was a lawful trial and conviction. *People v. Connor*, 58 St. Rep. 632; 142 N. Y. 130; aff'g 48 St. Rep. 25. If the former trial was before a court, one of the members of which was related to the defendant within the prohibited degree, then the court was improperly constituted and without jurisdiction in the case. *Id.* The result would be a mis-trial and no bar to another trial. *Id.*



**Plea of guilty.**—This section does not provide that a man may not plead guilty of any crime whatever, but simply that no man shall be convicted upon such a plea, where the punishment is by death or imprisonment for life. *People v. Smith*, 60 St. Rep. 246; 78 Hun, 179; 28 Supp. 912.

**Separate trials.**—The defendant has no right to separate trials before separate juries of each issue raised by the pleadings. *Id.* Where there are but one indictment and one charge, the defendant's plea constitutes his answer and defense to the accusation, and he is entitled to but one trial and can demand but one jury. *Id.* The order in which the issues should be disposed of is a matter in the discretion of the court, which has power to direct them to be tried separately or together. *Id.*

**334.** A plea for former jeopardy which fails to allege either a former conviction or a former acquittal, as required by subdivision 4 of section 334 of the Code of Criminal Procedure, is insufficient and presents no issue of fact for the determination of the jury. *People v. Smith*, 177 N. Y. 210. See, also, *People v. Scannell*, 16 N. Y. Crim. Rep. 266; 35 Misc. 483.

**335. Withdrawal.**—It is discretionary with the court whether it will allow a defendant to withdraw a plea of not guilty in order that he may make a motion to set aside an indictment upon the ground that there were more persons acting upon the grand jury than were by law entitled to act thereon. *People v. Doyle* (Sup. Ct. 3 D. 1896), 11 A. D. 447; 76 S. R. 319; 42 S. 319.

**344. Removal.**—The defendant has a right to apply for a removal of the action to another county before trial upon the ground that a fair and impartial trial cannot be had in the county where the venue was laid. *People v. McLaughlin*, 150 N. Y. 365. A special term has no jurisdiction to set aside a discretionary stay granted by a judge, in order to furnish time for an application to remove the place of trial. *Id.*

**346. Change of place of trial.**—This section requires that a notice of at least ten days shall be given by a defendant in a criminal action of a motion to the supreme court to change the place of trial to another county on the ground that a fair and impartial trial cannot be had in the county where the indictment was found. *People v. McLaughlin* (Sup. Ct. Sp. T. 1895), 69 S. R. 252; 13 Misc. 287. When such a notice is given, the supreme court has no jurisdiction to order the defendant to make his motion forthwith. *Id.*

**Where made.**—This section provides that a motion to change the place of trial of any criminal action must be made to the supreme court at a special term in the district upon notice of at least ten days to the district attorney of the county where the indictment was pending, with a copy of the

affidavits or other papers upon which the application was founded. *People v. McLaughlin* (Sup. Ct. 1 D. 1896), 2 App. Div. 408.

Such time the court cannot properly, by an order to show cause, shorten. *Id.* But, if it does so, its action is erroneous, but not void. *Id.* The defendant has a right to say, when a motion to change the place of trial of an indictment shall be made. *Id.* If the day which he fixes is so far off that a delay of the trial until that time will obstruct the administration of justice, the court may vacate the stay granted upon a proper motion for that purpose, or may impose an earlier hearing of the motion as a condition of allowing the stay to remain in force. *Id.* But the court has no power to fix any other time than that named by the defendant for the hearing of the motion. *Id.*

**347. Stay.**—See *People v. McLaughlin* (Sup. Ct. Sp. T. 1895), 69 S. R. 252; 13 Misc. 287.

The act provides that to enable the defendant to make the application, a justice of the supreme court may, in his discretion for good cause shown by affidavit, make an order staying the trial of an indictment until the hearing and decision of the motion. *People v. McLaughlin* (Sup. Ct. 1 D. 1896), 2 App. Div. 408.

**358.** See *People v. Neidhart*, 15 N. Y. Crim Rep. 398.

**361.** See *People v. Bbell*, 180 N. Y. 470.

**362.** See *People v. Schmidt*, 168 N. Y. 569.

**363.** See dissenting opinion in *People v. Olmstead*, 56 St. Rep. 314; 74 Hun, 323; 26 N. Y. Supp. 818.

**376. Disqualification.**—A juror cannot be disqualified by asking questions with reference to his views, or to the effect that would be produced upon his mind by certain evidence which may be introduced on the trial. *People v. Hughson*, 84 N. Y. 153; 12 N. Y. Cr. 485. The fact that the juror does not approve of the carrying of a revolver or other concealed weapon in violation of the statute, does not necessarily disqualify him from serving upon a jury, or prevent him from determining the guilt or innocence of the accused as an impartial juror. *Id.*

Where it is obvious from the proof given that the juror whose name is called is not competent or indifferent between the parties the court may, even in the absence of a formal challenge, reject or excuse him. *People v. Decker*, 157 N. Y. 86; 13 N. Y. Cr. 364. Where it is manifest from the juror's own statement that, if the case assumes a condition that is able to arise on the trial, he will not be controlled by the law and evidence, he should not be permitted to serve as a

juror in a case where such a question may be involved. *Id.* Where, when the impanelling of a jury is completed, the defendant still has a number of peremptory challenges, so that he may challenge any juror upon the panel with whom he was not satisfied, his substantial rights are not so affected as to warrant a reversal of his conviction. *Id.*

**Foreign nationality.**—The question as to the capacity of a juror of foreign nationality to understand the language in which court proceedings are conducted, his general intelligence, his power of comprehending the evidence as offered by the witnesses, and many other points, must necessarily be considered by the court in determining the general competency of a juror. *People v. Spiegel*, 56 St. Rep. 727; 75 Hun, 161; 26 N. Y. Supp. 1041. In the case last cited, the trial court held, from what appeared before it upon the examination of the juror, that he was not competent to serve, because of his possible unfamiliarity with the language, and because his business was such that his attention would be distracted. The appellate court held that such findings should not be lightly interfered with, and that it was not so clearly shown that the juror was competent that it would reverse the conviction upon such ground.

**General.**—The constitutional provision does not, however, prevent the legislature from regulating the method of procuring and impanelling a jury; and, if the defendant does not take advantage of statutory provisions designed to protect his rights, he should not complain, in the absence of proof of injury. *People v. Mack*, 35 A. D. 114; 88 S. R. 698; 54 S. 698; 13 N. Y. Cr. 401.

**Incompetent.**—A juror who, on challenge, testifies in substance that he will not give the proper effect to the testimony of an accomplice or informer, where such witness will be sworn on the part of the people, is not indifferent between the parties. *People v. Mahony*, 56 St. Rep. 143; 73 Hun, 601; 26 N. Y. Supp. 257.

**Intelligent.**—The question whether a trial juror, in a criminal action, is intelligent, within the meaning of section 1079 of the Code of Civil Procedure, is one to be decided by the trial judge, and the decision must rest in his good judgment and sound discretion. *People v. McLaughlin* (Sup. Ct. 1 D. 1896), 2 App. Div. 419. It must be determined from the evidence given by the jurors themselves, the manner in which they answer the questions put to them, their demeanor while under examination, their appreciation and understanding of the language used in the questions addressed to them, and

their appreciation of the questions of fact and the principles of law to which their attention is called. *Id.*

The employment of extraordinary educational tests in the examination of jurors is not to be encouraged. *People v. McLaughlin*, 150 N. Y. 365.

**Opinion.**—Unless satisfied that the juror does not entertain such present opinion or impression as will influence his verdict, a challenge must be sustained under the last part of this subdivision. *Id.* But, if the juror on oath states that he believes that an opinion or impression formed with reference to the guilt or innocence of the defendant will not influence his verdict, the juror is competent within the language of the second part of this subdivision. *Id.* The declaration of the juror upon this point must be equivocal and cannot be qualified or conditional. *Id.* The extent of the examination to which the trial juror can be subjected is largely in the discretion of the trial judge. *Id.*

The existence, on the part of a person called as a juror, of an opinion as to the guilt or innocence of a person charged with a crime constitutes *prima facie* a disqualification. *People v. Wilmarth*, 156 N. Y. 566; 13 N. Y. Cr. 286. But it does not conclusively establish disqualification, for the statute steps in and provides that the existence of such an opinion or impression “is not sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict, according to the evidence, and the court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict.” *Id.* After a juror makes the declaration provided for by the statute, then it is for the trial court to determine whether the juror does not entertain such a present opinion or impression as will influence his verdict; and the decision made in such a case is necessarily one of fact, not reviewable in this court. *Id.* But, if he fails to make such a declaration, then the disqualification *prima facie* established by his answers is not overborne, and a decision by the trial court that the juror does not entertain such a present opinion or impression as will influence his verdict is without evidence to support it. *Id.*

**Overruling challenge for cause.**—There has been some misapprehension as to the rule governing appellate courts in reviewing decisions of trial courts overruling challenges for cause made by defendants in criminal cases. *People v. Larubia*, 55 St. Rep. 457; 140 N. Y. 87; *aff’g* 53 St. Rep. 415.

In *Freeman v. People*, 4 Denio, 9, some of the challenged jurors were allowed to sit and others were peremptorily challenged, after the challenge for cause by the defendant had been overruled. It was held that, as to the jurors who, after challenge for cause had been overruled, were excluded upon peremptory challenge, the exceptions taken upon the trial of the challenge were unavailable. The decision of the court in this case, that the use of a peremptory challenge, after challenge for cause has been overruled, precludes the party from availing himself of any exception taken upon the trial of the challenge for cause, has never been overruled. See *People v. Larubia*, ante. This point was not involved in the case of *People v. McQuade*, 18 St. Rep. 288; 110 N. Y. 284. The doctrine was explained and, perhaps, qualified in *People v. Casey*, 96 N. Y. 115, which held that it did not apply in a case where it appeared that, before the jury were fully impanelled, all the peremptory challenges of a defendant had been exhausted.

The cases of *People v. Bodine*, 1 Denio, 281, and *Freeman v. People*, 4 id. 9, established the principle that an error in the ruling of the trial judge on the trial of a challenge for cause, interposed by the defendant, to which exception was duly taken, was not waived by the omission of the defendant to exercise the right of peremptory challenge though, when the jury was completed, he had peremptory challenges unused.

The court of appeals, in *People v. McQuade*, 18 St. Rep. 288; 110 N. Y. 284, followed the decisions in *People v. Bodine* and *Freeman v. People*, supra, upon this point. See *People v. Larubia*, ante.

In *People v. McQuade*, ante, three jurors challenged by the defendant for bias were held by the trial court to be competent, and to this ruling exception was taken by the defendant. The challenged jurors sat as jurors in the case. The court of appeals held that the jurors challenged were not competent, and that the challenges should have been sustained. The point was taken in behalf of the people that the defendant could have challenged them peremptorily, and that no legal injury resulted from the erroneous ruling since it appeared that, when the jury was sworn, the defendant had four available peremptory challenges. The court overruled this contention upon the authority of *People v. Bodine* and *Freeman v. People*, ante.

In *People v. Carpenter*, 1 St. Rep. 648; 102 N. Y. 240, the doctrine of *Freeman v. People*, ante, was, in substance, reas-

serted by the court, but the decision was placed on the ground that the jurors challenged were competent. See *People v. Larubia*, ante.

In the case last cited, the challenged person did not sit as a juror. The defendant did not see fit to stand upon his exception to the competency of the juror, but excluded him upon peremptory challenge, and, when the jury was sworn, he had a large number of peremptory challenges unused.

**Qualification.**—In case the challenged juror testifies that he believes that, notwithstanding the opinion he has formed, such opinion or impression will not influence his verdict, and that he can render an impartial verdict, it is not error to receive him as a juror. *People v. Flaherty*, 84 S. R. 574; 50 S. 574; *People v. Cornetti*, 92 N. Y. 85; *People v. Carpenter*, 102 id. 238; 6 N. E. 584; *People v. McGonegal*, 136 N. Y. 62; 32 N. E. 616. An opinion formed because defendant had been suspended from the priesthood does not necessarily render a juror incompetent. *Id.*

Where a juror states that he has a decided opinion as to defendant's guilt or innocence which it would take evidence to remove, and that he does not think he would be prejudiced, challenge for actual bias should be sustained. *People v. Wilmarth*, 85 S. R. 688; 51 S. 688; 13 N. Y. Cr. 227.

**Relationship.**—A verdict should not be set aside on the ground that one of the jurors was disqualified by consanguinity to the successful party, unless it be shown that injustice has been done, though the fact of relationship was not known to the defeated party until after the trial. *People v. Mack*, 35 A. D. 114; 88 S. R. 698; 54 S. 698; 13 N. Y. Cr. 401.

**Reversal.**—It is not sufficient ground for a reversal that the jury, while in charge of two officers, attended church, though the topic of the sermon was the prevalence of crime, where the officers, as soon as they discovered that anything might be said which would prejudice the jury, at once left the church with them, and the court out of extreme caution instructed them that no opinion expressed by the pastor should have the slightest weight or influence upon their minds, but that their verdict must be based solely upon the evidence produced before them. *People v. Constantino*, 153 N. Y. 24; 12 N. Y. Cr. 399.

**Review.**—Under these sections, it has been held that the decision of the trial court on the question of indifferency of a juror is not reviewable except in the absence of any evidence to support it; and so, where the challenge is overruled, the decision may not be reviewed, unless the evidence discloses a



condition of mind on the part of the juror which, as matter of law, renders him incompetent, for actual bias. *People v. Flaherty*, 84 S. R. 574 (50 S. 574); *People v. McQuade*, 110 N. Y. 284; 18 N. E. 156; *People v. McGonegal*, 136 N. Y. 62; 32 N. E. 616.

**Special jury.**—Chapter 378 of 1896, which provides for a special jury in criminal cases in each county having a certain population, is a general law, and does not violate section 18, article 3 of state Constitution. *People v. Dunn*, 31 A. D. 139; 88 S. R. 194; 54 S. 194; 13 N. Y. Cr. 263. Nor does it violate section 2 of article 1 of such Constitution. *Id.* Nor is said act unconstitutional on the ground that it deprives the accused of due process of law, in that it creates a special commissioner of jurors and gives him a power of selection which may possibly be abused. *Id.* Nor is it unconstitutional, in that it does not allow the accused an appeal from the decision of the trial court upon his challenges. *Id.*

The power of selection of jurors from the general list, conferred upon the special jury commissioner, does not delegate to him any judicial power in the determination of the qualifications of the ultimate trial jury, and does not deprive a defendant of the "due process of law," guaranteed by the Constitution. *People v. Dunn*, 157 N. Y. 528. The act does not involve any unequal discrimination against defendants in criminal cases, in respect to the classes of jurors for the trial of civil and criminal cases respectively. *Id.* The act is not vitiated by the fact that it abrogates the privilege of an appeal from the rulings of the trial judge upon challenges to the special jurors. *Id.* See *People v. Flaherty*, 162 N. Y. 352; 15 N. Y. Crim. Rep. 11; *People v. Miller*, 17 N. Y. Crim. Rep. 263.

380. *People v. Larubia*, 53 St. Rep. 415, 417; 69 Hun, 197; 23 N. Y. Supp. 579; *aff'd*, 55 St. Rep. 457; already annotated.

385. **Order of challenge.**—Where the prisoner's counsel is, in no case and in no manner compelled to challenge the juror until after the prosecution has fully exhausted its right, there is a full compliance with the provision of this and the next section. *People v. Miles*, 62 St. Rep. 346; 143 N. Y. 383; 38 N. E. Rep. 456.

386. See notes under preceding section.

388. **Conduct of trial.**—This section expressly gives to the court the power, in its discretion in furtherance of justice, to permit evidence to be received out of its order and upon the original case even after a party has rested, if it is before the

case is finally submitted. *People v. Benham*, 160 N. Y. 402; *People v. Koerner*, 154 id. 355, 368.

**Improper remarks.**—Instructions to the jury do not always neutralize, either as a matter of law or fact, the effect of improper remarks in their presence. *People v. Fielding*, 158 N. Y. 542; *People v. Corey*, 157 id. 332, 346; *Brooks v. Rochester R. Co.*, 156 id. 244, 252; *People v. Hill*, 37 A. D. 327; *Swan v. Keough*, 35 id. 80.

After persisting in his efforts to protect his client until the court holds that he was out of order, the counsel for the defendant is not obliged to run the risk of punishment for contempt by continuing to object. *People v. Fielding*, ante.

When improper evidence has been received or improper statements made in the presence of the jury, if the court seeks to correct them, the correction should be as broad as the error, and cover substantially the same ground. *Id.*

A correction does not cure the error, where it does not go far enough and is not sufficiently clear and specific. *Id.*; *Coleman v. People*, 58 id. 555, 561; *People v. Gonzalez*, 35 id. 49, 59.

—**Subd. 1.** It is the right and duty of the counsel representing the people, upon the commencement of a criminal trial, to make a statement to the jury of the evidence that he expects to present, and the claim that he will make with reference thereto, to the end that the jury, upon listening to the evidence, may better understand and appreciate its connection and bearing upon the case. *People v. Benham*, 160 N. Y. 402.

—**Subd. 4.**—A characterization of the defendant, by the district attorney in summing up, objected to as not warranted by the evidence, is sufficiently retracted by asking the jury to disregard and forget what he had said, and to only consider the evidence upon the subject. *People v. Benham*, 160 N. Y. 402; *People v. Fielding*, 158 id. 542; *Williams v. Brooklyn E. R. R. Co.*, 126 id. 96.

—**Subd. 5.**—Requests to charge, requiring facts to be established by evidence equivalent to “absolute and positive proof,” or to the effect that if there be “any doubt,” whether it amounted to a reasonable doubt or not, the jury should acquit, or merely argumentative requests, calling upon the court to instruct the jurors that circumstances were entitled to “great weight” in their minds, are properly refused. *People v. Benham*, 160 N. Y. 402.

The court, once having charged a proposition of law, can retract it and correct the charge made before the jury has determined any of the issues of the case. *Id.*

Where a matter embraced in a request has been fully and sufficiently submitted to the jury, there is no need of further instruction. *Id.*

The court will not be justified in disturbing the judgment below, on the ground that the charge of the trial judge was not impartial, but was highly prejudicial to defendant, where the charge, when taken together, was fair, impartial and correct, both as to the law and facts, and was as favorable to the defendant as he was entitled to under the evidence. *People v. Kennedy*, 159 N. Y. 346.

**Opening.**—It is the legitimate office and purpose of an opening in a criminal action to give the charge against the accused and the evidence to be presented by the public prosecutor to establish the commission of the crime and its perpetration by the defendant. *People v. Van Zile*, 56 St. Rep. 204; 73 Hun, 534; 26 N. Y. Supp. 390. Its scope and extent must be controlled by the trial judge in the exercise of a wise discretion. *Id.* It would require a plain violation of the rights of the defendant to induce an appellate tribunal to reverse a conviction for an erroneous opening for the prosecution. *Id.*

The reading of an indictment is but another way of stating what the district attorney expects to prove and if not done in bad faith, is not reversible error. *People v. Reilly*, 97 S. R. 18; 63 S. 18.

**Order of proof.**—The provisions of section 388 of the Criminal Code are a mere formulation of the rules which previously existed in regard to the order of proof in civil and criminal cases; but it is within the discretion of the court to vary these rules. *People v. Koerner*, 154 N. Y. 355; 12 N. Y. Cr. 503. It is within the discretion of the judge to admit testimony bearing upon the original case at a later stage of the trial, and unless such discretion is abused, it constitutes no error. *Id.*

**Recall of witness.**—It is reversible error for the judge to permit the recall of the officer to testify as to the tools after the case had been closed, that is a subject within the discretion of the trial court, with which this court should not interfere, except it be shown that it was abused or unreasonably exercised. *People v. Reilly*, 97 S. R. 18; 63 S. 18.

**389. Affirmative defense.**—There is no such thing as an affirmative defense in a criminal prosecution. *People v. Shanley*, 30 Misc. 290.

**Burden.**—It is from the beginning for the prosecution to prove that the act was unlawful; the burden is at no time on the defendant to establish "by a preponderance of evidence,"

or "to the satisfaction of the jury," or in any other way, that it was not unlawful. *People v. Shanley*, 30 Misc. 290.

**Presumption of innocence.**—A defendant in a criminal action is presumed to be innocent until the contrary is proved, and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. *People v. Kelly* (Sup. Ct. 3 D. 1896), 1 A. D. 495; 76 S. R. 756; 42 S. 756. This presumption is strengthened by the testimony as to the previous good character of the defendant when given by a large number of prominent citizens of the city and county where he had lived, which is uncontradicted by any evidence produced by the people. *Id.* In a doubtful case, such evidence is entitled to great weight. *Id.*; *Remsen v. People*, 43 N. Y. 6; *People v. Sweeney*, 133 *id.* 609; *Stover v. People*, 56 *id.* 315. Where a question of fact is to be determined on a criminal trial from circumstantial evidence, the facts proved must not only be consistent with and point to the guilt of the prisoner, but they must be inconsistent with his innocence. *Id.* Where different inferences may be drawn from the same circumstances it is the duty of the court to presume in favor of innocence rather than of intentional and guilty misconduct. *Id.*

**Reasonable doubt.**—It is the duty of the trial judge, on the trial of a criminal action, to instruct the jury, clearly and ungrudgingly, in behalf of the defendant that, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. *People v. Stephenson*, 66 St. Rep. 566; 32 Supp. 1122. Not only must the guilt of the defendant follow as the only conclusion of reason before a conviction may be had but, in addition to that, if a reasonable doubt follows, a conviction may not be had. *Id.* The term "beyond reasonable doubt," seems to be even stronger than "conclusively." *Id.* In a criminal action, the jury may not convict because on the whole they are reasonably certain of guilt. *Id.* On the contrary, to convict, they must be without a reasonable doubt, though there is a clear preponderance of evidence on the side of guilt. *Id.*

The burden of proof is upon the prosecution. *People v. Dwens*, 148 N. Y. 648. The defendant is presumed to be innocent until proved guilty beyond a reasonable doubt, and no inference of guilt can be founded upon circumstances except such as naturally or necessarily follow from the facts. *Id.* If the facts and circumstances are of such a character as to permit fairly an inference consistent with innocence, they cannot be regarded as evidence to support a conviction. *Id.* The general rule, in criminal cases, is that, where the evidence is

circumstantial, the facts shown must not only be consistent with, and point to, the guilt of the defendant, but must be inconsistent with his innocence. *Id.*

In every case, the prisoner upon trial is entitled to have an instruction that his guilt must be proved beyond a reasonable doubt. *People v. Friedland* (Sup. Ct. 1 D. 1896), 2 App. Div. 332. Such a doubt is not a mere guess or surmise that the man may not be guilty. *Id.* It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence. *Id.* It is one which arises from the evidence and its character, or from the absence of satisfactory evidence in the case. *Id.* If, upon a consideration of all the evidence in the case, with such presumptions and inferences as fair minded and intelligent men have a right to draw from the facts which have been established, the jury have such a conviction of the accused's guilt that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to himself, they may safely say that the case is established beyond a reasonable doubt. *Id.*

See *People v. Ledwon*, 153 N. Y. 10, 17; 12 N. Y. Cr. 385.

It must be founded in reason, and must survive the test of reasoning or the mental process of a reasonable examination. *People v. Barker*, 153 N. Y. 111.

It is error to charge that the case of the people can be established by a preponderance of evidence, instead of beyond a reasonable doubt. *People v. Shanley*, 30 Misc. 290.

390. See *People ex rel. Young v. Stout*, 63 St. Rep. 154; 81 Hun, 336; 30 Supp. 898, and notes under section 444 post.

392. See *People v. Nino*, 149 N. Y. 217.

See *People v. Pustolka*, 149 N. Y. 570.

**Attorney.**—The former attorney of a prisoner may disclose confidential communications, made to him after he has refused to act for the prisoner. *People v. Hess* (Sup. Ct. 3 D. 1896), 8 A. D. 143; 40 S. 486. The Code only includes a communication "made in the course of his professional employment." *Id.* The fact simply that the communication is confidential is not enough. *Id.*; *Renihan v. Dennin*, 103 N. Y. 579; *Haulenbeek v. McGibbon*, 60 Hun, 26. Whether the communication is privileged is a matter for the court to determine from the facts appearing. *People v. Hess*, ante; *Bacon v. Frisbie*, 80 N. Y. 394.

**Child.**—By this section, if the magistrate believes that a child under twelve years of age ought not to be subject to the obligation of an oath, he may, nevertheless, take his evidence not on oath. *People v. O'Brien*, 56 St. Rep. 352; 74 Hun, 264;

6 N. Y. Supp. 812. But, in such case, the evidence so taken is not sufficient to convict, unless corroborated or supported by other evidence. *Id.* See, also, *People v. Sexton*, 42 Misc. 312.

The law fixes no precise age within which children are excluded as witnesses. *People v. Linzey*, 61 St. Rep. 240; 79 Hun, 23; 29 Supp. 560. Their competency depends upon their intelligence, judgment, understanding and ability to comprehend the nature and effect of an oath. *Id.* If a witness is over fourteen (now twelve) years of age, the law presumes him to possess the requisite discretion and understanding. *Id.* If under that age, the duty devolves upon the trial court, in the exercise of a sound discretion, to determine whether the witness has the requisite capacity and intelligence; and this discretion will not be interfered with upon appeal except upon a clear showing of its abuse. *Id.* The trial, in the above cited case, took place before the amendment of 1892 to this section took effect.

The unsworn evidence of defendant's little ten-year-old daughter was held to have been properly received and her statement clearly supported by other evidence in the case, as required by this section of the Code. *People v. Pustolka*, 149 N. Y. 570.

Under this section, it is within the discretion of a magistrate to receive the sworn evidence of a child but seven years of age, but upon such evidence alone, the defendant cannot be convicted. *People v. Smith* (Sup. Ct. 3 D. 1895). 67 S. R. 670; 86 Hun, 485.

Where a child is, by reason of her youth and immature understanding, incompetent to give either sworn or unsworn testimony on the trial of a criminal action, her statements, made out of court, though in the presence of the defendant, are also incompetent. *People v. Quong Kun* (N. Y. Gen. Sess. 1895), 68 S. R. 139.

**Circumstantial evidence.**—When a criminal charge is sought to be sustained wholly by circumstantial evidence, the hypothesis of guilt or delinquency should flow naturally from the facts and circumstances proved and be consistent with them all. *People v. Fitzgerald*, 156 N. Y. 253; 13 N. Y. Cr. 36. The facts and circumstances must all be consistent with and point to the guilt of the accused not only, but they must be inconsistent with his innocence. *Id.*

Past transactions, involving suspicions of other possible wrong-doing, or acts from which inferences of moral turpitude may be drawn, should be excluded, unless they have some bearing on the main fact to be proved. *People v. Fitzgerald*,

156 N. Y. 253; 13 N. Y. Cr. 36.



156 N. Y. 253; 13 N. Y. Cr. 36. A circumstance which has no bearing on the case one way or the other, and will present the defendant to the jury in a very unfavorable light with respect to a transaction foreign to the issue, should be excluded. *Id.* Letter, written by bishop of diocese to defendant prior to commission of alleged crime, which has no tendency to throw light on the real question of fact involved in the case, and can only prejudice and mislead the jury, is inadmissible. *Id.* Question on cross-examination, which relates to the very transaction that the witness had described on his direct examination, and has a plain tendency to explain or modify it, is proper, and ruling excluding it is error. *Id.*

**Competent.**—A prisoner has no constitutional right to be convicted by evidence that shall be competent in every particular, though he has a constitutional right that the tribunal, before which the evidence is introduced, shall be constructed according to law. *People v. Spiegel*, 56 St. Rep. 727; 75 Hun, 161; 26 N. Y. Supp. 1041.

**Declarations of deceased.**—Where the people have been permitted to prove statements of the deceased made by her during her last illness, a statement, made by her to a third party about two weeks before death, that her husband had given her a disease and that both were using for it some medicine of his, is admissible as a part of the *res gestae*. *People v. Benham*, 30 Misc. 466.

**Dying declaration.**—The Code of Criminal Procedure, though, in prescribing the rights of a defendant in a criminal action, it provides that he is entitled "to be confronted with the witnesses against him in the presence of the court," except in certain cases was not intended to abolish the rule governing the admission of dying declarations. *People v. Corey*, 157 N. Y. 332; 13 N. Y. Cr. 384. The deceased is not a witness, within the meaning of such a provision or of the bill of rights, and it is sufficient if the defendant is confronted with the witness who testifies to the declaration. *Id.* A charge to the jury upon the subject of dying declarations that "it is the experience of mankind that the premonition of immediate death, from which there is no hope of recovery, is always sufficient to influence persons so situated to speak the truth," is erroneous. *Id.*

To render dying declarations admissible, it will not suffice to show that the declarant believed that he was about to die, but it must also be proved that he was at the time without any hope of recovery. Dissenting op. of Parker, J., in *People v. Chase*, 61 St. Rep. 42; 79 Hun, 206; 29 Supp. 376; *People v.*

**Smith**, 5 St. Rep. 759; 104 N. Y. 491-502. Before admitting them, it shall be made clearly to appear that the declarant was, in fact, resting under the shadow of death from the fatal stroke and so believed, entertaining no hopes of recovery. **People v. Smith**, ante. The fact that death does not follow speedily after the declaration, should have but little effect in determining the question as to the admissibility of the declaration. **People v. Chase**, ante. It is the condition of mind of the declarant which determines that question. *Id.* It is not necessary that any specific words or phrases shall be used by the declarant to exhibit the condition of mind requisite to make a dying declaration admissible. *Id.*

While the law recognizes the necessity of admitting dying declarations on a par with an oath in a court of justice, it does not, and cannot, regard them as of the same value and weight as the testimony of a witness given in a court of justice, under all the tests and safeguards which are there afforded for discovering the truth. **People v. Kraft**, 148 N. Y. 631; *aff'g*, 91 Hun, 474.

Dying declarations are not entitled to as much weight as should be given to the highest species of testimony, nor to as great weight as should be given to the same statement testified to by the declarant when in health and subjected to a cross-examination before the trial court. **People v. Kraft** (Sup. Ct. 1 D. 1895), 91 Hun, 474.

**Effect of evidence.**—Even in criminal prosecutions, the legislature may, with some limitations, enact that, when certain facts have been proved, they shall be *prima facie* evidence of the existence of the main fact in question. **People v. Cannon**; **People v. Quinn**; **People v. Bartholf**, 54 St. Rep. 431; 139 N. Y. 32; *aff'g*, 43 St. Rep. 427, and *rev'g*, 44 *id.* 920, and 49 *id.* 68; **Board of Excise Com'rs, etc., v. Merchant**, 2 St. Rep. 760; 103 N. Y. 143, and cases therein cited.

The limitations are that the fact, upon which the presumption is to rest, must have some fair relation to, or natural connection with, the main fact. *Id.*

**Evidence.**—The rules of evidence are the same in criminal as in civil cases, except as otherwise provided in the Code of Criminal Procedure. **People v. McLaughlin** (Sup. Ct. 1 D. 1896), 2 App. Div. 419.

The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided by the Code. **People v. Tuczkewitz**, 149 N. Y. 240.

In criminal cases, the jurors are the exclusive judges of all questions of fact. *Id.*

**Expert.**—A qualified person may testify to handwriting. *People v. Flechter*, 44 A. D. 199; 94 S. R. (60 S.) 777.

An expert could speak only from a comparison. *Id.*

Upon the trial of an indictment for knowingly receiving a stolen violin, a draft advertisement for its return, handed to the complainant by the defendant, and declared by him at the time to be in his handwriting, is admissible to prove the defendant's knowledge of the theft. *Id.*

It must of necessity rest in the main with the trial judge to determine whether a particular witness has the essential qualifications to testify as an expert in matter of handwriting, and his decision will not be held to present an error of law, requiring a reversal unless it is against the evidence, or mainly without support in the facts appearing in the case. *Id.*; *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56.

If a man be in reality an expert upon any given subject belonging to the domain of medicine, his opinion may be received by the court, although he has not a license to practice medicine. *People v. Rice*, 159 N. Y. 400. But such testimony should be received with great caution, and only after the trial court has become fully satisfied that upon the subject as to which the witness is called for the purpose of giving an opinion, he is fully competent to speak. *Id.*

The statute authorizing the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine makes this species of evidence competent and proper before grand juries the same as before a trial court. *People v. Molineux*, 14 N. Y. Cr. 6; 27 Misc. 79; 92 S. R. (58 S.) 155.

Disputed writings cannot be made standards under the statute by comparing them with a lot of other disputed writings, for the purpose of fastening them upon the defendant. *Id.*; *Clark v. Douglass*, 5 A. D. 547.

**Former adjudication.**—Where a defendant relies upon an adjudication of the matters in controversy in a former suit, he is not confined to the record alone, but may show by extrinsic proof what particular matters are litigated, provided the matters sought to be shown were within the issues tried. *People ex rel. Sullivan v. Sloane*, 14 N. Y. Cr. 52; 39 A. D. 265; 90 S. R. (56 S.) 930.

**Good character.**—A charge that if the jury, after a consideration of all the evidence, are satisfied of the guilt of the defendant beyond a reasonable doubt, good character is no defense, is not erroneous. *People v. Dippold*, 85 S. R. 859; 51 S. 859; 13 N. Y. Cr. 230.

Where a witness for defendant has testified to the latter's good character, the people may properly cross-examine and ask him if he has heard reports derogatory to his character. *People v. Jeffery*, 63 St. Rep. 585; 82 Hun, 409; 31 Supp. 267.

In all cases, the defendant is at liberty to produce positive testimony as to his good character to strengthen the presumption which always exists, and, when such evidence has been produced, it is something more than mere corroborative evidence of the testimony which he gives. *People v. Friedland* (Sup. Ct. 1 D. 1896), 2 App. Div. 232. In every case, where such testimony has been given, the defendant is entitled to an instruction that it is to be considered as primary testimony upon the question of his guilt. *Id.* Where such evidence is given, it is to be considered as directly bearing upon the question of guilt or innocence, even though the evidence against the accused is of the most direct and positive nature. *Id.* In every case, the weight to be given to it is for the jury. *Id.*

The jury are bound to consider evidence as to good character. *People v. Pedro* (Kings S. T. 1897), 19 Misc. 300; 77 S. R. 44; 43 S. 44. So high is good character valued by the law, that such evidence may of itself create the reasonable doubt which will require an acquittal. *Id.*

**Good faith.**—It is not erroneous, under subdivision 2, section 31 of Liquor Tax Law, to submit to the jury evidence as to the good faith of the party or parties who order the meal in question. *People v. Dippold*, 85 S. R. 859; 51 S. 859; 13 N. Y. Cr. 230.

**Judgment in civil action.**—A judgment in a civil action, determining a material question involved in a criminal action, is not admissible in evidence in the latter action. *People v. Leland*, 56 St. Rep. 73; 73 Hun, 162; 25 N. Y. Supp. 943. The fact that a question was put to complainant, on cross-examination, as to whether defendant had brought such action, does not open the door for the introduction in evidence of the judgment by the prosecution. *Id.*

**Moral character.**—Moral character of defendant is not involved in the inquiry, where he does not make it a subject for debate himself, or testify in his own behalf. *People v. Fitzgerald*, 156 N. Y. 253; 13 N. Y. Cr. 36.

The fact that a witness has been expelled from some church, society or club, does not tend to impeach his credibility. *People v. Dorthy*, 156 N. Y. 237; 13 N. Y. Cr. 30. The prosecution, upon defendant's admission that he has been disbarred as an attorney of the court, is not entitled to require him to

answer or explain the charges that had been made against him in the proceedings for his removal. *Id.*

Letter, written by one of defendant's professional brethren to complainant after the commission of the offense and expressing a very unfavorable opinion of the integrity of the defendant, and of his conduct in the particular transaction involved in the charge set forth in the indictment, is not legal proof against the accused. *People v. Dorthy*, 156 N. Y. 237; 13 N. Y. Cr. 30. The opinions of defendant's neighbors, verbal or written, with respect to his character or conduct, should be excluded, unless given on oath in open court upon some issue where character or credibility was involved. *Id.*

**Immaterial.**—Where an indictment for selling liquor on Sunday, a joint sale to four persons is alleged, it is not material which one of the four purchased the liquor. *People v. Dippold*, 85 S. R. 859; 51 S. 859; 13 N. Y. Cr. 230. Where, upon the trial of an indictment for selling liquor on Sunday, a witness testifies, apparently from his own knowledge, that defendant paid the bill, the latter is not harmed by a ruling, denying a motion to strike out the testimony of such witness that certain books showed that beer was sold to the defendant. *Id.* So, on the trial of an indictment for selling liquor on Sunday, the contradiction of a letter, written by defendant's son to the mayor, which contained a statement of defendant's position in a manner entirely correct according to this claim then and at the trial, cannot effect any substantial right of defendant. *Id.*

**Impeachment.**—A witness may not be examined respecting collateral questions for the purpose of forming a basis for the impeachment of such statements by the testimony of other witnesses. *People v. Van Tassel*, 84 S. R. 53; 50 S. 53.

**Motive.**—The motive, attributed to the accused in any case, must have some legal or logical relation to the criminal act, according to known rules and principles of human conduct. If it has not such relation, or if it points in one direction as well as in the other, it cannot be considered a legitimate part of the proof. *People v. Fitzgerald*, 156 N. Y. 253; 13 N. Y. Cr. 36. If evidence tends to prove a motive for the commission of the offense charged, it is none the less admissible because it tends also to prove that the defendant may have been guilty of some other crime or moral delinquency. *Id.*

**Opinions.**—When, on a trial for murder, a hypothetical question put by the defendant concludes by asking his judgment as to what would be the man's mental condition at the time of the act, it is proper for the court to exclude an answer

that, under the circumstances, the witness did not believe the man would be responsible for his acts, and to confine the witness to stating what the man's mental condition would be. *People v. Tuckewitz*, 149 N. Y. 240.

**Parol evidence.**—In criminal prosecutions, the rule which prevents proof of conversations and agreements made prior to the execution of a written instrument to explain the object of the instrument, does not apply. *People v. Barringer*, 59 St. Rep. 78; 76 Hun, 330. Where the felonious intent of the defendant is in question, he cannot be precluded from showing that such felonious intent did not exist by the production of a paper wherein he has written or signed something inconsistent with his claim of the non-existence of the felonious intent. *Id.* He is not estopped by any such writing. *Id.*

**Physician.**—The examination, by a physician, of a person accused of crime, at the special employment of the people, for the purposes of the prosecution, is not an attending of a patient in a professional capacity, and the physician is not rendered incompetent, on that ground, to disclose information acquired by him in such examination. *People v. Hoch*, 150 N. Y. 291.

**Privilege—Waiver.**—In a case to which sec. 834 of the Civil Code is applicable, the privilege cannot be waived by anyone save the patient, and, if he be dead, the seal of the statute cannot be removed. *People v. Benham*, 30 Misc. 466. But the aid of this section cannot be invoked to shield a person charged with the murder of the patient. *Id.* This was held in *Pierson v. People*, 79 N. Y. 424; *People v. Murphy*, 101 id. 129, and in *People v. Harris*, 136 id. 423.

**Similar transactions.**—Evidence of other transactions, otherwise material or relevant, is not inadmissible merely because it tends to prove another crime. *People v. Van Tassel*, 156 N. Y. 561; 13 N. Y. Cr. 289.

**Similar crime.**—The commission of one crime is not admissible in evidence upon the trial for another where its sole purpose is to show that the defendant has been guilty of other crimes. *People v. Flanigan*, 42 A. D. 318; 93 S. R. (59 S.) 101; *People v. Place*, 157 N. Y. 584, 598; *People v. McLaughlin*, 150 id. 365.

An accused person is required to meet the specific charge made against him, and is not called upon to defend himself against every act of his life. *People v. Flanigan*, ante; *People v. Crapo*, 76 N. Y. 288.

There is a clear and important distinction between allowing evidence of the commission of another crime to show motive,



intent or guilty knowledge, or where the crime proved is an incident to, a part of or leads up to, the crime with which a defendant is charged, and a case where the crime proved is entirely independent of and disconnected with the crime alleged in the indictment. *People v. Flanigan*, ante; *People v. McLaughlin*, 150 N. Y. 386.

Upon the trial of an indictment for assault, evidence that on former occasions, entirely independent of and disconnected with the offense in question, and extending through a period of eight years, the husband had assaulted the wife for her alleged infidelity, is inadmissible upon the question of the husband's motive and intent on the occasion in question. *People v. Flanigan*, ante.

Where the causing of the death of two persons, if murders, were separate and distinct crimes, and both were committed by the same person, proof as to the one crime cannot be given on the trial for the other. *People v. Molineux*, 14 N. Y. Cr. 6; 27 Misc. 79; 92 S. R. (58 S.) 155.

**Single witness.**—The common law permits a conviction, in the face of a denial of guilt by the accused, on the testimony of a single witness. *People v. Lesser*, 59 St. Rep. 131; 76 Hun, 371; 27 N. Y. Supp. 750. Where the testimony is direct, this rule is not likely to work injustice, because there will always arise or be present circumstances which will be corroborative of such witness. *Id.* Where the evidence, however, is purely circumstantial, depending, at best, upon an opportunity to commit the act, little or no chance is given to the accused of demonstrating his innocence, except by denial of the accusation, and by presenting evidence of good character, which, in such a case, is entitled to considerable weight. *Id.*

**Stipulation.**—Where both parties to a criminal action, the people and the defendant, have, through their respective counsel, stipulated in writing as to the existence of certain facts, and have embodied such facts in a written statement which has been put in evidence, each party has the right to claim that the jury ought to be bound by those facts so far as they go, and the court is entirely justified in so instructing the jury. *People v. Cannon*, ante.

**Witness.**—A witness for the prosecution, sworn as to the identity of the stolen violin, cannot be asked upon his cross-examination whether he had ever changed the label of a violin, where there is no suggestion that the question affected the credibility of the witness. *People v. Flechter*, 44 A. D. 199; 94 S. R. (60 S.) 777.

Evidence that it is customary for dealers in violins to counterfeit them in the manner described, is inadmissible to mitigate the unfavorable inferences to be drawn from the fact that the defendant, who was also a dealer in violins, resorted to such practices. *Id.*

The mere fact that the witness did not interrupt the magistrate and demand to be sworn, when the latter rendered his decision to the effect that the violin was not the complainant's, did not of itself affect his credibility. *Id.*

The scope of a cross-examination is within the discretion of the trial judge, and each case rests largely upon its own facts. *People v. Braun*, 158 N. Y. 558.

The court in its discretion may exclude disparaging questions put to a witness on the cross-examination not relevant to the issue, though avowedly for the purpose of discrediting him, even if no claim of privilege be interposed; and such ruling is not reviewable on error unless the discretion be manifestly abused. *Id.*; *La Beau v. People*, 34 *id.* 230; *People v. Casey*, 72 *id.* 393; *Real v. People*, 42 *id.* 280; *People ex rel. Phelps v. Oyer & Terminer*, 83 *id.* 460.

Inquiries on irrelevant topics to discredit the witness, and to what extent a course of irrelevant inquiry may be pursued, are matters committed to the sound discretion of the trial court. *People v. Braun*, ante. The exercise of this discretion is not the subject of review except in case of plain abuse and injustice. *Id.*; *Great Western Turnpike Co. v. Loomis*, 32 *id.* 127; *La Beau v. People*, 34 *id.* 230.

**393. Defendant as witness.**—An accused person who becomes a witness in his own behalf thereby places himself in the attitude of any other witness, in respect to the right of cross-examination. *People v. Stephenson* (Sup. Ct. 1 D. 1895), 71 S. R. 649; *People v. Smith*, 37 A. D. 280; 89 S. R. 932; 55 S. 932; *People v. Irving*, 95 N. Y. 541; *People v. Tice*, 131 *id.* 651; *People v. Webster*, 139 *id.* 73, 84. But the general scope of such cross-examination is well defined, and the courts will not allow any transgression of the well-understood limitations. *Id.* The boundaries of a cross-examination of a defendant, in a criminal action, was held to be that he may be required to answer questions not only affecting his credibility, but also as to matters relative to the issue, though having no relation to his testimony on the direct examination. *Id.*; *People v. Smith*, ante; *People v. Brown*, 72 N. Y. 571. The trial court may, in the exercise of its discretion, still further restrict the cross-examination, but cannot extend it beyond the limits of such rule. Where the defendant, on a trial for

arson, offers himself as a witness, he may properly be asked, upon his cross-examination, if he had not for five or six years past been living in criminal intercourse with a certain woman, as such evidence tends to affect his moral character and bears directly upon his credibility as a witness. *People v. Smith*, ante.

An instruction that the jury were not to assume, from the fact that defendant did not testify as a witness at the trial, that he would deny or admit any of the evidence, but that they should consider the evidence as it stands, unaffected by the fact that he did not take the stand, is a sufficient charge on the subject. *People v. Fitzgerald*, 12 N. Y. Cr. 524; 80 S. R. 1020; 46 S. 1020.

The fact that the accused does not testify in his own behalf cannot be permitted to create any presumption against him. The force of this proposition should not be weakened or destroyed with the jury by qualifying words. *People v. Fitzgerald*, 156 N. Y. 253; 13 N. Y. Cr. 36.

A person who is called before the grand jury at his own request and urgent solicitation, cannot object to the indictment on the ground that he was compelled to testify against himself. *People v. Willis*, 23 Misc. 568; 86 S. R. 808; 52 S. 808; 13 N. Y. Cr. 255. See *People v. Priori*, 164 N. Y. 459.

395. *People v. Bishop*, 53 St. Rep. 60; 69 Hun, 105; 23 N. Y. Supp. 243, was affirmed in 54 St. Rep. 932.

**Confessions.**—Where the district attorney states to defendant that, if he makes any statement, it must be voluntary and without threats or promises, the confession is admissible, though a police officer, in whose custody he was, had previously used strong language to induce him to confess. *People v. Mackinder*, 61 St. Rep. 523; 80 Hun, 40; 29 Supp. 842. Where there is no conflict in the evidence as to the circumstances under which such statement was made, the question of its admissibility in evidence should be decided by the court, and not left to the jury. *Id.*; *Willett v. People*, 27 Hun, 469. But, where there is a conflict of testimony, or room for doubt, the court should submit the question to the jury, with instructions that, if they are satisfied that the confession was procured by the prohibited inducements, they should disregard and reject it. *People v. Mackinder*, ante; *People v. Kortz*, 3 St. Rep. 315; 42 Hun, 335; *People v. Fox*, 31 St. Rep. 570; 121 N. Y. 449; *People v. Cassidy*, 44 St. Rep. 869; 133 N. Y. 612.

A confession, not made under the influence of fear produced by threats, or by promises or deception, is admissible even in a criminal prosecution. *Notara v. De Kamalaris*, 83 S.

R. 216; 49 S. 219; *Fralich v. People*, 65 Barb. 48, 51; *Hartung v. People*, 4 Park. 319; *O'Brien v. People*, 48 Barb. 274, 279, 280. Prima facie, as a matter of course, a confession by a prisoner is admissible as evidence against him, and it is for him to show legal grounds for excluding it. And it is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put to him, or that it was made under hope or promise of a benefit of a collateral nature. *Id.*

A confession is voluntary, where it is not made under the influence of fear produced by threats or upon any stipulation of the district attorney. *People v. Pullerson*, 159 N. Y. 339.

The confession of the accused, though not sufficient to warrant his conviction without additional proof that the crime charged has been committed, is sufficient for this purpose where there is ample evidence, aside from the confession, corroborating the statements of the defendant. *Id.*

If the defendant supposes that there is any conflict in the evidence as to the circumstances under which his confession was made, or as to whether it was voluntary or otherwise, he should request the submission of that question to the jury. *People v. Kennedy*, 159 N. Y. 346.

Since the adoption of this section of the Criminal Code, the test of admissibility of the statement of a party accused of crime, whether made in the course of judicial proceedings or not, is whether it was voluntarily made, and that is to be determined by its nature and the circumstances under which it was made. *Id.*

It is no ground for the exclusion of an admission by a prisoner charged with crime that it was made while he was under arrest, if shown to have been made voluntarily and without influences of promises or threats. *Id.*

A confession is admissible under the provisions of sec. 395, where there can be no pretense or claim that statements were made while the defendant was under the influence of fear produced by threats, or upon any stipulation by the district attorney that he should not be prosecuted therefor. *Id.*

District attorneys and other executive and administrative officers should remember that to be admissible statements made by one charged with or suspected of crime must be voluntary, fairly obtained, and not procured by inquisitorial compulsion or other improper means. *Id.* Statements by defendant, charged with indecent assault on child of five years, that he was only fooling with the child. "I wanted to see what

she had, that was all," made after arrest, on the way to the station house, held clearly admissible. *People v. Colleta*, 65 App. Div. 570. The courts have not gone so far as to exclude confessions made by a person under arrest to those in authority over him, simply because they were procured by deception, provided they were voluntarily made. *People v. White*, 17 N. Y. Crim. Rep. 538; 176 N. Y. 331.

**398. Conspiracy.**—Where, in the absence of evidence sufficient to justify the conclusion that several persons, including the defendant, who were charged with the commission of a crime, acted from a wanton purpose and design to do the act constituting the offense, evidence of the acts and declarations of one of them is erroneously admitted at the trial of defendant, against his objection. *People v. Van Tassel*, 84 S. R. 53; 50 S. 53. But such error is cured by the subsequent admission of sufficient evidence of such combination. *Id.* At the trial of defendant upon an indictment charging subornation of perjury in procuring a person to testify falsely in a certain action, evidence of other attempts to induce other persons to testify falsely in the same action, which bears directly upon the subjects of motive and intent in the commission of the offense, has relation to the same transactions, and to the same purpose, to establish a fact in issue upon the trial, to which the testimony was material, and connected in point of time, is admissible. *Id.*

**399.** See *People ex rel. Doherty v. Board of Police Commissioners* (Sup. Ct. 1 D. 1895), 65 S. R. 178.

In *People v. Kunz*, 58 St. Rep. 740; 27 N. Y. Supp. 945, the judgment was reversed on the ground that the conviction rested upon the testimony of the complainant, uncorroborated by other evidence.

See *People v. Terwilliger*, 56 St. Rep. 257; 74 Hun, 310; 26 N. Y. Supp. 674.

**Corroboration.**—Under this section, it matters not how consistent the narration of the accomplice, how much it is fortified by detail in the statement itself, or how reasonable and convincing the relation of the facts by him, it is not enough, unless corroborated by such other testimony as tends to connect the defendant with the commission of the crime. *People v. Christian*, 60 St. Rep. 814; 78 Hun, 28; 29 Supp. 271.

The testimony of the accomplice, in this case, was held to have been sufficiently corroborated to sustain the conviction. *Id.*

Testimony in corroboration should tend to show the material facts necessary to establish the conviction of a crime

and the identity of the person committing it. *People v. Wissant*, 24 Misc. 361; 87 S. R. 695; 53 S. 695; *People v. Plath*, 100 N. Y. 592.

—**Accomplice.**—The testimony of an accomplice must be corroborated. *Police v. Mullins* (Sup. Ct. 1 D. 1896), 5 A. D. 172; 39 S. 361.

Prior to the enactment of this section, a jury, if satisfied of the truth of statements made by an accomplice, could convict on his testimony alone. *People v. Mayhew*, 150 N. Y. 346; *People v. Costello*, 1 Denio, 83; *People v. Dyle*, 21 N. Y. 578; *Dunn v. People*, 29 id. 523; *Lindsay v. People*, 63 id. 154. But this section introduced a new rule of evidence. *People v. Mayhew*, ante. Under it, it is not necessary that the corroborative evidence of itself should be sufficient to show the commission of the crime or to connect the defendant with it. *Id.*; *People v. Elliott*, 106 N. Y. 292. It is sufficient if it tends to connect the defendant with the commission of the crime. *Id.* Nor need the corroborative evidence be wholly inconsistent with the theory of the defendant's innocence. *Id.* If the trial judge is satisfied that there is testimony tending to connect the defendant with the commission of the crime as the statute requires, he is bound to submit the case to the jury, who are the sole judges whether the evidence relied upon to corroborate the accomplice is sufficient. *People v. Mayhew*, ante; *People v. Everhardt*, 104 N. Y. 591.

To constitute an accomplice, one must be so connected with a crime that at common law he might himself have been convicted either as the principal or as an accessory before the fact. *People v. Zucker*, 80 S. R. 766; 46 S. 766. To warrant such a conviction, the one accused must have taken part in the preparation of the crime, with intent to assist in the crime. *Id.* Every act which may have a tendency to assist in the preparation of the crime is not of absolute necessity criminal. *Id.*

The fact that one knew of defendant's purpose to commit a crime, and performed an act tending to assist in the perpetration of the offense, does not, as a matter of law, render him an accomplice, within the rule requiring testimony of accomplices to be corroborated, where it was in dispute whether he did the act with intent that it should aid in the commission of the crime. *People v. Zucker*, 80 S. R. 766; 46 S. 766.

Where defendant is charged with subornation of perjury, testimony given at his trial, on behalf of the people, by the person whom he procured to testify falsely, must, if corrobo-



rated, be submitted to the jury. *People v. Van Tassel*, 84 S. R. 53; 50 S. 53.

Where, in case of testimony of accomplices, there is some corroborative evidence fairly tending to connect the defendant with the commission of the crime, it is for the jury to determine whether the corroboration is sufficient. *People v. Baker*, 13 N. Y. Cr. 165; *People v. Desscher*, 16 N. Y. Crim. Rep. 328; 69 App. Div. 217; *People v. Bessert*, 16 N. Y. Crim. Rep. 409-417; *People v. O'Farrell*, 17 N. Y. Crim. Rep. 409; 175 N. Y. 323; *People v. Strauss*, 94 App. Div. 453.

**410. Advise acquittal.**—The court may advise an acquittal in criminal cases, under the provisions of this section of the Code. *People v. Tuczkewitz*, 149 N. Y. 240. But it can do no more. *Id.* It cannot order or even advise a conviction. *Id.*

Where, on the trial of a criminal action, the evidence is such as to make the question of the guilt or innocence of the defendant one for the jury, the court has no authority to dismiss the indictment and direct a verdict of not guilty. *People v. Schooley*, 149 N. Y. 99; *aff'g*, 89 Hun, 391.

It is made the duty of the court, where it deems the evidence insufficient to warrant a conviction, to advise the jury to acquit, and the jury must obey the advice. *People v. Ledwon*, 153 N. Y. 10, 16; 12 N. Y. Cr. 385. The defendant is not confined to any form of words, in presenting to the court, the question of his right to be acquitted. *Id.* All that is necessary is that in some intelligible form there should be presented to the court, for its ruling and decision, the question that there is no evidence for the jury, or not sufficient evidence upon which to base a conviction. *Id.* A motion in form to discharge the defendant or dismiss the indictment may be regarded as in substance a request to direct an acquittal, or that the court instruct the jury, as matter of law, that the prisoner could not be convicted. *Id.*

Under this section of the Criminal Code, the court may advise the jury to acquit the defendant, and the jury are required to follow his advice. *People v. Cronk*, 40 A. D. 206; 92 S. R. (58 S.) 13.

**411. View.**—The statute has left it discretionary with the trial judge as to whether the view should be had. In exercising this discretion, he should first satisfy himself that the premises are in substantially the same condition as at the time of the commission of the crime, and the view should be taken by the jury, attended only by the officers, or persons selected by the court to exhibit the premises. *People v. Thorn*, 156 N. Y. 286; 13 N. Y. Cr. 77.

By asking that the jurors be permitted to view the premises, the prisoner's counsel waived the right of himself, or the defendant, to be present. *Id.*

Court of appeals will not grant a new trial on the ground that justice requires it, where the jurors were not guilty of misconduct in viewing the premises or nothing occurred which was prejudicial to defendant. *People v. Thorn*, 156 N. Y. 286; 13 N. Y. Cr. 77.

The view, provided for by section 411 of Criminal Code, is not the taking of testimony within the meaning of the Bill of Rights. Its sole purpose and object is to enable jurors to more accurately understand and fully appreciate the testimony of witnesses given before them. *Id.*

**416.** The discharge of the jury and the postponement of the trial because of the illness of one of the jurors is proper, and a plea of former jeopardy cannot be based thereon. *People v. Smith*, 177 N. Y. 210.

**419.** See *People v. Tuckewitz*, 149 N. Y. 240.

**420.** See *People v. Tuckewitz*, 149 N. Y. 240.

**Prejudicial error.**—The remark of the court to a witness for the defendant to answer the question and stop “quibbling” constitutes prejudicial error, where the case, at best, was a close one, and a verdict for the defendant would have been amply justified by the evidence. *People v. Hill*, 37 A. D. 327. Such statement was not cured by the subsequent charge of the judge instructing the jury that they were to determine the questions of fact regardless of the opinion of the court or of the counsel thereon. *Id.* If the judge sought to efface from the minds of the jury an impression made by this characterization of the conduct of the defendant, he should have acted promptly, and by explicit caution to the jury to disregard the remark made. *Id.*

**425. Exhibits.**—Where the court, at the retirement of the jury inquires if there is any objection to the jury taking the exhibits, the clothing of the deceased, which was made an exhibit, upon the trial, is deemed included in the inquiry, so as to demand an objection from the defendant in case he does not wish the clothing to be left with the jury. *People v. Hughson*, 154 N. Y. 153; 12 N. Y. Cr. 485. Taking the revolver used in killing into the jury room. *People v. Gallagher*, 17 N. Y. Crim. Rep. 18; 75 App. Div. 39.

**427. Verdict.**—On the trial of an indictment for murder where after the jury had agreed upon their verdict, one of their number became suddenly ill but, having improved, was brought in later in the day and took his seat with his asso-

ciates, and, upon the advice of the court, the jury again retired and conferred, the verdict returned by them is properly received. *People v. Buchanan*, 64 St. Rep. 427; 145 N. Y. 1.

**428. Coercion.**—The question how long a court may keep a jury together is one that rests in its sound discretion. *People v. Sheldon*, 156 N. Y. 268; 13 N. Y. Cr. 61. An attempt to drive the members of a jury into an agreement is beyond the power of the court, and an obvious attempt to effect such a result demands a new trial. *Id.* No juror should be induced to agree to a verdict by fear that failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. *Id.* A verdict so obtained ought not to be allowed to stand in any case, and least of all, in one involving a human life. *Id.*

**434. Sealed verdict.**—No provision has been made by law permitting the rendition of a sealed verdict in a criminal case. *People v. Pickert*, 26 Misc. 112.

**444. Attempt to commit.**—This section provides that upon an indictment for a crime, the defendant may be convicted of an attempt to commit a crime. *People v. Kane*, 161 N. Y. 380.

**Less degree.**—An assault, in any of its degrees, is not a necessary legal element in a charge of murder in an indictment in substantially the same form as was in use under the common law. *People v. McDonald*, 159 N. Y. 309. Until some statute authorizes a conviction for assault under an indictment charging homicide, the courts are not required, on the trial of such an indictment, to submit to the jury the question whether the defendant was guilty of assault instead of murder. *Id.*

The conviction of the defendant of an assault in the second degree is not a bar to an indictment charging either degree of murder or manslaughter. *Id.*; *Burns v. People*, 1 Park. Cr. 182; *Dedien v. People*, 22 N. Y. 178; *People v. Willson*, 109 id. 345.

Upon an indictment charging only the higher degree of the crime, the accused can be convicted of any less degree of it. *People ex rel. Young v. Stout*, 63 St. Rep. 154; 81 Hun. 336; 30 Supp. 898.

The law provides that a jury may find a defendant guilty of a less degree of crime than that charged in the indictment. *People v. Blakeman* (N. Y. Gen. Sess. 1895), 68 S. R. 140. But this provision of the Criminal Code does not curtail the rule of the common law or in any way interfere with its operation, that, if a defendant be found guilty, he should be

ound guilty in accordance with the evidence introduced. *Id.*

A jury may find the defendant guilty of a less degree of the same crime as is charged in the indictment. *People v. Connors* (Ct. Sess. 1895), 70 S. R. 169; 13 Misc. 582; *People v. Schiari*, 96 App. Div. 479; *People v. Young*, 96 App. Div. 33.

Does not apply to the defendant who was indicted before or tried after the passage of the amendment of 1900. *People v. Cox*, 16 N. Y. Crim. Rep. 248; 67 App. Div. 344. Amendment of 1900 only applicable when the "act complained of is not proven to be the cause of death." *People v. Wheeler*, 9 App. Div. 396; 17 N. Y. Crim. Rep. 205.

445. See *People ex rel. Young v. Stout*, 63 St. Rep. 154; 81 Hun, 336; 30 Supp. 898, and notes under previous section.

**Amendment.**—The general term, where its memorandum of decision, reversing conviction, fails either to direct a new trial or to discharge the defendant, has power to amend the order so as to make it conform to the decision intended to be made. *People v. Hill*, 57 St. Rep. 293; 73 Hun, 473; 26 N. Y. Supp. 131; *Altman v. Hofeller*, 51 St. Rep. 197; 137 N. Y. 619; *People v. Phelps*, 44 St. Rep. 737; 18 N. Y. Supp. 699.

**Different degrees.**—The language of this section, "in all cases," must necessarily exclude cases where the crime consists of different degrees. *People v. Connors* (Ct. Sess. 1895), 70 S. R. 169; 13 Misc. 582.

448. See *People ex rel. Ritzenthaler v. Higgins*, 151 N. Y. 570; rev'g 77 Hun, 103.

458. **Case.**—It is the duty of the counsel for the defendant to prepare and serve a proposed case setting forth the evidence in narrative form, so far as practicable, and of the district attorney to prepare and serve such amendments thereto as he deemed proper, and of the trial judge, upon due notice, to settle the case in the usual way. *People v. Barone*, 161 N. Y. 475.

The failure of counsel for defendant in such a case to discharge his duty in this regard may properly be taken into consideration in passing upon his application for compensation under sec. 308, ante. *Id.*

465. See *People v. Strait*, 154 N. Y. 165.

See *People v. Ledwon*, 153 N. Y. 10, 16; 12 N. Y. Cr. 385.

See *Hanrahan v. Ayres*, 64 St. Rep. 14; 10 Misc. 435; 31 Supp. 458.

**Cumulative.**—Whenever it is made to appear that a person convicted of crime can produce evidence upon another trial, such as, if before received, would probably have changed the verdict, if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it upon the

trial was not owing to want of diligence," a new trial ought to be awarded without hesitation. *People v. Benham*, 30 Misc. 466.

**Defendant's testimony.**—The fact that a defendant cannot, from prudential reasons, withhold his own personal testimony from the trial, and cannot thereafter apply for a new trial upon it as newly discovered evidence, does not preclude a new trial where the newly discovered testimony of other witnesses, besides himself, is material. *People v. Benham*, 30 Misc. 466.

**Requirements.**—If the defendant has complied with these four requirements of the statute, and if each has been substantially fulfilled to the satisfaction of the court, he is entitled to another trial. *People v. Benham*, 30 Misc. 466.

**Want of diligence.**—Where, at the time of the trial, the newly discovered evidence had been temporarily forgotten by both the witness and the defendant, want of diligence in making an application for such a new trial cannot be fairly charged. *People v. Benham*, 30 Misc. 466.

**New trial.**—Amended by chap. 270 of 1894.

This amendment added the last provision of subdivision 7 of the present section, and went into effect April 6, 1894.

Where upon the reversal of the judgment, proof which would raise a disputed question of fact is possible, the appellate court has no right to assume that it does not exist and acquit the defendant, but must order a new trial. *People v. Kane*, 59 St. Rep. 33; 142 N. Y. 366.

—**Subd. 6.**—Under the Code of Criminal Procedure, the trial court is empowered to grant a new trial upon the application of the defendant, when the verdict is contrary to law or clearly against evidence. *People v. Smith* (Sup. Ct. 2 D. 1896), 6 A. D. 234; 39 S. 1009. A motion to set aside the verdict as not in accordance with the evidence is equivalent to a motion for a new trial. *Id.* A denial of the motion is reviewable on an appeal from the judgment. *Id.*

—**Subd. 7. Newly discovered evidence.**—Power to grant a new trial can only be exercised when the four requirements of the statute are concurrently fulfilled to the satisfaction of the court, and these requirements are conjointly the test of efficiency which must be applied. *People v. Moore*, 29 Misc. 574; 96 S. R. (62 S.) 252.

When the defendant makes a motion for a new trial on the ground of newly discovered evidence which he could not with diligence have produced on the trial, he cannot be heard to say that, for prudential reasons, he did not call a witness (himself) who could have testified to the fact. *Id.*

The moving affidavits must present evidence which will be competent and admissible upon a new trial, if granted. *Id.*

There should be an affidavit of the witnesses who will give new evidence that they are ready to swear to the facts claimed to be newly discovered (*Adams v. Bush*, 1 Abb. Dec. 7; 2 Abb. N. S. 104), and an affidavit that the witnesses told the party that they would so swear is not enough. *Id.*; *Shumway v. Fowler*, 4 Johns. 425; *Roberts v. Johnstown Bank*, 14 S. 433.

A new trial, on the ground of newly discovered evidence, will not be granted where the affidavits of the proposed witnesses do not state that the affiants know the matters therein set forth of their own knowledge. *People v. Moore*, ante; *Hecla Powder Co. v. Sigua Iron Co.*, 37 S. 149; 1 A. D. 371.

Upon the latter provision of subd. 7, the court has not the power to compel the appearance of persons for examination who have not sworn to affidavits presented on the motion for a new trial. *People v. Moore*, ante.

The judgment, on a motion for a new trial, must not be disturbed, unless it be clearly made to appear that since the trial there has been discovered competent, material, credible evidence, which, if before received, would probably have changed the verdict, which could not have been discovered before the trial by the exercise of due diligence, and which, on a new trial, would probably produce a different result from the former trial. *Id.*

—**Jury.**—The denial of a motion for a new trial, made upon the ground that there had been an illegal separation of the jury, is in the discretion of the court, where the proofs raise a question of fact. *People v. Buchanan*, 64 St. Rep. 427; 145 N. Y. 1. A motion for a new trial, on the ground that a juror became mentally incompetent on the trial before the rendition of the verdict, is properly denied where, upon the conflicting opinions of the experts, the facts stated in the affidavits and those within the observation of the court, it cannot be said that the moving party made out a case of mental incompetency in the juror. *Id.*

Where a juror was taken ill on the trial of an indictment for murder and the trial judge put him in charge of a sworn officer, to enable him to consult a physician, on the defendant's counsel stating that there was no objection, and the juror remained in charge of such officer over a day upon the physician's reporting him too ill to come out, and on the second day he took his seat and the trial was proceeded with, —without anything appearing to show that the sick juror was ever out of the charge of the officer or that any communi-



cation was had with any person not connected with the trial, such facts do not constitute a separation of the jury, within the intent of the above section of the Code. *People v. Hoch*, 150 N. Y. 291.

See *People ex rel. Ritzenthaler v. Higgins*, 151 N. Y. 570; rev'g, 77 Hun, 103.

A new trial will not be granted in a criminal case on the ground of newly discovered evidence, where such evidence consists of a retraction by a witness for the prosecution of his testimony given on the trial, and in denial of the facts then testified to by him, where such testimony was corroborated by circumstantial evidence. *People v. Mayhew* (Kings S. T. 1897), 19 Misc. 313; 78 S. R. 206; 44 S. 206. In such case, there is no probability that the result upon a new trial would be different. *Id.*

In determining a motion for a new trial on the ground of newly discovered evidence in favor of the defendant, four conditions must be found to concur: (1) It must appear by affidavit that, upon another trial, the defendant can produce evidence such as, if before received, would probably have changed the verdict; (2) that such evidence has been discovered since the trial; (3) that it is not cumulative; (4) that failure to produce it upon the trial was not owing to want of diligence. *People v. Shea* (Sup. Ct. S. T. 1896), 16 Misc. 111; 38 S. 821.

The proposed evidence must raise a reasonable presumption that its reception would have changed the verdict of the jury, or that, on a new trial, it would produce a different verdict, before the court can order a new trial. *Id.*; *People v. Noonan*, 38 S. R. 854; *People v. Hovey*, 30 Hun, 358.

Motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court. *People v. Baker*, 13 N. Y. Cr. 165.

See *People v. Dwyer*, 30 Misc. 283; 14 N. Y. Crim. Rep. 404; *People v. Benham*, 30 Misc. 466; 14 N. Y. Crim. Rep. 434. Sub. 7. *People v. O'Connor*, 16 N. Y. Crim. Rep. 445; *People v. Gallagher*, 17 N. Y. Crim. Rep. 18; *People v. Sullivan*, 40 Misc. 308; 17 N. Y. Crim. Rep. 270.

**467. Arrest of judgment.**—When a motion in arrest of judgment and for a new trial raises a question of fact to the utterance of disqualifying statements by a juror and has been denied by the trial judge, on his giving credence to the juror's denial, the court of appeals will leave the question of the juror's credibility with the trial judge, and, on review, will

not discredit the juror's testimony and accept that given by others. *People v. Benham*, 160 N. Y. 402.

**470a.** See *People ex rel. Dunnigan v. Webster* (Sup. Ct. Sp. T. 1895), 71 S. R. 676; 14 Misc. 617.

A defendant may be sentenced upon the same day the verdict is rendered if the court does not intend to remain in session longer. *People v. Spencer*, 179 N. Y. 408.

**482.** *People v. Neidhart*, 15 N. Y. Crim. Rep. 475.

**483.** Amended by chap. 372, Laws 1901; amended by chap. 274, Laws 1903, and chap. 613, Laws 1903. Amended by chap. 656, Laws 1905.

**484. Perpetual imprisonment.**—In a note to section 549 (present section 484), the revisers state that a sentence that the defendant stand committed until the fine is paid was then virtually a sentence of perpetual imprisonment, unless the fine be either paid or remitted. *People ex rel. Gately v. Sage*, 13 A. D. 135; aff'g, 17 Misc. 712; 41 S. 531. This is now modified by the provision of this section, that the imprisonment cannot exceed more than one day for every dollar of the fine. *Id.*

**Village ordinance.**—Where a village ordinance imposes only a penalty for its violation, the term for which a defendant in such proceeding may lie imprisoned for failure to pay the fine, is governed by sec. 1, chap. 385 of 1875, and this section does not apply. *People v. Garabed*, 12 N. Y. Cr. 294; 79 S. R. 827, 830; 45 S. 827, 830.

**Sheriff.**—When the judgment is a fine and that the defendant be imprisoned until it is paid, the judgment must be executed by the sheriff of the county. *People ex rel. Gately v. Sage* (Westchester Co. Ct. 1896), 17 Misc. 712; aff'd, 13 A. D. 135; 41 S. 531. In such case, there is no authority for the sheriff to deliver the defendant to any officer, nor is there authority for any officer to hold, because the defendant has been in his custody, by virtue of the imposition of another sentence, the term of which has expired. *Id.* Where the judgment imposes the fine in addition to imprisonment and follows the language of section 484 of the Criminal Code, by directing that, in default of payment, the defendant be imprisoned until the fine is satisfied, not exceeding one day for every dollar of the fine, the defendant, at the expiration of the term of absolute imprisonment, should be delivered up to the sheriff of the county and be detained by him until payment of the fine or until the expiration of the days required. *Id.*

**485. Evidence out of court.**—In a capital case, the fact that statements as to the position of articles on the premises where the homicide occurred, tending to show that the de-

fendant's testimony upon a material point was untrue, were made to the trial jury, out of court and in the absence of the defendant, while viewing the scene of the homicide by direction of the court, furnishes ground for granting a new trial. *People v. Gallo*, 149 N. Y. 106.

**Misdirection.**—A misdirection in the charge to the jury, upon one point, is sufficient to justify the granting of a new trial in a criminal action, though the jury might properly have found their verdict upon another point as to which there was no misdirection. *People v. Helmer* (Sup. Ct. 5 D. 1895), 67 S. R. 180; 88 Hun, 530.

**Subd. 8.**—Subdivision 8 of this section provides that the case and exceptions shall consist, among other things, of a copy of a stenographer's minutes of the trial, the result of which provision is that a large mass of evidence, frequently upon points not really disputed or disputable, is returned, all of which must be perused before the court of appeals can properly come to a conclusion in a capital case. *People v. Shea*, 69 S. R. 320; 147 N. Y. 78.

See *People ex rel. Ritzenthaler v. Higgins*, 151 N. Y. 570; rev'g, 77 Hun, 103.

**Stenographer's minutes.**—If the power exists in some officer or tribunal to make any change whatever, after they have been filed with the county clerk, in the minutes of the stenographer, required by this section to be embodied in the record of appeal from a judgment of death, such power can only be exercised after due opportunity has been afforded to the defendant to be heard. *People v. Conroy*, 151 N. Y. 543. The question whether any such power does exist in any officer or tribunal was not decided in this case. *Id.* The court of appeals has no power to alter the record furnished to it by the county clerk on appeal from a judgment of death. *Id.* But it has the power to require the clerk to obey the statute by furnishing it with literal copies of the stenographer's minutes as filed with him, where he has furnished copies of the minutes as changed without notice to the defendant, after filing. *Id.* The practice now prescribed by statute, of printing, at public expense and without opportunity for amendment or exclusion of immaterial matter, the stenographer's minutes of the trial, as part of the record on appeal in capital cases, instead of the case regularly settled by the trial judge, is to be deprecated. *Id.*

See *People v. Priori*, 163 N. Y. 99.

**Unreliable.**—Where the evidence, in a capital case, is uncertain and apparently unreliable, and it is improbable that the whole truth relating to the homicide has been given, a new trial will be granted. *People v. Gallo*, 149 N. Y. 106.

**487.** Amended by chap. 372, Laws 1901. Chap. 424 of 1877, relation to the appointment of a state agent for the guidance and employment of discharged convicts, was repealed by chap. 93 of 1895.

**488.** The language of this section, that the judgment be executed by the sheriff, can be entirely satisfied by confining its application to cases where the only sentence imposed on the defendant is a fine, or fine and imprisonment in the county jail. *People ex rel. Gately v. Sage*, 13 A. D. 135; *aff'g*, 17 Misc. 12; 41 S. 531. This section does not provide that a prisoner, does not operate to suspend all proceedings and deprive the jail, after having served his sentence in the state prison, be transferred to and be imprisoned in the county jail of the county where he was convicted, for the purpose of working out his fine. *Id.*

**491.** See *Matter of Molineux*, 177 N. Y. 395.

**503. Reprieve.**—A reprieve by the governor to a day certain, granted in a capital case, authorizes the execution of the sentence on the day on which the reprieve terminates, and it is not necessary that the prisoner should be brought before the court to have the time of execution fixed. *Matter of Buchanan*, 66 S. R. 621; 146 N. Y. 264. The distinction between a reprieve and a suspension of sentence, though the words are sometimes used interchangeably, is that a reprieve postpones an execution of the sentence to a day certain, whereas a suspension is for an indefinite time. *Id.* In *People v. Enoch*, 13 Wend. 159, which was an appeal in a capital case in which the execution of the sentence had been respited by the governor, the chancellor held that, where the execution of the sentence is respited by the governor until a particular day, it is the duty of the sheriff to proceed and execute the judgment of the court at that time, unless further reprieve is granted or the judgment has been reversed or annulled in the meantime. It was the duty of the warden, in whose custody the defendant was on the day on which the second reprieve terminated, to execute the sentence on that day without waiting for the order of the court. This section has no application to the case of a reprieve unless the day fixed thereby has passed and the sentence has for any reason not been executed, though the judgment of conviction is still in force. *Matter of Buchanan*, ante.

**504. Application for order.**—An application for an order directing the agent and warden of a state prison in whose custody the prisoner is, commanding that he be brought before the court of appeals in order that it may inquire into

circumstances and direct the execution of his sentence, must be granted if no legal reason exists against the execution of said sentence. *Matter of Buchanan*, 66 S. R. 621; 146 N. Y. 264.

An appeal to the United States supreme court from the decision of the district judge denying a writ of habeas corpus of the parties. *People v. Youngs*, 151 N. Y. 210.

state courts of any power to act in the premises until the appeal shall be heard and determined. *Matter of Buchanan*, 66 S. R. 621; 146 N. Y. 264.

507. See *Matter of Molineux*, 177 N. Y. 395.

508. See *Matter of Molineux*, 177 N. Y. 395.

510. **Habitual criminals.**—Chapter 357 of 1873 was in effect repealed by section 690 of the Penal Code and sections 510-514 of the Code of Criminal Procedure. *People ex rel. Sloane v. Fallon*, 27 Misc. 16; 13 N. Y. Cr. 429.

The legislature in enacting the Code of Criminal Procedure intended to deal with the subject-matter of the act of 1873 and to revise and improve it, and when it placed habitual criminals within the class of disorderly persons, as defined in the Code of Criminal Procedure, it referred to the class of criminals who were intended to be dealt with under the act of 1873, and gathered them in, together with others who have been previously characterized in various statutes as disorderly persons, under a comprehensive scheme for a more scientific and convenient restatement of the law concerning such persons and their treatment. *People ex rel. Sloane v. Fallon*, 27 Misc. 16; 13 N. Y. Cr. 429.

514. See *Weiss v. Herlihy*, 23 A. D. 608; 83 S. R. 81; 49 S. 81.

515. **Appeal.**—An order, in relation to the remission of the forfeiture of a bail bond, is appealable. *People v. Young* (Sup. Ct. 5 D. 1895), 71 S. R. 846; 92 Hun, 373.

It is provided in this section that the only mode of reviewing a judgment order in a criminal action or special proceeding of a criminal nature is by appeal. *People ex rel. Peck v. Schantz* (Ulster Co. Ct. 1895), 69 S. R. 187; 13 Misc. 563.

In a proceeding respecting disorderly persons, the defendant has a right to appeal to the court of sessions from a judgment of conviction upon a trial before the magistrate. *People v. Fuerst* (Ct. Sess. 1895), 69 S. R. 205; 13 Misc. 304.

There is no authority for an appeal to the appellate division from the certificate of the justice presiding at the trial awarding compensation to counsel under section 308 of Crim-

nal Code. *People v. Heiselbetz*, 85 S. R. 685; 51 S. 685; 13 N. Y. Cr. 223.

The only method of reviewing judgments or orders, made in criminal actions or special proceedings of a criminal nature is by appeal. *People ex rel. Commissioners, etc. v. Cullen* (Sup. Ct. 1 D. 1896), 7 A. D. 118; 40 S. 1. The subsequent provisions of chapter 1, title 2, Code of Criminal Procedure in regard to appeals in criminal actions were in no way intended to take away the right of review which had previously existed in reference to special proceedings, 7 A. D. 535, 540; 40 S. 243. It goes beyond mere technical errors and defects such as were cured by the Statutes of Jeofails. *Id.*

The power of the court of appeals to grant new trials in capital cases must be exercised in conformity with the statutory provision which requires that judgment upon an appeal must be rendered without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties. *People v. Youngs*, 151 N. Y. 210.

Counsel have no right to appeal for the purpose of delay nor unless they think there is some ground for reversal in the judgment; and if there is any reason for appealing, even though feeble and inconclusive, it should be presented to the court for consideration. *People v. Scott*, 153 N. Y. 40; 12 N. Y. Cr. 374.

The provisions of chap. 19,, title 8 of the Code have no application to the review of judgments of conviction by court of special sessions. *People v. Ash*, 44 A. D. 6; 94 S. R. (60 S. 436).

Practice on appeals from the court of special sessions is governed by the provisions of sec. 1413 of such charter, sec. 20 of chap. 601 of 1895 and chap. 1, title 11, part 4, of the Code of Criminal Procedure. *Id.*

**Reversal.**—A conviction secured on the testimony of a witness, who claimed at the time of the trial that he was innocent but afterwards plead guilty under an indictment for the same offense, will be reversed on appeal. *People v. Friday*, 63 St. Rep. 812; 83 Hun, 240; 31 Supp. 399.

**Certiorari.**—Certiorari lies to review a conviction for a criminal contempt. *People ex rel. Barnes v. Court of Sessions*, 63 St. Rep. 832; 82 Hun, 242; 31 Supp. 373.

**Facts.**—Where a conviction is reversed on the facts by the general term, the power to review the facts ends. *People v. Mitchell*, 59 St. Rep. 170; 142 N. Y. 639; 36 N. E. Rep. 1051.



**Special proceedings.**—The special proceedings of a criminal nature, referred to in this section, are the various special proceedings enumerated and provided for in part sixth of this Code. *People ex rel. Taylor v. Forbes*, 62 St. Rep. 176; 143 N. Y. 219; 38 N. E. Rep. 303. And, as no provision is made in this Code for proceedings to punish for contempt or to review any order made in such proceedings, the practice is governed by the same procedure as applies to ordinary cases where private rights are involved, the determination of which may be reviewed by means of a writ of certiorari. *Id.*

This section abolishes review by writ and substitutes review by appeal in all criminal matters. *People ex rel. Edwards v. Warden*, 16 N. Y. Crim. Rep. 401; 37 Misc. 639.

517. See notes under section 485, ante.

**Constitutional right to appeal.**—No person has a constitutional right to appeal, and no court has an inherent right to entertain an appeal. *People v. Rutherford*, 47 A. D. 209. See *People v. Priori*, 163 N. Y. 99.

**Demurrer.**—An appeal from a judgment of conviction brings up for review the disallowance of a demurrer to the indictment. *People v. Wilson*, 151 N. Y. 403; aff'g, 7 A. D. 326. It is not requisite to a review of the objection taken by a demurrer that it should have been also raised in some form after the trial was entered upon. *Id.*

**Denial of new trial.**—An appeal does not lie to the court of appeals from an order of the trial court, denying a motion for a new trial on the ground of newly discovered evidence, made after the affirmance of a judgment of death. *People v. Mayhew*, 151 N. Y. 607.

**Exclusive.**—The Code of Criminal Procedure provides in what cases an appeal may be taken and what matter may be reviewed on appeal, and that must be taken as exclusive of all other form of appeal or matter to be reviewed. *People v. Rutherford*, 47 A. D. 209; *People v. Petrea*, 30 Hun, 102; aff'd, 92 N. Y. 129.

519. Order of appellate division reversing a judgment for defendant on demurrer to an indictment is reviewable by court of appeals. *People v. Drayton*, 168 N. Y. 10.

520. **Matter of right.**—Chap. 1, tit. 2 of this Code authorizes the defendant to appeal from a judgment rendered against him, "as a matter of right." *People v. McKane*, 59 St. Rep. 301; 7 Misc. 371; 28 Supp. 175; *People v. Drayton*, 16 Crim. Rep. 1.

523. **District attorney.**—The district attorney must have notice of appeal, surrender of bail, etc. *Tompkins v. Mayor*, 77 S. R. 878; 43 S. 878. But no express duty is enjoined

in connection therewith, yet it cannot be doubted that an obligation exists to do what is necessary to be done regarding the matter to which the notice relates. The statutory duty is to conduct all prosecutions for crimes and offenses. *Id.*

The provisions of this section are mandatory, and the service upon the district attorney is as essential to perfect the appeal in a bastardy proceeding as is the service upon the clerk. *Keller v. Clearey*, 56 App. Div. 466; 101 St. Rep. 862; 15 N. Y. Crim. Rep. 270.

527. See *People v. Camp*, 54 St. Rep. 455; 139 N. Y. 87; *aff'g*, 51 S. R. 30.

See *People v. Terwilliger*, 56 St. Rep. 255; 74 Hun, 310; 26 N. Y. Supp. 674.

**Application for certificate.**—Though it is not in terms provided in this section, or in section 529, post, that an application to one judge only shall be made for a certificate, these sections do not in terms authorize applications to be made to several and successive judges. *People v. McKane*, 59 St. Rep. 302; 7 Misc. 371; 28 Supp. 175.

A defendant, under conviction for a felony, is not entitled to submit an application for a certificate, mentioned in this section, until such notice as the judge may prescribe has been given, to the district attorney of the county where the conviction was had, of the application for the certificate. *Id.*

Where the court has a reasonable doubt of the validity of certain proceedings had in a case, a certificate of reasonable doubt, to stay the judgment, pending appeal, under this section, will be granted. *People v. McLaughlin* (Sup. Ct. Sp. T. 1895), 69 S. R. 252; 13 Misc. 287.

The conduct of a person at the time of his arrest for a felony may be shown even though the evidence tends to prove the commission of another felony. *People v. Moore*, 26 Misc. 168. Though the court, in overruling the objection, states that if the course of the witness' testimony there should be disclosed any evidence tending to establish another and different criminal act from that which the defendant is on trial for, the jury will disregard it, adding that the jury might take the evidence for what it was worth in its bearing upon the case, a certificate of reasonable doubt, whether a judgment of conviction should stand, will be refused. *Id.* Where the answer of the witness for the defendant on cross-examination, was made harmless by direction of the court, it cannot be presumed that it had any influence upon the jury in rendering their verdict. *Id.* Instruction to the jury that they are the sole judges of the facts and of the credibility of the wit-

nesses, and need not accept the testimony of a witness even though no one contradicts him, renders harmless a statement in the charge that certain witnesses for the prosecution have not been contradicted. *Id.*

—**Satisfaction of Judge.**—On an application for a stay of proceedings in a criminal case, it is not necessary that the judge, to whom the application is made, should be satisfied that the judgment will be reversed. *People v. Valentine*, 13 Misc. 553; 12 N. Y. Cr. 269; 78 S. R. 903; 44 S. 903. It is enough that he is satisfied that a question of law is raised sufficient for the consideration of the appellate tribunal. *Id.* Nor is it necessary for the applicant to show that the error, alleged to have been committed, did in fact prejudice the defendant; but, on the contrary, the judge, to whom the application for a stay is made, must be satisfied that the error could not in any way have affected or prejudiced the defendant before he is warranted in denying an application for a certificate of reasonable doubt. *Id.*

—**Stays.**—The same liberality, as is exercised in granting stays in proceedings, pending appeals, in civil cases, is not exercised in staying proceedings upon convictions for crime. *People v. Hess*, 56 St. Rep. 267; 26 N. Y. Supp. 630. Such liberality would seriously prejudice the administration of criminal justice. *Id.*

Stays are not granted in criminal cases, until after careful examination and a determination by the justice making the examination, that, in his opinion, there is a reasonable doubt whether such judgment of conviction will stand. *Id.* The defendant is not entitled to the stay as a matter of right. *Id.*; *People v. Holmes*, 3 Park. 567; *People v. O'Rielly*, 9 Abb. N. C. 91.

Under a liberal and just construction of the language of this section, a judge is called upon to review the entire evidence, the charge of the trial court and the law of the whole case. *People v. Hess*, ante; *People v. Sharp*, 9 St. Rep. 157. He is required by it to form an opinion whether the judgment should stand. *Id.*

To this rule there may be exceptional cases, as where a part of the record, or a portion only of the evidence may reveal a palpable error, or present a point so sharply as to render it unnecessary to examine the whole case. *People v. Hess*, ante.

Under this section, the law does not cast upon the judge, to whom the application is made, the duty of concluding or deciding whether error was committed upon the trial, in order to determine whether the stay applied for should be granted.

*People v. Stephenson*, 66 St. Rep. 566; 32 Supp. 1112. If any assigned error, sufficient, if well founded, to reverse the judgment, give rise to a reasonable doubt, the law makes it his duty to inquire no further, but to stay the execution of the judgment until the question is settled upon appeal. *Id.*

**What sufficient.**—This section makes it the duty of the appellate division to “order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall be taken or not in the court below.” *People v. Goldberg*, 80 S. R. 913; 46 S. 913.

It is not necessary in determining whether the defendant is entitled to a certificate, to decide that error was committed by the court, but to ascertain if there is a reasonable doubt whether the judgment should stand. *People v. Hall*, 83 S. R. 158; 49 S. 158.

**—Where made.**—An application for a certificate of reasonable doubt should ordinarily be made to a justice of the supreme court of the district where the action is pending, and attorneys should not be encouraged to go outside the district to get orders of this character, when they can be quite as well or better considered by a justice of the locality where the proceeding is pending. *People v. Hall*, 83 S. R. 158; 49 S. 158.

**Duty of appellate court.**—By this section, it is the duty of the appellate court to guard carefully the rights of the defendant, and to exclude all incompetent testimony and prejudicial matter whether counsel for defendant did or did not object. *People v. Watkins*, 23 A. D. 253; 82 S. R. 856; 48 S. 856.

**General term.**—It is the province of the general term to order a new trial, if satisfied that the verdict against the prisoner is against the weight of evidence or against the law, or that justice requires a new trial, whether exceptions shall have been taken or not in the court below. *People v. Lesser*, 59 St. Rep. 132; 76 Hun, 371; 27 N. Y. Supp. 750.

**How doubt must arise.**—A doubt, to justify an acquittal, must be a reasonable one and arise from a careful, candid investigation of all evidence in the case. *People v. Barberi*, 12 N. Y. Cr. 423; 81 S. R. 168; 47 S. 168.

**New trial.**—It is only in a case where the appellate court is satisfied that the verdict against the prisoner is against the weight of evidence or against the law, or that justice requires a new trial, that it will, in the absence of exceptions taken in the court below, be justified in ordering a new trial. *People*

v. Derringer, 57 St. Rep. 136, 141; 73 Hun, 203; 25 N. Y. Supp. 1012.

People v. Martin, 33 A. D. 282; 87 S. R. 745; 53 S. 745, was held to be a case where, under the provisions of this section of the Code of Criminal Procedure, justice requires the court to grant to the defendant a new trial.

Although no exception was taken, section 527 of the Code of Criminal Procedure states that "the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below." People v. Pelton, 36 A. D. 450.

See People v. Sherlock, 15 N. Y. Crim. Rep. 412; 166 N. Y. 180. Error of criminal trials upon the appeal can be made in the Court of Appeals only by exceptions duly taken at trial. People v. Grossman, 15 N. Y. Crim. Rep. 527; 168 N. Y. 47. Does not change old rule that errors in criminal trials can be made available in Court of Appeals only by exceptions taken at the trial. Id.; see People v. Doody, 15 N. Y. Crim. Rep. 425; People v. Calaber, 91 App. Div. 529.

528. This section was amended by chap. 119 of 1895. The amendment went into effect, September 1, 1895. It added to the original section the provision in regard to the duties of the clerk of the court and the payment of the expenses of the special messenger.

**Conflict in evidence.**—Court of appeals has power in a capital case, to review the facts and to set aside a verdict of conviction, when not supported by sufficient evidence or when it appears that injustice has been done. But, where there is a conflict in the evidence, or where opposing inferences are to be drawn from the facts, it is the province of the jury to determine what the truth is; and the verdict, under such circumstances, is conclusive upon the courts. People v. Sutherland, 154 N. Y. 345; 12 N. Y. Cr. 495.

In order to deal properly with legal errors not resulting upon exceptions, the court of appeals must first determine whether it is satisfied that the verdict is against the weight of evidence, or against law, or that justice requires a new trial. People v. Conroy, 153 N. Y. 174, 177; 12 N. Y. Cr. 299. This court will not disturb a verdict reached upon conflicting evidence, unless its examination of the record induces the conviction that injustice has been done, or that errors committed which have prejudiced the substantial rights of the accused. Id.

**Court of appeals.**—It is not the province of the court of appeals to review or determine controverted questions of fact arising upon conflicting evidence, but that the jury is the ultimate tribunal in such cases, and with its decision the court may not interfere, unless it reaches the conclusion that justice has not been done. *People v. Kennedy*, 159 N. Y. 346.

Where the proof justifies a jury in finding that the homicide was intentional, and resulted from sufficient deliberation and premeditation to warrant a verdict of murder in the first degree, the court of appeals will not interfere with the determination of the jury upon the facts. *Id.*

When the court of appeals, upon a review of the whole case, is satisfied that the defendant has not had a fair trial, or that injustice may have been done, it has the power to order a reversal, even though no exception was taken at the trial to rulings alleged to be erroneous. *People v. McDonald*, 159 N. Y. 309. In all cases an exception is necessary in order to raise a pure question of law, and even then, under the general provisions of the Code, the said court is required to disregard exceptions which present only technical errors and which do not affect the substantial rights of the parties. *Id.*

On the review of a conviction of murder in the first degree, where the defense of insanity is interposed, the verdict is conclusive upon that issue, in the absence of such elements from the case as show that the verdict was against the weight of evidence, or that it was influenced by some mistake, error or prejudice. *People v. Braun*, 158 N. Y. 558; *People v. Hoch*, 150 *id.* 291.

Section 528 of the Code of Criminal Procedure confers upon the court of appeals the power, and imposes the duty as well of reversing a judgment whether any exception shall have been taken or not, where it is satisfied that the verdict is against the weight of evidence or against law, or that justice requires a new trial. *People v. Rice*, 159 N. Y. 400. Unless the court does reach the conclusion that the verdict was against the weight of evidence or against law, or that justice requires a new trial, it shall not reverse when there is no exception requiring it. *Id.*

It is not the duty of the court of appeals to grant a new trial because of an alleged error to which no exception was taken upon the trial and which could not have had any influence upon the verdict reached. *Id.*

**Evidence.**—The judgment will be affirmed, when no harm has resulted to the defendant from the admission of incom-



petent evidence. *People v. Burgess*, 153 N. Y. 561; 12 N. Y. Cr. 450.

This section does not affect the well established principle that the rejection of competent and material evidence, which is harmful to defendant and is excepted to, presents an error requiring a reversal. Such ruling affects a substantial right, even though the appellate court, with the rejected evidence before it, would still come to the conclusion reached by the jury. *People v. Strait*, 154 N. Y. 165; 12 N. Y. Cr. 479.

**Exception.**—The court of appeals will consider any fact in the defendant's favor, even though not presented by exception. *People v. Wilson*, 56 St. Rep. 828; 141 N. Y. 185.

Where the court below has decided that the defendant's rights were affected by incompetent testimony and his exceptions good, such decision is not open to review in the court of appeals. *People v. Dorthy*, 156 N. Y. 237; 13 N. Y. Cr. 30. The defendant is entitled, in the court of appeals, to sustain the judgment of reversal on any ground disclosed in the record upon which the court below might have made the decision under review. *Id.* The statement in the judgment that the court below had reviewed the facts, and, in the exercise of its discretion, had refused to grant a new trial on the facts, does not cover a question arising out of an abuse of discretion in permitting irrelevant and incompetent questions to be propounded to the defendant on cross-examination, when a proper exception had been taken. *Id.*

The power, conferred by section 528 of the Code of Criminal Procedure in the review of capital cases, is not called into exercise by the appearance of some error which no exception points out, unless the substantial rights of the accused can be seen to be affected by it, and, therefore, justice demands a new trial; and, in determining whether a new trial shall be granted under it, it is not the province of the court of appeals to review or determine controverted questions of fact arising upon conflicting evidence, but the jury is the ultimate tribunal in such case, and with its decision the court may not interfere unless it reaches the conclusion that justice has not been done. *People v. Decker*, 157 N. Y. 186; 13 N. Y. Cr. 364.

The court of appeals is authorized to order a new trial when it is satisfied that the verdict is against the weight of evidence or against law or that justice requires a new trial, even if no exception was taken in the court below. *People v. Corey*, 157 N. Y. 332; 13 N. Y. Cr. 384.

**Facts.**—Where the facts and circumstances testified to justify the jury in finding that the shooting was intentional,

and that it was the result of sufficient deliberation and premeditation on the part of the accused to warrant the verdict, the court of appeals is not warranted in interfering with the determination of the jury upon the facts. *People v. Sutherland*, 154 N. Y. 345; 12 N. Y. Cr. 495.

The court of appeals in capital cases, acts not only in the capacity of an ordinary appellate tribunal reviewing errors of law pointed out by exceptions duly taken, but if satisfied that the verdict is against the weight of evidence or against law or that justice requires a new trial, it is the duty of this court to grant it whether any exceptions shall have been taken or not in the court below. *People v. Shea*, 69 S. R. 320; 147 N. Y. 78. The duty imposed upon the court is that of reading the whole evidence in a case of conviction of murder in the first degree. *Id.* Upon a review under subdivision 8 of this section, and sections 517 and 528 of this Code, the court of appeals will not reverse the finding of the jury where such finding is not clearly against the weight of evidence and it does not appear to have been influenced by any improper consideration, in case there is at least a conflict in the evidence from which different inferences might be drawn. *Id.*

Court of appeals will not disturb a verdict reached upon conflicting evidence, unless its examination of the record induces the conviction that injustice has been done, or errors committed which have prejudiced the substantial rights of the accused. *People v. Conroy*, 153 N. Y. 561; 12 N. Y. Cr. 99. There is no hard and fast rule as to the time necessary for a defendant to deliberate, premeditate and form the design to kill. *Id.* It is always a question for the jury in the light of the facts. *Id.*

**How confined.**—Where the judgment is not one of death, the jurisdiction of court of appeals is confined to questions of law. *People v. Ledwon*, 153 N. Y. 10; 12 N. Y. Cr. 385. The same strictness with respect to exceptions does not prevail in criminal as in civil cases, but the court will look at the substance rather than at the form, with a view to promote justice. *Id.*

The jurisdiction of the court of appeals is limited to the review of questions of law only, and no unanimous decision of the appellate division that there is evidence supporting or tending to sustain a verdict not directed by the court, can be reviewed by this court. *People v. Helmer*, 154 N. Y. 596; 13 N. Y. Cr. 1.

**How construed.**—This section must be construed in con-

nection with section 542 of the Criminal Code. *People v. Constantino*, 153 N. Y. 24; 12 N. Y. Cr. 339.

The effect of these sections has recently been under consideration in the court of appeals. *People v. Hoch*, 150 N. Y. 291; 44 N. E. 976; *People v. Youngs*, 151 N. Y. 210; 45 N. E. 460. The conclusion reached in those cases was that however great the latitude of power conferred upon this court by those sections, in capital cases, the power to order a new trial is not to be exercised by the mere appearance of some error to which no exception was taken, unless the substantial rights of the accused can be seen to have been affected by it, and hence justice demands a new trial. *People v. Constantino*, ante.

**New trial.**—This section provides for a direct review by the court of appeals of a judgment upon a verdict of conviction of murder in the first degree. *People v. Leonardi*, 62 St. Rep. 356; 140 N. Y. 360; 38 N. E. Rep. 372. Where justice demands it, this court can direct a new trial, though no exception appears in the case. *Id.* Errors, however, even of a material nature, if unexcepted to upon the trial, are not necessarily ground for granting a new trial by this court. *Id.* In the absence of exceptions, unless the record shows that the ends of justice really require a new trial, it will not be granted, even though some legal or material error may have occurred upon the trial. *Id.*; *People v. Driscoll*, 12 St. Rep. 253; 107 N. Y. 414; *People v. Lyons*, 16 St. Rep. 660; 110 N. Y. 647; *People v. Kelly*, 22 St. Rep. 969; 113 N. Y. 647.

The court of appeals will exercise the power conferred upon it by section 528 of Criminal Code, in granting a new trial on the ground that justice requires it where the people have failed to prove the fact of the killing of the deceased by the defendant beyond a reasonable doubt, and it appears that another person has, since the conviction of defendant, been convicted of murder in the second degree for the killing of the deceased. *People v. Carbone*, 156 N. Y. 413; 13 N. Y. Cr. 105.

The court of appeals has the power to order a new trial for the reception of incompetent evidence even though no exception has been taken; but this power is exercised only in cases where manifest injustice has been done, and it is apparent that a different result might have been reached. *People v. Burgess*, 153 N. Y. 561; 12 N. Y. Cr. 450.

In determining whether a new trial should be granted under its provisions, it is not its province to review and determine controverted questions of fact arising upon conflicting evi-

ence, but that the jury is the ultimate tribunal in such a case, and with its decision the court may not interfere, unless it reaches the conclusion that injustice has probably been done. *People v. Place*, 157 N. Y. 584; *People v. Cignarale*, 110 N. Y. 3, 26; *People v. Trezza*, 125 id. 740; *People v. Kelly*, 113 id. 47; *People v. Hoch*, 150 id. 291; *People v. Youngs*, 151 id. 10, 222; *People v. Constantine*, 153 id. 24, 35; *People v. Decker*, 157 id. 186. In examining the question whether a new trial should be granted upon the ground that justice requires it, it is the duty of the court of appeals to assume the existence of the facts as they are established by the finding of the jury. *People v. Place*, ante. As a general rule, to entitle a party to review the rulings of a trial court upon the question of admitting or rejecting evidence, there must have been a proper objection taken to the evidence when offered, and an exception to the ruling made thereon. *Id.* The decision of a trial judge overruling a mere general objection to evidence will be sustained on appeal, unless it clearly appears that there is some ground of objection which could not have been obviated if it had been specified, or unless the evidence called for was in any aspect of the case incompetent. *Id.*; *Quinby v. Strauss*, 90 N. Y. 664.

**Power.**—In reviewing a capital case, the court of appeals must be satisfied that a fair trial has been had, and, when it can see that the case has been tried and submitted to the jury upon an erroneous theory, prejudicial to the accused, and which had a controlling influence upon the trial and the result, it ought to regard the principle which has been decided, rather than the concrete form in which the question arose and became a practical one at the trial, and should not be astute to seek for some technical ground, not urged upon the trial or appeal, to sustain the ruling. *People v. Barberi*, 149 N. Y. 56.

The court of appeals has power, in a capital case, to review the facts and to grant a new trial when satisfied that the accused has not had a fair trial, or when injustice has been done, but it must observe the rules and principles which apply to all tribunals exercising appellate jurisdiction. *People v. Kerrihan*, 69 S. R. 508; 147 N. Y. 210.

See *People v. Nino*, 149 N. Y. 317.

**Purpose.**—The provisions of this section were not intended to confer upon the court of appeals the right to disregard any valid exception taken by a defendant, or to abridge any rights formerly possessed in reviewing the rules of a trial court. *People v. Corey*, 148 N. Y. 476.

**Questions of law.**—The Constitution provides that “after the last day of December, 1895, the jurisdiction of the court of appeals, except where the judgment is of death, shall be limited to the review of questions of law, raised upon an appeal from the determination of an appellate division. *Matter of Caruthers*, 158 N. Y. 131. Under the Constitution and the Civil and Criminal Codes, the court of appeals is given no original jurisdiction, but is limited to the review of the determination of other courts. *Id.*

**Verdict conclusive.**—On the review of a conviction of murder in the first degree, where the defense of insanity is interposed, the verdict is conclusive upon that issue, in the absence of such elements from the case as show that the verdict was against the weight of evidence, or that it was influenced by some mistake, error or prejudice. *People v. Braum*, 158 N. Y. 558; *People v. Hoch*, 150 *id.* 291. The court in its discretion may exclude disparaging questions put to a witness on the cross-examination not relevant to the issue, though avowedly for the purpose of discrediting him, even if no claim of privilege be interposed; and such ruling is not reviewable on error unless the discretion be manifestly abused. *People v. Braun*, ante; *La Beau v. People*, 34 *id.* 230; *People v. Casey*, 82 *id.* 393; *Real v. People*, 42 *id.* 280; *People ex rel. Phelps v. Oyer and Terminer*, 83 *id.* 460.

528. See *People v. Schmidt*, 168 N. Y. 568; *People v. Whiteman*, 16 N. Y. Crim. Rep. 461; *People ex rel. Murphy v. Crane*, 17 N. Y. Crim. Rep. 238; *People v. Tobin*, 176 N. Y. 278; *People v. Boggiano*, 179 N. Y. 267; *People v. Raffo*, 180 N. Y. 434.

529. Amended by chap. 502 of 1894. Amended by chap. 217, Laws 1902. *People v. Whiteman*, 16 N. Y. Crim. Rep. 461.

See note under sec. 527, ante.

**Amendment.**—The amendment of 1897 to section 529 of Code of Criminal Procedure, applies to criminal actions in existence when the amendment took effect, at least to such proceedings in said actions as occurred after that amendment. *People v. Lyons*, 85 S. R. 811; 51 S. 811; 13 N. Y. Cr. 108.

**Stay.**—In respect to a stay of conviction after sentence, notice is required to be given to the district attorney but no express duty in connection therewith is enjoined upon the officer; yet the notice is required, in order that he may oppose the stay, if such course be proper. *Tompkins v. Mayor*, 77 S. R. 878; 43 S. 878.

532. **Transmitting papers.**—Upon an appeal being taken, it is the duty of the clerk with whom the notice is filed, to transmit a copy of the notice of appeal and of the judgment roll to the clerk of the county where the next general term is to be

neld. *People v. Hill*, 57 St. Rep. 293; 73 Hun, 473; 26 N. Y. Supp. 331.

536. Amended by chap. 369, Laws 1902.

539. Amended by chap. 369, Laws 1902.

542. See *People v. Mackinder*, 61 St. Rep. 528, 529; 80 Hun, 40; 29 Supp. 842; *People ex rel. Kenfield v. Lyon*, 64 St. Rep. 740; 83 Hun, 303; 31 Supp. 942; *People v. Burton*, 60 St. Rep. 549; 77 Hun, 498; 28 Supp. 1081; *People v. Fitzgerald*, 80 S. R. 1020, 1034; 46 S. 1020, 1034; *People v. Silverman*, 181 N. Y. 235.

See annotations in *People v. Constantino*, 153 N. Y. 24; 12 N. Y. Cr. 339, under section 528, ante.

See *People v. Peckens*, 153 N. Y. 576.

**Burden.**—Where a charge is erroneous, the verdict must be set aside, unless it is apparent that the error did not and could not have affected the verdict. *People v. Helmer*, 154 N. Y. 596; 13 N. Y. Cr. 1. It is not for the defendant to show how he was injured, but it rests with the prosecution to show that no possible injury could have arisen from the error. *Id.*

It is not the duty of the court of appeals to hold that the evidence is hurtful to the defendant's case on some imaginary ground, even if it is not strictly competent. *People v. Sutherland*, 154 N. Y. 345, 353; 12 N. Y. Cr. 495.

An error in receiving or rejecting evidence can only be disregarded where it could by no possibility have produced injury. *People v. Shinburne*, 84 S. R. 51; 50 S. 51; *Stokes v. People*, 53 N. Y. 164; *People v. Koerner*, 154 *id.* 355; 48 S. R. 730; *People v. Strait*, 154 N. Y. 165-171; 47 N. E. 1090. In *People v. Corey*, 148 N. Y. 476; 42 N. E. 1066, it was held that: While even in criminal cases a new trial will not be granted by an appellate court on account of errors not affecting a substantial right of the defendant, the statute in no way impairs or affects the rule that the rejection of competent and material evidence, or the reception of incompetent and improper evidence, which is harmful to a defendant and excepted to, presents an error requiring reversal, even if the appellate court would, with the rejected evidence before it, or with the improper evidence excluded, still come to the same conclusion reached by the jury. *Id.*

**Erroneous ruling.**—See *People v. Stephenson* (Sup. Ct. 1 D. 1895), 71 S. R. 649.

This section is in effect little more than a codification or statutory enactment of the previously established rule, that even in criminal cases a new trial will not be granted for an erroneous ruling, where the appellate tribunal can see that by no possibility could the error have worked any possible



harm to the defendant. *People v. Corey*, 148 N. Y. 476. It in no way impairs or affects the previously well established principle that the rejection of competent material evidence, or the reception of incompetent and improper evidence, which is hurtful to a defendant and excepted to, presents an error requiring reversal. *Id.* Such a ruling affects a substantial right of a defendant, even though the appellate court would, with the rejected evidence before it, or with the improper evidence excluded, still come to the same conclusion reached by the jury. *Id.*

**Inadmissible evidence.**—When technically inadmissible evidence, admitted on a criminal trial, apparently did not affect the case or prejudice the defendant, the error is to be disregarded on appeal. *People v. Coombs*, 158 N. Y. 532.

**Proof.**—On the trial of an indictment for printing circulars advertising counterfeit money, evidence that the circulars were of a kind used by counterfeiters, is not prejudicial to defendant, where the object of the circulars appears upon their face. *People v. Marvin*, 61 St. Rep. 47, 48; 79 Hun, 310; 29 Supp. 381.

**Technical.**—Errors in the rulings of the trial court, which do not prejudice the defendant, do not furnish ground for disturbing the verdict. *People v. Brown*, 55 St. Rep. 103, 108; 71 Hun, 601; 24 N. Y. Supp. 1111.

Where none of the grounds of error assigned affect a substantial right, it is the duty of the appellate court to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. *People v. Derringer*, 57 St. Rep. 136, 141; 73 Hun, 203; 24 N. Y. Supp. 1012.

If error is committed on the trial of the challenge for cause, it becomes merely technical when, after filling the panel, it appears that the use of the peremptory challenge did no harm to the defendant. *People v. Larubia*, 55 St. Rep. 457; 140 N. Y. 87; *aff'g*, 53 St. Rep. 415.

The duty of the appellate division, under these sections of the Code, to give judgment after hearing an appeal, without regard to technical errors or defects, or exceptions which do not affect the substantial rights of the parties, considered. *People v. Wicks* (Sup. Ct. 4 D. 1896), 11 A. D. 539; 76 S. R. 630; 42 S. 630.

Though no amendment of the indictment was made, still under section 542 it is the duty of the appellate court to give judgment, without regard to technical errors or defects not

ffecting the substantial rights of the parties. *People v. Boombs*, 36 A. D. 284; 89 S. R. 276; 55 S. 276.

In a case that is free from doubt upon the merits, the appellate courts disregard errors of the trial court, even in a criminal case, when it is reasonably certain that they could not have affected the result. *People v. Fielding*, 158 N. Y. 542.

Where the accused, upon the trial of an indictment for the robbery of a store, in the commission of which the clerk in charge was assaulted, is not permitted to ask the clerk whether he had not identified another person as his assailant, but is subsequently given full opportunity to cross-examine him in reference to his identification of the accused, such error may be disregarded. *People v. Stack*, 41 A. D. 548; 92 S. R. (58 S.) 691.

The provisions of this section and section 684 are mandates to which a court, with reason and discretion, should give full force and effect. *People v. Flechter*, 44 A. D. 199; 94 S. R. (60 S.) 777; *People v. Dimick*, 107 N. Y. 13.

The court of appeals is required to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. *People v. Barone*, 161 N. Y. 451.

See annotation of *People v. Flechter*, 44 A. D. 199; 94 S. R. (60 S.) 777, under sec. 542, ante.

Error in refusal to charge will be disregarded. *People v. Miller*, 169 N. Y. 339; *People v. Conklin*, 17 N. Y. Crim. Rep. 414; 175 N. Y. 333. But see *People v. Montgomery*, 17 N. Y. Crim. Rep. 503; 176 N. Y. 219; 17 N. Y. Crim. Rep. 503.

**543. Discharge.**—In order to uphold the decision of the general term discharging the defendant, the court of appeals must be able to see, in the record, some fundamental obstacle to his conviction for the crime charged in the indictment. *People v. Camp*, 54 S. R. 455; 139 N. Y. 87; aff'g 51 S. R. 30.

**Doubt.**—A judgment of conviction, in a criminal action, will be reversed on appeal, where the circumstances, though strongly suspicious, do not exclude every hypothesis except the guilt of defendant. *People v. Maxwell* (Sup. Ct. 3 D. 895), 67 S. R. 541; 86 Hun, 620.

**New trial.**—Where the general term reverses a conviction upon the ground that the verdict was against the weight of evidence or that justice required a new trial, or for any other errors which can be obviated or corrected upon a new trial, it should, instead of discharging the defendant, order a new trial. *People v. Camp*, 54 St. Rep. 455; 139 N. Y. 87; aff'g 51 St. Rep. 30.

547. See *People v. Brown*, 55 St. Rep. 103, 110; 71 Hun, 601; 24 N. Y. Supp. 1111.

See *People v. Mackinder*, 61 St. Rep. 529; 80 Hun, 40; 29 Supp. 842.

See *People v. Burton*, 60 St. Rep. 549; 77 Hun, 498; 28 Supp. 894.

See *People v. Bates*, 61 St. Rep. 584; 79 Hun, 584; 29 Supp. 894.

See *People v. Stone*, 65 St. Rep. 673; 85 Hun, 138; 32 Supp. 511.

See *People v. Hurlburt* (Sup. Ct. 4 D. 1895), 92 Hun, 46.

See *People v. Theobald* (Sup. Ct. 4 D. 1895), 71 S. R. 527; 92 Hun, 182.

See *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354.

See *People v. Orr* (Sup. Ct. 4 D. 1895), 71 S. R. 169, 172; 92 Hun, 199.

See *People v. Helmer*, 13 A. D. 426; 77 S. R. 642; 43 S. 642.

*People v. Lytle* (Sup. Ct. 4 D. 1896), 7 A. D. 553, 564; 40 S. 153.

*People v. Wicks* (Sup. Ct. 4 D. 1896), 11 A. D. 539; 76 S. R. 630; 42 S. 630.

*People v. Hoffman*, 24 A. D. 233; 82 S. R. 482; 48 S. 482.

See *People v. Peckens*, 153 N. Y. 576, 596; 12 N. Y. Cr. 433.

**Remittitur.**—After the judgment of the appellate court is given, it must be entered in the judgment book, and, when so entered, a certified copy of the entry shall be remitted to the clerk, with whom the original judgment roll is filed. *People v. Hill*, 57 St. Rep. 293; 73 Hun, 473; 26 N. Y. Supp. 331.

A judgment of the appellate court shall be entered in the judgment book in the county where the court is in session when the decision is made, and shall be certified to the county where the original judgment roll is filed. *Id.* Until this is done, a case must be regarded as still in the appellate court. *Id.*

548. See *People v. Bates*, 61 St. Rep. 584; 79 Hun, 584; 29 Supp. 894.

**Remittitur.**—The decision of the court and the return shall be remitted to the court below in the same form and manner as in civil actions. *People v. Hill*, 57 St. Rep. 293; 73 Hun, 473; 26 N. Y. Supp. 331.

549. **Amendment.**—The intention of this section was not to prohibit an appellate court from so amending its order or decision as to make it conform to the decision intended. *People v. Hill*, 57 St. Rep. 293; 73 Hun, 473; 26 N. Y. Supp. 331. It applies only to a case where the decision of the court has been fully perfected in accordance with its intentions. *Id.*

§ 550. As to defective indictment for receiving stolen property. See *People v. Hartwell*, 15 N. Y. Crim. Rep. 377; 166 N. Y. 361.

553. **Bail.**—Where the defendant is charged with a felony, his right to bail on that charge is not absolute, but rests in the discretion of the court, and in the further discretion of the court to examine into the question as to the probability of his appearing for trial, when called. *People v. Watson* (Ct. Gen. Sess. 1895), 70 S. R. 327; 14 Misc. 430. In testing that probability, the court has a right to take into consideration the reputation which the defendant has borne, acknowledged through the lips of his counsel at the bar, the fact that he has been a professional thief for many years, and the common character which surrounds his name. *Id.* Admission to bail in the case of a felony, will, when the defendant pleads present insanity in addition to not guilty, be refused until the determination of the former issue. *Id.*

554. See Laws 1895, chap. 880, sec. 2. Subd. 4 added by chap. 329, Laws 1903. Amended by chap. 656, Laws 1905.

554a. Amended by chap. 614, Laws 1903. Amended by chap. 656, Laws 1905.

555. See *Matter of Taylor*, 60 St. Rep. 149; 8 Misc. 159; 28 Supp. 500, which was affirmed by the general term in 59 St. Rep. 887, but the latter judgment was reversed by the court of appeals in 62 St. Rep. 175; 143 N. Y. 219.

567. Amended by chap. 202, Laws 1904. Amended by chap. 202, Laws 1904.

568. When a prisoner charged with homicide is admitted to bail he must be produced by the bail to answer an indictment for perjury. *Peruitti v. People*, 99 App. Div. 391.

570. The method of taking the appeal, making the return, arguing the appeal, rendering judgment thereon and carrying it into effect, is wholly prescribed by these sections. *People ex rel. Comrs. v. Cullen*, 151 N. Y. 54.

593. **Recognizance.**—Judgment on a forfeited recognizance will not be vacated, where the application is not accompanied by a certificate of the district attorney to the effect that the people have not been prejudiced. *People v. Byrnes*, 61 St. Rep. 120. Judgment on a forfeited recognizance will be vacated where the principal died before the recognizance was forfeited. *People v. Meyer*, 61 St. Rep. 121.

595. An order forfeiting a recognizance, where its caption and certain words indicated that it is an order of the "Court of General Sessions of the Peace holden in and for the city and the county of New York," but which was not entered as an order, and did not become a part of the records of that court and was signed with the name of the magistrate as "judge of

the Court of General Sessions" was held, when taken in its entirety, to be the act of the magistrate signing it and to be within its powers. *People v. Rich*, 36 A. D. 60.

**597. Forfeiture.**—The provision of the statute that the court may remit the forfeiture, or any part thereof, upon such terms as are just, confers a discretionary power upon the court. *People v. Young* (Sup. Ct. 5 D. 1895), 71 S. R. 846; 92 Hun, 373. One court will not review the discretion of another court, unless authorized by statute to do so, or unless such discretionary power has been so abused by the latter court as to constitute error in law. *Id.*

**598.** See *People v. Young* (Sup. Ct. 5 D. 1895), 71 S. R. 846; 92 Hun, 373.

**616.** This section was amended by chap. 98 of 1895. The amendment went into effect September 1, 1895. It gives to the witnesses for the people the same fees and mileage as witnesses in a civil action. The original section provided for the payment of a reasonable sum, upon the order of the court or a judge, to a poor witness or a witness who was a non-resident of the county, when summoned on behalf of the people.

**Allowance.**—A witness in a criminal case, who has been committed to jail for failure to give security for his appearance, is not entitled to a per diem allowance for the time of his confinement in the jail. *People ex rel. Troy v. Petit* (Erie S. T. 1897), 19 Misc. 280; 78 S. R. 256; 44 S. 256.

**617.** This section was amended by chap. 98 of 1895. The amendment went into effect September 1, 1895. It provides for the payment, in the discretion of the court, of witness' fees to defendant's witnesses, which is an entirely new provision. It added all but the last sentence of the present section.

**618a.** Unconstitutional. *Matter commonwealth of Pennsylvania*, 45 Misc. 46.

**619. Contempt.**—This section refers to cases of disobedience to process and refusal to answer as a witness. *People ex rel. Taylor v. Forbes*, 62 St. Rep. 176; 143 N. Y. 229; 38 N. E. 303; reversing 59 St. Rep. 887, which affirmed 60 *id.* 136. In these cases, the remedy is referred to the procedure prescribed in civil cases provided for in the Code of Civil Procedure. *Id.*

**658.** See *People v. Tobin*, 17 N. Y. Crim. Rep. 517; 176 N. Y. 278.

§ 662. Added by chap. 129, Laws 1903.

**663.** Chap. 70 of 1895 authorizes the commissioner of agriculture to settle and compromise certain claims in favor of the

state for violations of sections 26, 27, 28 and 29 of the agricultural law, relating to the sale or use of oleomargarine.

**671. Nolle prosequi.**—This section is merely a substitute for a nolle prosequi under the old practice. *People v. Willis*, 23 Misc. 568; 86 S. R. 808; 52 S. 808; 13 N. Y. Cr. 255. The court should not exercise its discretion to dismiss an indictment charging an attache of the court with crime. *People v. Spolasco*, 15 N. Y. Crim. Rep. 293; 33 Misc. 520.

**684.** See *People v. Marvin*, 61 St. Rep. 47; 79 Hun, 310; 29 Supp. 381; *People v. Lytle* (Sup. Ct. 4 D. 1896), 7 A. D. 553, 564; 40 S. 153; *People v. Peckens*, 153 N. Y. 576; 12 N. Y. Cr. 433; *People v. Russell*, 16 N. Y. Crim. Rep. 57.

See *People ex rel. Smith v. McFarlane*, 50 App. Div. 95; 14 N. Y. Crim. Rep. 555.

**692. Reprieves and pardons.**—The power to grant reprieves and pardons was always a part of the executive power. *People ex rel Forsyth v. Court of Sessions*, 57 St. Rep. 404; 141 N. Y. 288; rev'g, 50 St. Rep. 234. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. *Id.* It releases the punishment and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as though he had never committed the offense. *Id.* It removes the penalties and disabilities and restores him to all his civil rights. *Id.* It makes him, as it were, a new man and gives him a new credit and capacity. *Id.*

**695. Duty of prosecuting officer.**—It was the duty of the prosecuting officer, prior to this provision of the Code, to communicate to the pardoning power the facts of the case in which the application for a pardon had been made. *Tompkins v. Mayor*, 77 S. R. 878; 43 S. 878.

The object of the communication by the district attorney to the governor, stating the facts developed upon the trial, was for the purpose of enabling the governor to obtain a correct view of the facts which led to the conviction. *Id.* The object of the hearing before the commissioner is to apprise the governor not alone of the facts, but of any change in the facts, which the trial developed, which would make the exercise of the pardoning power proper. *Id.*

**696.** This section was added by chap. 392 of 1894, and went into effect May 3, 1894.

**Conditional pardons.**—Under sec. 5, art. 4 of the State Constitution, providing that the governor may grant pardons on such conditions as he may think proper, a condition that the person pardoned shall totally abstain from the use of intoxicating liquors for five years, is valid. *People v. Burns*, 59 St.



Rep. 855; 28 N. Y. Supp. 300. Where the convict is charged with violating such conditional pardon, the question of fact is properly tried by a jury on return of an order to show cause why he should not be remanded to prison for such violation, under his original sentence. *Id.*

**697.** Section 697 of original Code was repealed by section 3, chap. 360 of 1882.

See *People v. Trimble*, 38 St. Rep. 999.

New. This section was added by chap. 392 of 1894, and took effect May 3, 1894.

**698.** Section 698 of original Code was repealed by section 3, chap. 360 of 1882.

New. This section was added by chap. 392 of 1894, and went into effect May 3, 1894.

**699.** Section 204, which provides for the manner in which the testimony shall be taken and authenticated, under the procedure authorized by Part IV, relating to criminal actions prosecuted by indictment, does not apply to the procedure authorized by Part V, relating to courts of special sessions and police courts. *People v. Giles*, 152 N. Y. 136; 46 N. E. 326; rev'g, 12 A. D. 495; 76 S. R. 749; 42 S. 749.

**Minutes.**—Though there is no provision in this part of the Criminal Code expressly requiring it, it is the duty of magistrates to keep, or have kept under their direction, minutes of testimony taken upon the trial of the cases therein provided for, to the end that their determinations as to facts may be reviewed upon appeal. *People v. Giles*, 152 N. Y. 136; 46 N. E. 326; rev'g, 12 A. D. 495; 76 S. R. 749; 42 S. 749.

**Reading charge.**—Though this section of the Criminal Code provides that, where courts of special sessions or police courts have jurisdiction and the defendant is brought before the magistrate, a charge against him must be distinctly read and he must be required to plead thereto, still an omission to reduce the charge to writing does not deprive the magistrate of jurisdiction. *People v. Carter* (Sup. Ct. 4 D. 1895), 68 S. R. 584; 88 Hun, 304. And where a defendant is brought before a magistrate for intoxication in a public place and without any other action on his part pleads guilty to the oral charge, the requirements of this section are waived, and his conviction will not be reversed because the charge was not reduced to writing. *Id.* The filing of an information in writing is not required, as the statute expressly gives authority to arrest any person, intoxicated in a public place, without a warrant. *Id.*

In a case which courts of special sessions have exclusive jurisdiction to hear and determine in the first instance, the

charge must be distinctly read to the defendant when he is brought before the magistrate, and he must be required to plead thereto. *People v. Molinet* (Ct. Sess. 1895), 69 S. R. 204; 13 Misc. 301. This first step in the procedure is had in the court as such and not before the magistrate, and each succeeding judicial act to conviction and judgment continues to be the act of the court of special sessions. *Id.*

**701. Demand for jury.**—Upon a trial by jury, the court must proceed to try the issue. *People v. Molinet* (Ct. Sess. 1895), 61 S. R. 204; 13 Misc. 301. No election or waiver, other than a failure to obtain the certificate of removal, is necessary to give the court jurisdiction to try the case. *Id.* If the defendant demands a trial by jury, the court must summon one. *Id.* If he fails to make such demand, the court must proceed to try the case. *Id.* Under the prior statute, it was held that the court could not acquire jurisdiction to try a prisoner without a jury for an offense, unless it affirmatively appeared, in the proceedings had before the trial, that he expressly waived his right to a trial by jury. *People v. Mallon*, 39 How. 454. Such is not the law now. *People v. Molinet*, ante; *People v. Green*, 4 N. Y. Cr. 442.

Where a jury trial is demanded before the magistrate, and the venire issued by him for the purpose of procuring a jury as provided by law is delivered not to a constable, as required by section 2983 of Code of Civil Procedure, but to a deputy sheriff, who has no authority to execute the same or to summon the jurors, it is a fatal error, where defendant objected to all proceedings before trial. *People ex rel. McLane v. Whitney*, 83 S. R. 589; 49 S. 589.

**Recital.**—Under this section, the judgment of conviction, in a case tried in a court of special sessions without a jury, need not recite that the defendant did not demand a jury. *People v. Luczak*, 65 St. Rep. 417; 32 Supp. 219. See *People v. Mallon*, 39 How. 454, for a contrary view.

**702. Jury.**—Where the act, under which the police justice is elected, authorizes him to try all criminal cases that may be tried by a justice of the peace, but only as court of special sessions, the provisions of the Criminal Code, regulating proceedings in courts of special sessions, apply to a summary proceeding brought before him, and the defendant in such case, is entitled to a jury trial if he so elects. *Erbe v. Monteverde* (Sup. Ct. Sp. T. 1895), 69 S. R. 476; 13 Misc. 404.

**Village ordinances.**—If the right to a jury trial in police courts and courts of special sessions exists, it must be by virtue of the provisions of this section. *People v. Van Houten*

(Ct. Sess. 1895), 69 S. R. 265; 13 Misc. 603. But this section does not apply to cases for violation of village ordinances before police justices, but only to crimes and misdemeanors as created and defined by the Penal Code. *Id.*

**Waiver.**—Before the court hears any testimony upon the trial, the defendant may demand a trial by jury. *People v. Molinet* (Ct. Sess. 1895), 69 S. R. 204; 13 Misc. 301.

**706. Jury.**—The action of the magistrate in having excused, out of court and before the trial, one of the original jurors summoned, where the panel of jurors is exhausted at a criminal trial and talesmen have to be summoned, some of whom are known by the constable to be hostile to the accused, is an error which prejudices the accused. *People v. Pickert*, 26 Misc. 112.

**707.** See dissenting opinion in *People v. Olmsted*, 56 St. Rep. 314; 74 Hun, 323; 26 N. Y. Supp. 818.

**712. Absence of witnesses.**—It is not error to refuse an adjournment on the ground of the absence of witnesses, where the defendant does not excuse their absence or furnish proof that they are material and that he cannot safely proceed to trial without their testimony. *People v. Hildebrandt* (Co. Ct. 1896), 16 Misc. 195.

**Trial before same magistrate.**—A criminal case cannot be partly tried before one, and partly before another, magistrate. *People v. McPherson*, 55 St. Rep. 688; 74 Hun, 336; 26 N. Y. Supp. 236. When the trial of a case is once commenced, it must proceed to the end before the same court and jury. *Id.*

**717.** See *People v. Polhamus*, 8 A. D. 133; 40 S. 491.

**Extent of punishment.**—A court of special sessions cannot inflict a punishment greater than imprisonment for six months and a fine of fifty dollars. *People ex rel. Knatt v. Davy*, 65 St. Rep. 162; 32 Supp. 106.

A defendant convicted of the crime of selling intoxicating liquors, in violation of section 31 of chapter 401 of 1892, may be sentenced to pay a fine and to be imprisoned until the fine be paid, not to exceed one day for each dollar of the amount of the fine. *People v. Shaver*, 37 A. D. 21; 89 S. R. 701; 55 S. 701.

The provisions of this section are not applicable to a conviction under the Liquor Tax Law. *People ex rel. Langworthy v. Hazard*, 23 Misc. 477; 86 S. R. 670; 52 S. 670; *People v. Stock*, 26 A. D. 564.

As it covers the whole subject, prescribing the punishment and the manner in which the fine shall be collected, the penalty imposed must be in accordance with the statute, and in

such a case, where the defendant was convicted and fined, and, in the alternative, ordered sent to the penitentiary not exceeding one day for each dollar imposed as a fine, was void, to the extent of the imprisonment, and the defendant was entitled to his discharge. *People ex rel. Langworthy v. Hazard*, 23 Misc. 477; 86 S. R. 670; 52 S. 670.

**Functus officio.**—The court of special sessions, organized *pro hac vice*, becomes *functus officio* upon the pronouncing of sentence and the issuing of a certificate of conviction. *People v. Jewett*, 53 St. Rep. 305; 69 Hun, 552; 23 N. Y. Supp. 942. The justice, who has held it, has no power to reorganize or reopen it for any purpose whatever in connection with the case. *Id.* A different certificate of conviction and sentence, made out by the justice on the following day, is, therefore, void, and does not affect the validity of the first certificate. *Id.* In the case last cited, the defendant was convicted of assault in a court of special sessions, and sentenced, on Saturday night, to fine and imprisonment, and a commitment or certificate of conviction was made out and signed the same day; but on Sunday, the justice undertook to modify the sentence by imposing a fine of seventy-five dollars, without imprisonment. It was held that the jurisdiction of the court ceased with the sentence and issue of the certificate; that the subsequent proceedings were void, and did not affect the validity of the original judgment or the certificate issued at that time.

**Judgment.**—This section of the Code requires, upon a plea of guilty or conviction, the court to render judgment thereon of conviction or imprisonment, or both. *People ex rel. Dunningan v. Webster* (Sup. Ct. Sp. T. 1895), 71 S. R. 676; 14 Misc. 617.

**Place of imprisonment.**—Where the original judgment and sentence fix no place of imprisonment, the court of sessions has power to modify the judgment of a court of special sessions by adding the words, "in the county jail of Delaware county." *People v. Shaver*, 89 S. R. 701; 55 S. 701; 13 N. Y. Cr. 420.

**Special sessions.**—This section is included in the title relating to proceedings in courts of special sessions. *People ex rel. O'Brien v. Woodworth*, 60 St. Rep. 767; 78 Hun, 586; 29 Supp. 211. If the defendant is tried in a court of special sessions, such court concededly has no jurisdiction to impose a money penalty exceeding fifty dollars. *Id.*

Where a fine and imprisonment are both imposed, the question whether the fine is larger than the court had jurisdiction to impose, cannot be raised until the term of imprisonment

has been served, and then the defendant, if the imposition of the fine is invalid, is entitled to his liberty, upon payment of the legal amount. *Id.*

A penalty imposed by a city ordinance as distinguished from a fine, must be collected in a civil action. *People ex rel. Kane v. Sloane*, 98 App. Div. 450.

**718. Punishment.**—This section and section 848 direct, in effect, that a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied; specifying the extent of the imprisonment, which cannot exceed one day for every dollar of the fine. *People ex rel. Bedell v. Kinney*, 82 S. R. 749, 751; 48 S. 749, 751.

**721. Certificate of conviction.**—A form for a certificate of conviction to be made by a court of special sessions is provided by this section. *People ex rel. Ryan v. Webster*, 67 St. Rep. 79; 33 Supp. 337. It is the judgment of the court which authorizes the commitment and detention. *Id.* The certificate is evidence to the detaining officer of his right to receive and detain the offender. *Id.* The proceedings of courts of special sessions should be construed with sufficient strictness to protect the rights of persons charged with crime before these tribunals, but too technical rules should not be applied. *Id.* All that the statute requires is a brief designation of the offense. *Id.* It should be pointed out, indicated or named so that the defendant and others shall know of what crime he was convicted and imprisoned. *Id.* A statement that the charge against the defendant was "indecent exposure of the person and intoxication," is sufficient. *Id.*

This section of the Code relates to proceedings in courts of special sessions and police courts, and provides that when a conviction is had upon a plea of guilty, or upon a trial, the court must make and sign a certificate in substantially the form as there given. *People ex rel. Forbes v. Markell* (Sup. Ct. 4 D. 1895), 71 S. R. 734; 92 Hun. 286. This section does not require that any judgment should be entered in the minutes of the court. *Id.* There is but one mode of rendering judgment, and that is by pronouncing sentence. *Id.* And there is but one record of the judgment, and that is the certificate of the sentence pronounced. *Id.* The police court is not a court of record, and the provisions of this and the following sections are evidently intended to provide for the form and preservation of its judgment. *Id.* It is reasonable to presume that the certificate set out in this section is designed to be the record of conviction. *Id.*

Certificate of conviction which does not state among other things, the person from whom the property was taken, and entirely fails to specify the date of the offense, is fatally defective. *Matter of Brown*, 19 Misc. 692; 78 S. R. (44 S.), 1096.

The date of an offense is one of the essential particulars of the description thereof required to be inserted in such a certificate. *Id.* A person convicted is entitled to have the date of the offense, of which he is convicted, so specified that there will never be any danger of or opportunity for certain proceedings for the same offense. *Id.*

A certificate of conviction designating the offense as "Charged with petit larceny in stealing one mink boa, . . . the property of A." is sufficient, notwithstanding the date and place of such offense are omitted in the description contained in the certificate. *People ex rel. Sullivan v. Sloane*, 14 N. Y. Cr. 52; 39 A. D. 265; 90 S. R. (56 S.) 930.

The provision of this section of the Criminal Code is complied with when the offense of which the person is convicted is described with such particularity as to reasonably identify such offense. *Id.*

**Habeas corpus.**—The only question upon the return of a writ of habeas corpus to inquire the cause of imprisonment of one detained under an apparently valid legal process, is whether the court has jurisdiction to try the relator. *People ex rel. Hunt v. Markell*, ante. The merits of the conviction are not open for review. *Id.*; *People v. Liscomb*, 60 N. Y. 570; *People v. Neilson*, 16 Hun, 214; *People v. Markell*, 92 Hun, 286; 36 S. 723.

**Requirement.**—This section requires that a certificate of conviction of a court of special sessions must be substantially in the form set forth in that section, and requires, with other things, that it briefly designated the offense. *People ex rel. Hunt v. Markell*, 84 S. R. 766; 50 S. 766. Such designation requires such certainty that a jury may deliver an intelligent verdict, that the law may render a proper judgment, and that the defendant may plead the judgment in bar of any other prosecution for the same offense. *Id.*; *People v. Taylor*, 3 Denio, 91; *People v. Stocking*, 50 Barb. 573, 586; *People v. Olmsted*, 26 S. 818; *In re Brown*, 19 Misc. 692; 44 S. 1096; *People v. Whitney*, 22 Misc. 226; 49 S. 591.

**723. Authority to sheriff.**—A certificate of conviction is not usually the authority given to the sheriff to receive a prisoner and keep him confined in the common jail, unless such document contains the further command to that effect and purpose. *People ex rel. Snyder v. Whitney*, 83 S. R. 591; 49 S. 591. The certificate of conviction is practically the record of the court showing the trial and judgment. *Id.* A commitment may be embodied in a certificate of conviction, provided such certificate contains sufficient authority to the sheriff to



receive and detain the prisoner in conformity to the judgment, or is properly certified by the magistrate before whom the trial was had, or by the clerk of the county with whom such certificate should be filed within twenty days after such conviction is had. *Id.*

**Void certificate.**—A certificate of conviction of a justice of the peace, not containing a statement of the magistrate, showing his jurisdiction to try, or to pass judgment upon, defendant after trial and conviction, is void. *People ex rel. Snyder v. Whitney*, 83 S. R. 591; 49 S. 591. A defective certificate of conviction, unaccompanied by a commitment or mittimus, and containing no mandate to the sheriff to receive and confine the prisoner, does not authorize a sheriff to detain a prisoner in the common jail. *Id.*

**Filing.**—By this section, it is provided that within twenty days after the conviction, the court must cause the certificate provided by sec. 721, ante, to be filed in the office of the clerk of the county. *People ex rel. Forbes v. Markell* (Sup. Ct. 4 D. 1895), 71 S. R. 734; 92 Hun, 286.

**724. Dual purpose.**—A certificate of conviction is sometimes made to serve the dual purpose of a certificate of conviction and a commitment of the relator to the custody of the defendant, as sheriff of the county and keeper of the common jail. *People ex rel. McLane v. Whitney*, 83 S. R. 589; 49 S. 589.

**Evidence.**—By this section, it is provided that the certificate made and filed as prescribed by section 721, ante, or a certified copy thereto, is conclusive evidence of the facts stated therein. *People ex rel. Forbes v. Markell* (Sup. Ct. 4 D. 1895), 71 S. R. 734; 92 Hun, 286.

**725. Certificate.**—A certificate of conviction, not certified either by the magistrate or by the clerk of the county, as provided by this section, is void. *People ex rel. Snyder v. Whitney*, 83 S. R. 591; 49 S. 591.

In habeas corpus proceedings, when the return of the officer asserts a legal judgment of conviction, he is required to establish the fact of such judgment. *Id.*

**Execution.**—By this section, it is provided that the judgment must be executed by the sheriff or other proper officer upon receiving a copy of such certificate, certified by the clerk of the county court. *People ex rel. Forbes v. Markell* (Sup. Ct. 4 D. 1895), 71 S. R. 734; 92 Hun, 286.

**726. Game law.**—The amendment of 1893 to section 238 of the Game Law does not require that the fines and penalties for the violation of said act should go to the county treasurer,

under this section. *People ex rel. Huntington v. Crennan*, 56 *St. Rep.* 807; 74 *Hun.* 637; 26 *N. Y. Supp.* 167.

741. Amended chap. 563, Laws 1904.

742. Amended chap. 563, Laws 1904.

743. Amended chap. 563, Laws 1904.

744. Amended chap. 563, Laws 1904.

745. Amended chap. 563, Laws 1904.

746. Amended chap. 563, Laws 1904.

749, *et seq.* **Appeals.**—The subject of appeals, in courts not of record, is covered by these sections, which relate exclusively to proceedings in courts of sessions, police courts and the like. *People ex rel. Comrs. v. Cullen*, 151 *N. Y.* 54.

This section embraces appeals from courts of sessions, police courts and the like, and provides a complete system of reviewing judgments rendered therein. *People ex rel. Comrs. v. Cullen*, 151 *N. Y.* 54.

The words "not otherwise" of this section was probably intended as emphasizing the repeal of the method of review by certiorari, which the method by appeal superseded. *People v. Burnham*, 22 *A. D.* 616; 82 *S. R.* 946; 58 *S.* 946.

While the court has power, in a direct proceeding instituted by petition and in the interests of an infant, to go behind its commitment to the custody of a House of Industry, the court cannot review a commitment, made by a competent criminal tribunal, upon returns to writs of habeas corpus and certiorari. *People ex rel. Stern v. N. Y. Soc. for Prevention of Cruelty to Children*, 27 *Misc.* 457; 92 *S. R.* (58 *S.*) 118; *Matter of Knowack*, 158 *N. Y.* 482.

Proceedings, which terminate in the commitment of a child, can be adequately reviewed upon an appeal, as prescribed by this section. *People ex rel. Stern v. N. Y. Soc. for Prevention of Cruelty to Children*, ante. A writ of certiorari cannot be issued to review such determination. *Id.*

**Bastardy proceedings.**—The amendments of 1890 to these sections have not changed the character of the proceedings on appeals from the orders in bastardy proceedings. *People ex rel. Board of Comrs. etc. v. McCloskey*, 15 *A. D.* 41; 78 *S. R.* 111; 44 *S.* 111. The language of section 749 is for the review of a judgment upon conviction." *Id.* The orders, made in bastardy proceedings, are never so characterized by the Code, but are spoken of as orders of filiation. *Id.*

**Children.**—Where an appeal, under the provisions of this section, from a commitment of children pursuant to the provisions of section 291 of the Penal Code, the affidavit upon which the appeal is allowed does not allege any errors with

reference to the determination of the facts, the evidence is required to be returned, and the failure of the magistrate preserve it furnishes no ground for a reversal of the commitment. *People v. Giles*, 152 N. Y. 136; 46 N. E. 326; rev'g, 12 A. D. 495; 76 S. R. 749; 42 S. 749.

**Convictions by minor courts.**—Section 2 of the act of 1895 so amends this section as to cover convictions by the minor courts in criminal proceedings and special proceedings of criminal nature, as well as in criminal actions to which it has previously been confined. *People ex rel. Comrs. v. Cullen*, 151 N. Y. 54.

**Certiorari.**—This section is included in part V of the Code which provides for a complete system of procedure, independent of that provided for in part IV, except so far as the provisions of part IV are expressly adopted in part V. *Id.* The appeal provided for by this section is a substitute for the review formerly had of proceedings, authorized by this part of the Code, under the writ of certiorari. *Id.* The provisions of the Criminal Code do not require the evidence to be incorporated in the commitment, but they do not dispense with their being inserted in the return when required by the notice or affidavit of appeal. *Id.*

**Entering jury room.**—It is reversible error for a justice of court of special sessions to enter, in the absence of defendant's attorney, the jury room while they are deliberating upon their verdict. *People v. Linzey*, 61 St. Rep. 240; 79 Hun, 23; 29 Supp. 560.

**New trial.**—A judgment upon conviction, rendered by a court of special sessions, may be reversed by the county court upon appeal, and not otherwise. *People v. Hildebrandt* (Ct. Ct. 1896), 16 Misc. 195. The county court has not the power on appeal, to grant a new trial in analogy to the practice which prevails in the supreme and county courts upon conviction after indictment, upon affidavits setting forth facts in support of a motion therefor. *Id.*

**Return.**—When an affidavit, annexed to the return of a justice of special sessions, will be treated as part of the return. *People v. Linzey*, 61 St. Rep. 240; 79 Hun, 23; 29 Supp. 560.

**Special county judge.**—The special county judge has power to allow an appeal from a judgment of conviction by a court of special sessions. *People v. Burnham*, 22 A. D. 616; 82 S. R. 946; 48 S. 946.

750. See *People v. Giles*, 152 N. Y. 136; rev'g, 12 A. D. 495; 76 S. R. 749; 42 S. 749; 96 N. E. 326; *People v. Benson*, 10 Crim. Rep. 28.

4. **Affidavit of appeal.**—The only allegations of error which can be considered by the court on appeal from a court of special sessions, are those alleged in the affidavit on which the appeal is allowed. *People v. Jewett*, 53 St. Rep. 305; 69 Hun, 551; 23 N. Y. Supp. 942.

This section requires that the affidavit of appeal must state the facts showing the alleged errors in the proceedings or conduct of which complaint is made. *People v. Jewett*, 53 St. Rep. 305; 69 Hun, 551; 23 N. Y. Supp. 942.

The errors relied upon must be pointed out in the affidavit in which the appeal is allowed. *People v. Giles*, 152 N. Y. 46 N. E. 326; rev'g, 12 A. D. 495; 76 S. R. 749; 42 S. 749. The errors are those provided for by section 550, ante, among which is a determination of fact. *Id.*

*People v. Beatty*, 39 Hun, 476, the defendant was convicted of disturbing certain oyster beds. Upon the hearing of the appeal from a judgment of the court of sessions, affirming the judgment of the court of special sessions, it was for the first time objected that in the charge before the court of special sessions the prefix "and" had been omitted, making the charge allege that the defendant "lawfully" did the acts set out. The court in that case said that, if the question had been raised by the affidavit, required by this section, it might have been sustained; but, as it was not so specified, it could not be so considered. *People v. Carter* (Sup. Ct. 4 D. 1895), 100 N. Y. R. 584; 88 Hun, 304.

5. **Appeal perfected.**—The appeal from a judgment of a court of special sessions is perfected though the defendant did not serve a copy of the affidavit and a notice of the allowance of appeal on the district attorney, as provided by section 752, amended by chapter 536 of 1897. *People v. Mulkins*, 25 N. Y. 599.

6. **When appeal allowed.**—By the provisions of this section, it is only when, in the opinion of the judge to whom the affidavit is presented, the question arising on the appeal should be decided by the court of sessions, that the appeal will be allowed. *People v. Jewett*, 53 St. Rep. 305; 69 Hun, 551; 23 N. Y. Supp. 942.

7. **Return.**—By the provisions of this section, it is only to matters stated in the affidavit that the magistrate or court, rendering the judgment, is required to make return. *People v. Jewett*, 53 St. Rep. 305; 69 Hun, 551; 23 N. Y. Supp. 942. Where the affidavit on appeal alleges no errors with reference to a determination of the facts, evidence is not required

to be returned. *People v. Giles*, 152 N. Y. 136; 46 N. E. 326; rev'g, 12 A. D. 495; 76 S. R. 749; 42 S. 749.

This section of the Code requires the police justice to return so much of the proceedings in the court below as are relevant to the allegations of error, and when no amended or further return has been made, the appellate court is necessarily confined to the matters thus presented in the consideration and determination of the appeal. *People v. Hilderbrandt* (Co. Ct. 1896), 16 Misc. 193.

**759. Laches in bringing an appeal to argument will justify its dismissal.** *People v. Addes*, 45 Misc. 314.

**761. Dismissal.**—This section has been held as sufficient to warrant an application for the dismissal of an indictment on the ground that the evidence taken before the grand jury was insufficient. *People v. Vaughn* (Kings Co. Ct. 1897), 19 Misc. 298; 76 S. R. 959; 42 S. 959.

**763. Hearing.**—The appeal must be heard upon the original return, and affidavits and other papers may not be received in support of an application for a new trial. *People v. Hildebrandt* (Co. Ct. 1896), 16 Misc. 195.

**764. See** *People v. Polhamus* (Sup. Ct. 3 D. 1896), 8 A. D. 133; 40 S. 941.

**Modification.**—This section of the Criminal Code confers upon the court the power to modify the sentence imposed upon the defendant, if the court shall deem it in furtherance of justice to do so. *People v. Mulkins*, 25 Misc. 599.

**New trial.**—In a proper case, the appellate court may grant a new trial, where it appears from the return that error has been committed in the court below which requires that the judgment upon the conviction be reversed, and justice demands that the appellant should again answer the charge upon the merits, in which event the new trial is had in the county court. *People v. Hildebrandt* (Co. Ct. 1896), 16 Misc. 195.

**Technical error.**—Where no substantial right of a person upon trial for the crime of assault is prejudiced by the erroneous admission of testimony, its admission is, under the provisions of this section, merely a technical error and will be disregarded upon appeal. *People v. Brockett*, 65 St. Rep. 667; 85 Hun, 138; 32 Supp. 423.

**768. Where new trial had.**—Where a new trial is ordered on appeal from a court of special sessions, such trial, under this Code, is to be had in the court of sessions of the county. *People v. Luhrs*, 61 St. Rep. 348; 79 Hun, 415; 29 Supp. 789.

**770. Defendant.**—This section provides that, if the judgment on the appeal be against the defendant, he may appeal therefrom to the appellate division of the supreme court in

the same manner as from a judgment in an action prosecuted by an indictment. *People ex rel. Comrs. v. Cullen*, 151 N. Y. 54.

An appeal by the defendant lies to the appellate division of the supreme court, from an order of the county court, adjudging the defendant to be the father of a bastard child. *People ex rel. Kirkpatrick v. Crowley*, 21 A. D. 189; 21 N. Y. Cr. 477; 81 S. R. 505; 47 S. 505.

**771. Final.**—This section directs that the judgment of the supreme court upon appeal shall be final, except “that where the original appeal was from a judgment of commitment of a child, either party may appeal to the court of appeals in like manner as a defendant under section 619,” which refers to appeals in cases originating in a court of record. *People ex rel. Comrs. v. Cullen*, 151 N. Y. 54. The court of appeals has no power to review a judgment or order of the appellate division of the supreme court, made in a special proceeding of a criminal nature, which originated in a police court or a court of special sessions, except where the original appeal was from a judgment of commitment of a child. *Id.* *Quaere*, whether the prosecution has the right to appeal to the supreme court, after a reversal by the county court or a court of sessions of a judgment against the defendant in a special proceeding of a criminal nature, which originated in a minor court. *Id.*

**773. Inquest.**—The amendment of 1887 to this section doubtless authorized an inquiry to some extent by the coroner into the circumstances of death before he determined to summon a jury; but this preliminary investigation to determine whether there should be an inquest does not constitute an inquest itself. *People v. Coombs*, 36 A. D. 284; 89 S. R. 276; 55 S. 276.

**777. Inquest.**—The result of an inquest is a judicial determination of the manner in which deceased came to his death; and if the death be occasioned by criminal means, who is guilty thereof. *People v. Coombs*, 36 A. D. 284; 89 S. R. 276; 55 S. 276; *People ex rel. Patterson*, 44 Misc. 20.

**827. Extradition.**—A person extradited, under the treaty between the United States and Great Britain, for assault with intent to murder, cannot be convicted of an assault with intent to do great bodily harm. *People ex rel. Young v. Stout*, 63 St. Rep. 152; 81 Hun, 336; 30 Supp. 898.

An extradited fugitive cannot be tried and convicted of any offense except that for which he was extradited, even though the offense for which he is tried may be of a minor or less



grade than the one for which he was surrendered. *People ex rel. Young v. Hannon*, 61 St. Rep. 724; 9 Misc. 600; 30 Supp. 370. Nor can he be tried for the extradited crime and convicted of a minor offense for which he could not have been extradited, though the former includes the latter offense. *Id.* He has the right to claim exemption from trial upon any other charges than those mentioned in the extradition proceedings. *Id.*

**832. Proof of conviction.**—Where the witness has been convicted of perjury, the fact of such conviction may be, under the provisions of this section, proved by the cross-examination of the witness. *People v. Williams* (Sup. Ct. 4 D. 1895), 71 S. R. 541; 92 Hun, 354.

**838. Jurisdiction.**—Under this section, a bastard is shown to be chargeable to a certain town, so as to authorize the overseer of the poor thereof to institute a bastardy proceeding against the father, where it is proved that it was born in the town, and has been therein ever since; that the father neglected to support it; that the mother was unable to do so; and that the child had been supported by its maternal grandparents. *People ex rel. Kirkpatrick v. Crowley*, 20 Misc. 160; 79 S. R. 824; 45 S. 824. See *Simis v. Alwang*, 61 App. Div. 426.

**Municipal Court of Rochester.**—This title is applicable to bastardy proceedings in the municipal court of Rochester. See subd. 15 of sec. 245 of chap. 14 of 1880, as amended by chap. 28 of 1894.

**839. Mistrial.**—Amended chap. 520, Laws 1904. Where the justices before whom a bastardy proceeding is brought fail to agree, there is a mistrial. *Kirkpatrick v. Crowley*, 20 Misc. 160; 79 S. R. 824; 45 S. 824. In such case, although there is no special provision authorizing a new complaint before another justice, the complainant undoubtedly had a right to discontinue the proceedings before the justices who had disagreed, and lodge a new complaint with another justice of the same town. *Id.*

**840. Application.**—Amended chap. 327, Laws 1905. One overseer of the poor of a town may, without consulting with the other overseer, if there are two, make an application and institute the proceeding under this section. *People ex rel. Garrett v. Ogden* (Sup. Ct. 4 D. 1896), 8 A. D. 464; 40 S. 827.

**Independent proceedings.**—By title 5 of the Code of Criminal Procedure, two independent proceedings are authorized, one against the father and the other against the mother, if she possesses property in her own right, to compel either to

support their bastard child. *People ex rel. Board of Police v. Shulman* (Sup. Ct. 4 D. 1896), 8 A. D. 514; 40 S. 779.

841. See *People ex rel. Garrett v. Ogden* (Sup. Ct. 4 D. 1896), 8 A. D. 464; 40 S. 827.

**Corroboration.**—There is no statute requiring corroboration of the prosecutrix in a bastardy proceeding, in order to secure a conviction, as in that of rape or seduction. *People ex rel. Kenfield v. Lyon*, 64 St. Rep. 739; 83 Hun, 303; 31 Supp. 942.

842. See *People ex rel. Ritzenthaler v. Higgins*, 151 N. Y. 570; rev'g, 77 Hun, 103.

844. **What contained in record.**—This section does not require the record on appeal to the court of sessions to contain a statement that the defendant, when arrested in a county other than that in which the warrant was issued, was taken before a magistrate in the county in which he was arrested. *People ex rel. Kenfield v. Lyon*, 64 St. Rep. 740; 83 Hun, 303; 31 Supp. 942.

848. **Two magistrates.**—This section provides that, upon the arrest of an individual charged with being the father of a bastard, the magistrate before whom he is brought must—"Immediately associate with himself, another justice of the peace or police justice in the same county or city; and the two magistrates thus associated must inquire into the charge." *People ex rel. Kirkpatrick v. Crowley*, 83 S. R. 214; 49 S. 214.

849. Amended by chap. 221 of 1894.

This amendment added the latter provision of the present section. It took effect Sept. 1, 1894.

**Adjournment bond in bastardy.**—This section provides that the magistrate may, on the application of the defendant, for good cause adjourn the examination not exceeding thirty days. *People ex rel. Ritzenthaler v. Higgins*, 59 St. Rep. 61; 28 N. Y. Supp. 458. It does not prohibit other adjournments and for a longer time by consent of both parties. *Id.* It does not prohibit more than one adjournment at the request of the defendant, but limits the time of any one adjournment to thirty days. *Id.*

In *People ex rel. Van Aken v. Millham*, 100 N. Y. 273, it was held that the sureties on a bond in a bastardy proceeding, under the provisions of the Criminal Code, were not released from liability because of the adjournment of the proceedings at the request of the defendant after the examination commenced.

In an action upon a bastardy proceeding adjournment bond, a defendant surety is entitled to insist that he shall not be held liable except according to the terms of his obligation.

People ex rel. Ritzenthaler v. Higgins, 151 N. Y. 570; rev'g, 77 Hun, 103. He may defend upon the ground that the instrument was not given according to the requirements of the statute, and that the officer who took it was without jurisdiction. Id. Such bond is void, unless the officer who acquired it, as a condition of the adjournment had jurisdiction of the person and of the case. Id. By force of the general provisions of this Code, the sole jurisdiction to grant such an adjournment and require a bond as a condition thereof rests with the officer who issued the warrant. Id.

**850. Acquittal.**—Amended chap. 520, Laws 1904. A disagreement of the two justices before whom a bastardy proceeding is tried does not constitute an acquittal, and is not a bar to subsequent proceedings, before two other justices, based on the same charge. People ex rel. Kirkpatrick v. Crowley, 83 S. R. 214; 49 S. 214.

**851. Appeal.**—In case a proceeding is instituted against the father and an adjudication is made against him, or if a proceeding is instituted against the mother and an adjudication is made against her, he or she may appeal from the adjudication made against him or her, as the case may be. People ex rel. Board of Police v. Shulman (Sup. Ct. 4 D. 1896), 8 A. D. 514; 40 S. 779. But the mother cannot appeal from any order or adjudication made in the proceeding against the father, nor can the father appeal from any adjudication or order made in a proceeding instituted against the mother. Id.

**Undertaking.**—This section provides for two distinct kinds of undertakings, and is in the alternative, either that the defendant will pay the sum directed for the support of the child, or will appear at the next court of sessions of the county to answer the charge, and obey its order thereon. People ex rel. Commissioners of Charities and Corrections v. Schildwachter (Sup. Ct. 1 D. 1895), 68 S. R. 436; 87 Hun, 363. If an undertaking has been given, as provided in the first part of the next section, for the payment of a weekly sum, the only question that can be raised is as to the amount of the allowance. Id. This section affects only appeals to the court of general sessions; and where the defendant gives an undertaking only for his appearance, the court of general sessions is at liberty upon the appeal to review the entire order made by the magistrates. Id.

If the filiation order imposed upon the sureties any bond or obligation greater than the provisions of this section require, it is void. Lester v. Worden (Sup. Ct. 3 D. 1896), 8 A.

D. 216; 40 S. 436. This section contains two subdivisions; the first provides for security when the defendant does not intend to dispute the adjudication that he is the father of the child. *Id.* Upon giving an undertaking with approved sureties to the effect provided in this subdivision, the defendant is entitled to be discharged from arrest. *Id.*

Bond, which omits that, in the event the court of sessions shall change the amount adjudged to be paid by defendant for the support of the child, such amount shall thenceforth be the limit of the obligation thereby incurred, is void. *Id.*

The power to compromise a bastardy undertaking given under this section, is vested solely in the commissioners of charities, and cannot be transmitted by them to another person. *Mayor v. Celia*, 84 S. R. 637; 50 S. 637.

—Subd. 2.—See *People ex rel. Kirkpatrick v. Crowley*, 20 Misc. 160; 79 S. R. 824; 45 S. 824.

852. See notes under preceding section.

**Undertaking.**—The undertaking, required by the first subdivision of this section provides for the payment of the sum ordered to be paid for the support of the child, and the expenses of confinement and recovery of the mother, etc. *Constable v. Kennedy*, 21 A. D. 97; 81 S. R. 452; 47 S. 452. Upon appeal, where such an undertaking is given, the only question which is brought up for review is that part of the order fixing the weekly or other allowance required to be paid. *Id.* If a review of the whole matter is desired, then the undertaking must be given as provided in the second subdivision. *Id.* Where the order of affiliation is complied with, by the giving of the undertaking to support, it is, in effect, an admission that the party is in fact the putative father, and is concluded from complaining of any other matter than the amount he is ordered to pay, while under the other subdivision the party stands upon his denial as to the whole matter, and becomes entitled to a review of the question. *Id.* But the terms of the undertaking upon such an appeal, and also the provisions of the statute, require the person against whom the order of affiliation has passed not only to appear before the court, but to obey its order thereon. *Id.* The policy of the law evidently is to permit a review of the proceeding only upon condition that the party shall comply with the order that is finally made, as well as to appear and submit his person to custody. *Id.*

By section 867, post, is provided the undertaking required upon the affirmance of the order of affiliation, which is in all

substantial respects the same as is required upon the order of affiliation under this section. *Id.*

The defendant upon giving an undertaking in accordance with first subdivision of section 851, ante, cannot review the adjudication that he was the father of the child. **Lester v. Worden** (Sup. Ct. 3 D. 1896), 8 A. D. 216; 40 S. 436. But he can appeal from that part of the order of filiation, fixing the weekly or other allowance to be paid. *Id.*

**857. Independent proceedings.**—By title 5 of the Code of Criminal Procedure, two independent proceedings are authorized one against the father and the other against the mother, if she possesses property in her own right, to compel either to support their bastard child. *People ex rel. Board of Police v. Shulman* (Sup. Ct. 4 D. 1896), 8 A. D. 514; 40 S. 779.

**861.** See *People ex rel. Commissioners of Charities and Correction v. Schildwachter* (Sup. Ct. 1 D. 1895), 68 S. R. 436; 87 Hun, 363.

**Appeal.**—This section provides that a person who feels himself aggrieved by an order of the magistrates in bastardy proceedings, may appeal to the court of sessions of the county. *People ex rel. Crouse v. Sup'rs, etc.* 53 St. Rep. 796; 70 Hun, 560; 24 N. Y. Supp. 796; aff'd, 54 St. Rep. 934.

These sections provide a complete scheme for appeals in bastardy cases, and prescribe the powers of the courts on such appeals. *People ex rel. Board of Comrs. v. McCloskey*, 15 A. D. 41; 78 S. R. 111; 44 S. 111. The amendments of 1890 to sections 749 and 751, ante, were not intended to abrogate this scheme. *Id.*

But this only applies to appeals from decisions of the magistrate to the county court. *Id.* There is no special provision for appeal to the supreme court from the decision of the county court. *People ex rel. Kirkpatrick v. Crowley*, 21 A. D. 189; 81 S. R. 505; 47 S. 505. But it was clearly the intention to confer upon the defendant, in all proceedings of a criminal nature, the right of appeal to the supreme court. *Id.*; *People ex rel. Commissioners v. Benson*, 63 App. Div. 142.

**863. Undertaking.**—This section only requires that the magistrates from whose order the appeal is taken shall transmit to the court of sessions the undertaking of the defendant for his appearance in that court, with a certified copy of the order appealed from. *People ex rel. Kenfield v. Lyon*, 64 St. Rep. 740; 83 Hun, 303; 31 Supp. 942.

**864. Former evidence.**—Appeals from magistrates, in bastardy cases, to the court of general sessions, like appeals from district courts to a county court, involve a new trial, and it

is only upon showing that the mother is dead or insane, that her former evidence is admissible upon such trial. *People ex rel. Commissioners of Charities and Correction v. Schildwachter* (Sup. Ct. 1 D. 1895), 68 S. R. 436; 87 Hun, 363. The court has no right to deprive the defendant of the benefit secured to him by appeal, of having a new trial upon the charge, which includes not only the right to cross-examine the relator, but also to produce and examine his own witnesses. *Id.* Evidence, affecting the complainant's chastity subsequent to the birth of the child, or long prior to the period of gestation, can have no material bearing upon the question at issue as to whether the defendant is the father of the child, and, if offered, it is very properly excluded as incompetent. *Id.*

**Trial de novo.**—On the hearing of a bastardy proceeding in the county court, the defendant cannot claim that the county court was limited to an examination of the proceedings before the police justice, and that the only matter to be determined by the court was whether the police justice erred on the evidence before him. *People ex rel. Board of Comrs. etc. v. McCloskey*, 15 A. D. 41; 78 S. R. 111; 44 S. 111. In such case, the provisions of this section require a trial de novo in the county court. *Id.*; *Roy v. Targee*, 7 Wend. 358; *People ex rel. Kenfield v. Lyon*, 83 Hun, 303; *People ex rel. Comrs. etc. v. Schildwachter*, 87 id. 363.

**865. Performance.**—Under the obligation required by the statute, if the defendant appeals to the court of sessions, and there procures an order reducing the amount to be paid by him, he will fully perform its conditions by paying the amount so reduced. *Lester v. Worden* (Sup. Ct. 3 D. 1896), 8 A. D. 216; 40 S. 436.

**867. Undertaking.**—This section provides for an undertaking required upon the affirmance of the order of affiliation, which is in all substantial respects the same as is required upon the order of affiliation under section 851. *Constable v. stable v. Kennedy*, 21 A. D. 97; 81 S. R. 452; 47 S. 452.

**868 Commitment.**—By this section, if defendant fails to give the undertaking required by the preceding section, he is to be committed to jail. *Constable v. Kennedy*, 21 A. D. 97; 81 S. R. 452; 47 S. 452.

**869. Forfeiture of undertaking.**—The undertaking on appeal becomes forfeited upon failure to obey the order and give the undertaking, and is not satisfied by appearance only. *Constable v. Kenedy*, 21 A. D. 97; 81 S. R. 452; 47 S. 452.

**873. Costs.**—This section directs that the costs must be awarded to the party in whose favor the appeal is determined.



People ex rel. Crouse v. Sup'rs, etc. 53 St. Rep. 796; 70 Hun, 560; 24 N. Y. Supp. 796; aff'd, 54 St. Rep. 934. It also directs the manner in which such costs are to be paid, when awarded against the overseer of the poor of a town, not liable for the support of its own poor. Id.

**874. Enforcement of costs.**—This section provides that, in cases other than those mentioned in the preceding section, the payment of the costs may be enforced by the court as in civil actions. People ex rel. Crouse v. Sup'rs, etc. 53 St. Rep. 796; 70 Hun, 560; 24 N. Y. Supp. 796; aff'd, 54 St. Rep. 934.

**Mandamus.**—Where costs have been awarded against a town in a proceeding brought by its overseer of the poor, and the board of supervisors fails to make provision for payment of the judgment therefor, the defendant is entitled to a mandamus to compel it to do so. Id.

**878. Amended chap. 52, Laws 1904.**

**881. Order for prosecution.**—The language of these sections is not mandatory, but permissive. Constable v. Kennedy, 21 A. D. 97; 81 S. R. 452; 47 S. 452.

All the substantial requirements of either section are answered by a prosecution under one. Id. If the court makes the order for prosecution, then the district attorney must prosecute in the name of the people. Id. If no such an order is made, then the overseer may prosecute in his own name. Id.

**Payment to mother.**—In an action upon a bastardy undertaking, under these sections to recover installments due, evidence that the defendant has paid a sum of money directly to the mother of the child is inadmissible. Mayor v. Celia, 84 S. R. 637; 50 S. 637. The bastardy undertaking was made to the people of the state of New York, for the purpose of insuring the support of the child. It was not given for the support of the mother. She is not a party to it, and she has no interest in it. She cannot, in any way, affect it, either in its operation, force or continuance. Id. See People v. Shulman, 8 A. D. 517; 40 S. 779.

**883. Breach of undertaking.**—Where defendant has given an undertaking in bastardy proceedings for the support of a child, his neglect to pay the sum ordered to be paid for such purpose is a breach of the undertaking, and the measure of the damages is the sum ordered to be paid, and which is withheld at the time of the commencement of the action, with interest thereon. Mayor v. Celia, 84 S. R. 637; 50 S. 637.

**887.** Chap. 237 of 1895, relates to the commitment of, and discharge of persons convicted of public intoxication, disorderly conduct or vagrancy in the city of New York.

Chap. 377 of 1895, is an act concerning tramps and vagrants in the county of Putnam.

—**Subd. 4. Prostitution.**—Under the provisions of the Code of Criminal Procedure, common prostitution seems to be treated only as evidence of vagrancy, which is a crime, and in that case only when the accused has no lawful employment whereby to maintain herself. *People v. Cowie* (Sup. Ct. 3 D. 1895), 69 S. R. 83; 88 Hun, 498. The fact that a woman is a common prostitute at the time when the warrant is issued, is sufficiently made out by proof of her improper and lascivious conduct. *Id.*

**888.** See *People ex rel. Comrs. v. Cullen*, 151 N. Y. 54.

While this section plainly requires notice to the father or mother to be present at the examination, for the purpose of committing a boy to the state industrial school, yet where the return to the case has not been traversed, and in the absence of evidence that the boy was committed without the required notice, the commitment was held valid. *The People ex rel. Filkins v. Supt. State Industrial School*, 33 Misc. 96; 101 St. Rep. 674; 15 N. Y. Crim. Rep. 278.

**890. Arrest without warrant.**—Under the general designation of “special proceedings of a criminal nature,” the right to arrest without a warrant is expressly conferred in cases of vagrancy only by these sections. *People v. Fuerst* (Ct. Sess. 1895), 69 S. R. 205; 13 Misc. 304.

**891.** Trial on Sunday void. See *People ex rel. Donahue v. Sheriff*, 15 N. Y. Crim. Rep. 512.

**899.** See *People ex rel. Shortell v. Markell*, 12 N. Y. Cr. 312; 9 S. R. 904; 45 S. 904.

**Abandonment.**—The offense of abandoning or deserting a wife, if not a crime within the meaning of the Penal Code, is clearly of a criminal nature, and it is incumbent upon the people to prove it. *People ex rel. Comrs. of Public Charities and Corrections v. Cullen*, 153 N. Y. 629; 12 N. Y. Cr. 462. Though it is the duty of the husband to support his wife, he is not bound to support her away from his home, even though such home may be disagreeable to her. *Id.* Abandonment, in the sense in which the term is used in the statute means the actual and willful desertion by the husband of the wife. *Id.* After judicial separation at the suit of the wife, the relation is so far terminated or suspended that the husband cannot be guilty of abandonment or desertion in any legal sense. *Id.* If the wife procures or consents to, the separation, the case does not come within the statute. *Id.* The fact that the court in the decree of separation made no allowance for the wife, does not change the situation. *Id.*

This section describes, among others, disorderly persons as persons who actually abandon their wives or children without adequate support, or who leave them in danger of becoming a burden upon the public, and neglect to provide for them according to their means. *Id.* If he abandons his wife without adequate support, he becomes under the statute a disorderly person. *Id.* The fact that some other court failed to do its duty does not absolve him from the offense against the law which he has committed. *Id.* Special proceedings by the Commissioners of Public Charities are not affected by the provisions of a decree of separation in reference to alimony. *Id.*

**Abandonment of child.**—The fact that a child has voluntarily left its home, does not absolve the father from his obligation to support and maintain it, nor relieve him from liability, under this Code, for a failure to do so. *Manning v. Wells*, 61 St. Rep. 61; 8 Misc. 646; 29 Supp. 1044. Under this section, if the circumstances of the abandonment of the child are sufficient to warrant it, a criminal prosecution can be had. *Id.*

**Appeal.**—Sec. 20, chap. 601 of 1895, which gives the right to appeal to the court of appeals, from a judgment of the court of special sessions in the city of New York, is constitutional. *People ex rel. Comrs. of Public Charities and Correction v. Cullen*, 153 N. Y. 629; 12 N. Y. Cr. 462. The legislature has the power to enact a statute providing for a final review in the court of appeals of a judgment or order made by a magistrate, convicting a party as a disorderly person. *Id.*

**Crime.**—A “disorderly person,” as defined by this section, is not, in contemplation of the law, guilty of the commission of either a misdemeanor or a felony. *People v. Fuerst* (Ct. Sess. 1895), 69 S. R. 205; 13 Misc. 304. While the several specifications set forth in the subdivisions of this section undoubtedly referred to acts and omissions, done or intended, which are detrimental to the peace, good order, economy and general welfare of the state, and some of which are also criminal offenses, yet the proceedings provided to be had thereunder, as respecting disorderly persons, do not lead to a judgment calling for the imposition of a fine or corporal punishment, except incidently, and as the result of a failure to give the security required by section 902 of this Code. *Id.* Though some of the specified acts constitute positive crimes, such as common gambling and the keeping of bawdy houses and render the offender amenable to prosecution therefor, but in such cases he is to be arrested and prosecuted in the usual and ordinary mode provided by law where a felony or

nisdemeanor has been committed. *Id.* A proceeding under this section against a disorderly person must be instituted by complaint and warrant. *Id.* Section 177 of this Code which allows a peace officer to arrest a person for a crime committed or attempted in his presence, does not apply to such proceeding. Where the defendant is arrested without a warrant and the complaint is not prepared until after his arrest a conviction of being a disorderly person cannot stand. *Id.*

**Defense.**—At common law, a husband is not bound to support his wife, while he is living away from her, if she is guilty of adultery. *People v. Brady* (Ct. Sess. 1895), 69 S. R. 208; 13 Misc. 294. The adultery of the wife is a defense to a prosecution of the husband as a disorderly person for neglecting to support her, under subdivision 1 of this section. *Id.*

Where the defendant was convicted by a police magistrate of being a disorderly person and having abandoned his wife and child without adequate support, and having left them in danger of becoming a burden upon the public, and having neglected to provide for them according to his means, he should be allowed, upon a further hearing in the court of general sessions (now county court) to disprove the complainant's allegations that he had abandoned her, and that she had no adequate means of support, and to prove that he had offered her a home which she refused to accept. *People ex rel. Karlsioe v. Karlsioe*, 1 App. Div. (93 Hun), 571.

In a prosecution for being a disorderly person, in that the defendant failed to support his wife, it is a question for the trial magistrate whether his offer to support her was bona fide. *People v. Frederick*, 60 St. Rep. 195; 78 Hun, 36; 28 Supp. 1002; *People v. Harris*, 38 St. Rep. 316; 14 Supp. 830.

**Disorderly person.**—Keeping a house "for the recort of prostitutes, drunkards, tipplers, gamesters or other disorderly persons," constitutes a disorderly person. *People v. Iverson*, 94 A. D. 301.

**Habitual criminals.**—The legislature in enacting the Code of Criminal Procedure intended to deal with the subject-matter of the act of 1873 and to revise and improve it, and when it placed habitual criminals within the class of disorderly persons, as defined in the Code of Criminal Procedure, it referred to the class of criminals who were intended to be dealt with under the act of 1873, and gathered them in, together with others who have been previously characterized in various statutes as disorderly persons, under a comprehensive scheme for a more scientific and convenient restatement of

the law concerning such persons and their treatment. *People ex rel. Sloane v. Fallon*, 27 Misc. 16; 13 N. Y. Cr. 429.

**Jurisdiction.**—Whether the officer who arrested the defendant should have had a warrant does not affect the question of his conviction after he was once within the jurisdiction of the court. *People v. Iverson*, 46 A. D. 301. It is no defense to a criminal prosecution that the defendant was illegally or forcibly brought within the jurisdiction of the court. *Id.*; *People v. Eberspacher*, 79 Hun, 410.

**Jury trial.**—A disorderly person convicted in the recorder's court of the city of Rochester is not entitled to a jury trial. *People v. Iverson*, 46 A. D. 301.

**Special proceeding.**—A proceeding respecting disorderly persons is not a criminal action, but a special proceeding of a criminal nature. *People v. Fuerst* (Ct. Sess. 1895), 69 S. R. 205; 13 Misc. 304.

On the question whether the defendant has abandoned or neglected the complainant, hearsay evidence of first husband is not permissible. *People v. Miller*, 30 Misc. 355; 14 N. Y. Crim. Rep. 407.

900. See *People ex rel. Shortell v. Markell*, 20 Misc. 149; 79 S. R. 904; 45 S. 904.

**Police justice.**—The police justice acts as an officer or magistrate, and not as a court. *People v. Fuerst* (Ct. Sess. 1895), 69 S. R. 205; 13 Misc. 304. This section calls for a complaint on oath, by which the proceeding is instituted, and upon which is to be issued a warrant requiring a peace officer to arrest the defendant and bring him before the magistrate for examination. *Id.*

**Separation.**—A police justice has jurisdiction to entertain the complaint and judicially pass upon and determine the question whether the defendant is a disorderly person for failure or neglect to support his wife and children. *People v. Meyer* (N. Y. Gen. Sess. 1895), 67 S. R. 826. In such case, there is no provision of law requiring the complaint to be made by the commissioners of charities and corrections. *Id.* Any person may make such complaint. *Id.* Where the defendant and his wife, enter into an agreement, through an intervening trustee, of separation, which provides that a certain sum per week should be paid to the wife for the support of herself and child, this is a separation, not an abandonment, and, so long as the defendant continues to pay the stipulated sum, he does not abandon his wife. *Id.* But when he fails to make the payments for the support of his wife and child, in accordance with such agreement, he is guilty of neglect

to support them in the county in which she then resides. *Id.* In such case, no demand for support is necessary. An agreement for a voluntary separation, wherein a certain sum is stipulated for support, is no bar to a prosecution to compel the husband to support his wife. *Id.*

**Transfer.**—When once a person is brought before a magistrate, on a complaint or charge, he shall not be brought before another magistrate, on the same complaint or charge, except that, for adequate cause, to be stated as part of the record, the magistrate to whom complaint was first made may send it to another magistrate. *People ex rel. Sagazei v. Sagazei*, 27 Misc. 727; 93 S. R. (59 S.) 701.

Magistrate no jurisdiction to pronounce judgment for abandonment on evidence that husband has not supported child. *People ex rel. Keeler v. Powers*, 16 N. Y. Crim. Rep. 48; 35 Misc. 775.

**901. Bond.**—The question, whether the giving of a bond required of a disorderly person estops him from appealing from the order requiring the bond, will not be considered where the bond required of and given by him does not comply with the charter and runs to officials who had no statutory existence at the time when the bond was given. *People ex rel. Sagazei v. Sagazei*, 27 Misc. 727; 93 S. R. (59 S.) 701.

**Family.**—A wife, abandoned by her husband, does not constitute a family. *People ex rel. Sagazei v. Sagazei*, 27 Misc. 727.

**Justification.**—The infidelity of the wife justifies the husband in separating from her, and thereupon terminates his obligation to support her. *People ex rel. Keller v. Shradly*, 40 A. D. 460; 92 S. R. (58 S.) 143. To be relieved from that duty he must secure a severance of the tie or prove facts which would entitle him, if innocent, to such severance. *Id.*

**902.** See *Cuniff v. Beecher* (Sup. Ct. 3 D. 1895), 66 S. R. 400.

**903.** Amended by chap. 302, Laws 1902.

**905.** Amended by chap. 165, Laws 1901. Amended by chap. 525, Laws 1904.

**912.** See *Oneida County v. Brewer*, 63 St. Rep. 377; 82 Hun, 80; 31 Supp. 106.

**914.** See *Keenan v. Brooklyn City Railroad Company*, 64 St. Rep. 814; 145 N. Y. 348.

**Defense.**—While the order, prescribed by this section, remains in full force, the officer is entitled to recover the sum adjudged thereby. *Id.* If the relative desires to relieve himself from the effect of the order, he must apply to the court



of sessions, under the provisions of this section, for a modification. *Id.* But, so long as the order remains unchanged, he is, by force of the statute, liable. *Id.*

The order cannot be treated as void because it gives no option to the defendant to support his relative or pay the amount provided. *Id.* If it is irregular, or for any reason improper, his remedy is by appeal. *Id.* The question of the irregularity or impropriety of the order cannot be properly raised in an action to enforce it. *Id.*

**Insane paupers.**—Where insane paupers were chargeable to towns and counties, the statutes authorize proceedings for their indemnification, which provisions were incorporated into these sections. *Matter of St. Lawrence State Hospital*, 13 A. D. 436.

The liability of fathers, mothers, and children of insane adult paupers to support them arises solely from the statutes which are designed to indemnify the civil divisions mentioned therein from the cost of supporting such paupers. *Matter of St. Lawrence State Hospital for the Insane*, 13 A. D. 436; 77 S. R. 608; 43 S. 608. When insane paupers were chargeable to towns and counties, the statutes authorized proceedings for the indemnification, which provisions were incorporated into sections 914 to 926, inclusive, of the Code of Criminal Procedure. *Id.*

**Procedure.**—This title defines the liability in respect to the support of poor persons and prescribes the procedure to enforce it. *Aldridge v. Walker*, 57 S. R. 273; 73 Hun, 281; 26 S. 297.

**Re-enactment.**—The provisions of title 8 of this Code are substantially like the provisions of the Revised Statutes as they existed before the adoption of the Code. *Aldridge v. Walker*, 57 St. Rep. 273; 73 Hun, 281; 26 N. Y. Supp. 297; *Herendeen v. De Witt*, 17 St. Rep. 298; 49 Hun, 55.

**Son.**—This section imposes upon a child of sufficient ability of a poor person who is old, impotent or decrepid, so as to be unable to work to maintain herself, the duty of maintaining such parent. *De Puy v. Cook* (Sup. Ct. 5 D. 1895), 70 S. R. 399; 90 Hun, 43. Where an adult son voluntarily assumes the support of an aged parent, unable to maintain herself, she is as much entitled to the protection of the law as though her son had been compelled to support her under this section of the Criminal Code. *Id.*

**918. Final determination.**—Though the determination, provided for by title 8, is denominated an order, it is a <sup>Pro-</sup>final determination of the matter, and, in effect, a judgment. ~~Ald-~~

ridge v. Walker, 57 St. Rep. 273; 73 Hun, 281; 26 N. Y. Supp. 297.

**920. Action.**—This section provides that, if a relative, required by an order of the court to relieve or maintain a poor person, neglects to do so in the manner approved by the officers mentioned in section 914, ante, and neglects to pay the sum prescribed by the court, the officers may maintain an action against the relative, and recover therein the sum directed in the order. Aldridge v. Walker, 57 St. Rep. 273; 73 Hun, 281; 26 N. Y. Supp. 297.

**Defense.**—The defendant cannot dispute his liability under the order, or avoid a recovery for the amount adjudged, except, perhaps, by showing that he maintained the poor person in a manner approved by the overseer of the town or superintendent of the county, as provided by section 914, ante, or by proving that he has paid to the superintendent the amount prescribed by the order. *Id.*

**921.** Amended by chap. 13, Laws 1903.

**941.** This title was amended by chap. 733 of 1894. The amendment is in reality a substitute for the original title. It took effect October 1, 1894. Amended by chap. 372, Laws 1901.

**942.** Amended by chap. 372, Laws 1901.

**943.** Amended by chap. 372, Laws 1901.

**946. Criminal statistics.**—Amended by chap. 372, Laws 1901. The Secretary of State is to cause to be published title 10 of the Code of Criminal Procedure, relating to criminal statistics, with forms and instructions for the execution of the duties therein prescribed, and to furnish copies annually to each county clerk for distribution among the officers mentioned therein. *People ex rel. Weed-Parsons Printing Company v. Palmer*, as Secretary of State (Sup. Ct. Sp. T. 1895), 68 S. R. 166.

**948.** See *People ex rel. Weed-Parsons Printing Company v. Palmer*, as Secretary of State (Sup. Ct. Sp. T. 1895), 68 S. R. 166.

**962.** See *People v. McLaughlin*, 150 N. Y. 365.

**Contempt.**—By this section, this Code is made to apply to criminal actions and to all other proceedings in criminal cases, which are therein provided for. *People ex rel. Taylor v. Forbes*, 62 St. Rep. 176; 143 N. Y. 219; 38 N. E. 303. Proceedings for contempt are not provided for in this Code, nor is a criminal contempt there defined, or the punishment therefor prescribed, except in section 619, which refers to cases of disobedience to process and refusal to answer as a witness. *Id.*







# FORMS

## TO THE

### CODE OF CRIMINAL PROCEDURE.

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#### No. 1.

*District attorney's precept for Criminal term of Supreme Court.*

**IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:**

[SEAL] *To the sheriff of the county of .....*

*Whereas, A criminal term of the supreme court is to be held in and for the county of.....at the court house in the.....on the.....day of.....*

*We command you, in pursuance of the provisions of the Revised Statutes, in such case made and provided,*

*First. That you summon the several persons who have been drawn in said county of .....pursuant to law to serve as grand jurors and petit jurors at said court to appear thereat.*

*Second. That you bring before the said court all prisoners then being in the jail of said county, together with all processes and proceedings in any way concerning them in your hands as such sheriff.*

*Third. That you make proclamation in the manner prescribed by law, notifying all persons bound to appear at said court by recognizance or otherwise, to appear thereat, and requiring all justices of the peace, coroners and other officers who have taken any recognizance for the appearance of any person at such court, or who shall have taken any inquisition or examination of any prisoner or witness, to return such recognizance or inquisition and examination to the said court at the opening thereof on the first day of its term.*

*Witness: Hon....., justice of the supreme court, this.....day of.....*

*Clerk.*

*District Attorney.*

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#### No. 2.

*Proclamation on foregoing precept.*

*Whereas, A criminal term of the supreme court is appointed to be held in and for the county of.... on the .....day of..... proclamation is therefore hereby made in conformity to a precept to me directed and delivered by the district attorney of .....county, on the .....day of ..... to all persons bound to appear at said criminal term of the supreme court by recognizance or otherwise, to appear thereat, and all justices of the peace, coroners and other officers who have taken any recognizances for the appearance of any person at such court, or who have taken any inquisition or the examination of any prisoner or witness, are required to return such recognizance, inquisition or examination at the opening of the first day of said court.*

*Dated at ..... , this.....day of....., 18...*

*Sheriff of the county of.....*



No. 3.

*Return to district attorney's precept.*

STATE OF NEW YORK,        }  
COUNTY OF.....        } ss. :

I have executed the within precept as I am within commanded, by having duly summoned the jurors drawn for the court mentioned therein to appear thereat, by making immediate proclamation as therein commanded, and causing the same to be published in a public newspaper printed in said county once a week from the receipt of said precept until the time appointed for said court, and by having the prisoners in jail brought before the said court, with all processes and proceedings in any way concerning them in my hands.  
Dated at....., this.....day of 18 ...

*Sheriff of the county of.....*

No. 4.

*Calendar of prisoners in jail.*

*To the court of....., now in session :*

I, the undersigned..... sheriff of the county of....., do hereby certify that the following is a correct list of the prisoners now detained in the jail of said county, the time when each was committed, by what process and the crime charged:  
(1) John Doe, committed January 10, 18 . . ., by justices' warrant, charged with  
[Giving the same regarding all.]

*Sheriff of the county of... ..*

No. 5.

§ 12. Articles of Impeachment.

Articles exhibited by the assembly of the State of New York in the name of themselves and all the people of the State of New York, against....., a....., in maintenance of their impeachment against him for wilful and corrupt misconduct in his said office of

ARTICLE I.

That the said....., being a civil officer of the State of New York, to wit. a....., unmindful of the duties of his said office, and in violation of his oath of office, in this, to wit: that the said....., acting in his said office, did

to the great injury of....., and to the great scandal and reproach of the people of the State of New York, and their dignity, and more particularly of the said office of

ARTICLE II., ETC., ETC.

And the said assembly, saving to themselves by protestation the liberty of exhibiting at any time hereafter any of the articles of impeachment against the said....., and also of replying to the answers which he may make to the impeachment aforesaid, and of offering proof of the said matters of impeachment, to demand that the said ..... be put to answer all and every of the said matters, and that such proceedings, trial and judgment may be thereupon had and given as are conformable to the constitution and laws of the State of New York; and the said assembly are ready to offer proof of the said matters at such time as the honorable court for the trial of impeachments may order and appoint.

By the assembly of the State of New York, in session duly convened at the capitol in the city of Albany, N. Y., this .....day of..... in the year of our Lord one thousand eight hundred and .....

*Speaker.*  
*Clerk.*  
} *Committee.*

**No 6.****§ 17 Summons to Court for Trial of Impeachment.**

people of the state of New York, by the grace of God, free and indepen-

ge of the court of appeals of the state of New York (or senator of the New York, for the.....senatorial district thereof), and a member of the court for the trial of impeachments, and to the court for the trial of impeachments, greeting:

Court for the trial of impeachments is hereby summoned to convene and to meet at the capitol in the city of Albany on the ..... day of ..... at ..... o'clock in the ....noon, and you are hereby required and summoned to be and appear in your own proper person, at the time and place above to organize and sit with the said court, upon the trial of certain articles of impeachment then and there to be tried and determined before the said court, have been made and presented by the assembly of the state of New York Senate of the state of New York. against ....., a ....., for wilful and misconduct in office, and hereof fail not.

at the city of Albany, N. Y., this.....day of... .., 18

*President of the Senate of the State of New York.*

**No 7.****§ 18. Oath to Members of Court.**

do solemnly swear (or affirm) that you will truly and impartially try and determine according to evidence the articles of impeachment preferred against .....for wilful and corrupt misconduct in office, about to be presented to this court for the trial of impeachments, of which you are a member, for confirmation.

**No 8.****§ 20. Writ and Process of Court.**

people of the state of New York, by the grace of God, free and indepen-

.....greeting:  
and each of you are hereby commanded and required that, laying aside your business, and all pretences and excuses whatsoever, you be and appear in your own proper persons before our court for the trial of impeachments, at on the ..... day of .. ....A. D., 18 ....at....., ..o'clock.....M. of that you be examined as witnesses, and to testify the truth and give evidence on behalf (or on behalf of the respondent hereafter named) concerning articles of impeachment then and there to be tried and determined before this court, have been made against.... a ....., and hereof fail not at your peril.  
Witness: The Hon..... the president of the Senate, this .....day of  
A. D. 18

Attest.

Clerk of the Senate.

**No 9.****§ 44. Order Removing Indictment.**

COUNTY COURT—COUNTY OF

PEOPLE OF THE STATE OF  
NEW YORK  
against

appearing to the satisfaction of this court that....., county judge of the county of .....is incapable of acting in the above criminal action pending by reason of [here set forth cause.]

ordered that the same be and it is hereby transferred to the supreme court of the said county of....., [or city court, as the case may be.]

## FORMS TO THE CODE

## No. 10.

§ 45. Order for Sessions.

Terms of the county court of the county of.....  
 I do hereby order and appoint the terms of the county court of the county  
 of....., for the year 18.., to be held at the.....in the.....of.....,  
 and at the times following, viz. :.....

On the second Monday of January.

On the third Monday of March.

On the third Monday of June.

On the second Monday of September, and

On the second Monday of November.

It is further ordered, that a grand and trial jury be drawn and summoned to  
 attend each of said terms.

Dated,....., ..... 18.....

County judge of the county of.....

## No 11.

§ 84. Complaint and Examination on Application for  
 Surety of the Peace....

} ss.

COUNTY OF

.....of the .....of ....., upon .....oath complains and informs that....  
 ....of said.....of ....., hath threatened to commit..... a crime against  
 the person (or property) of ....., in that said.....has threatened to .....  
 .....and that ..... hath just reason to fear  
 that the said .....will commit the said crime threatened. The said.....  
 therefore prays surety of the peace to be granted ..... against the said .....  
 and this ..... doth not from any private malice or ill-will toward the said ...  
 .... but simply because ..... is afraid, and hath good reason to fear that the  
 said .....will commit the said crime threatened.

Wherefore the said..... prays that a warrant may issue in due form of law  
 against the said....., and that..... may be dealt with touching the premises  
 as to law and justice shall appertain.

[Signature.]

On the ..... day of .....18 .....the said ..... personally appeared be-  
 fore me, and made oath to the truth of the foregoing complaint and information  
 subscribed by

[Signature.]

## No 12.

§ 86. Warrant for Arrest; Security to Keep  
 the Peace.

STATE OF NEW YORK,  
 COUNTY OF

} ss.  
 OF

In the name of the people of the state of New York: To any peace officer of  
 the county of ...., greeting:

Whereas, an information has been laid before me, .....justice of the peace  
 of the .....of....., in and for the said county, under the oath of....., in  
 the aforesaid county, that one ....., of the ... ..of....., did, on or about  
 the .....day of....., 18 ....., at the ..... of.....in said.....county,  
 threaten to commit the crime of.... against the person of....., and alleg-  
 ing there is just reason to fear the commission of said threatened crime, and  
 further praying that a warrant issue for the arrest of said accused, and that he  
 be dealt with pursuant to the provisions of the Code of Criminal Procedure,  
 and after examining on oath said complaint.....and reducing an examination  
 to writing and caused the same to be duly subscribed; by which examination it  
 appears that there is just reason to fear the commission of the crime threatened  
 by said

These are, therefore, to command you forthwith to arrest the said....., so complained of, and to bring him before me, at my office.....in the..... of....., within said....., to answer unto the matters contained in said information, and to be further dealt with according to law.

Given under my hand, at the.... of....., in said county, this day of....., 18 .

[Signature.]

### No. 13.

§ 86. Warrant of arrest for Surety of the Peace on Threat to Commit a Crime against Property.  
Court,..... county of....., ss:

In the name of the people of the State of New York:

To any peace officer of the county of....., greeting:

Whereas, complaint and information on oath has this day been duly laid by ..... of the..... of....., in the county of....., before me, ..... a..... justice..... of the said..... of....., that on the..... day of..... 18 , at the..... of....., in said county, one..... did threaten to commit a crime against the property of... .. in that..... and that he has just cause to fear that the said..... will ..... and has demanded surety of the peace against the said..... and it appearing to me upon examination on oath, of the said..... and of ..... that there is just reason to fear the commission of said crime threatened by the said..... against the peace of the people of the State of New York, and the form of the statute in such case provided:

We, therefore, command you, forthwith to arrest and take the body of the said ..... and bring.. ..... before the said....., at the ..... in the said..... of..... with this warrant and a return of your doings thereon endorsed, to answer the said complaint and information, and to be dealt with according to law.

Hereof fail not at your peril.

Witness the said....., at the ....., of....., in the county aforesaid, the..... day of....., 18 .

[Signature.]

By virtue of the within warrant, I have arrested the within named..... and now have him before the magistrate by whom this warrant was issued.

Dated..... 18 .

### No. 14.

§§ 85, 86. Examination.

COUNTY OF ALBANY, ss.:

The examination of..... and..... taken upon oath before me, ..... a..... justice of said..... of....., on the..... day of..... 18 , on complaint and information made before me, by the said ..... against..... for the purpose of obtaining surety of the peace.

The said..... on..... oath aforesaid, before me, saith that on the..... day of ....., 18 , at..... in said..... of....., ..... did threaten this deponent that... .. would..... the said.....

The said..... on..... oath aforesaid, before me, saith that..... was present at the ..... of..... at the time mentioned in the above examination of ....., and that..... heard the said..... on that occasion make use of the threats above stated in the said..... examination, and that..... this deponent hath at various times and on divers occasions within the last..... months heard the said..... assert and swear that... .. would... .. the said.....

Taken before me the day and year first above mentioned.

[Signature.]

## No. 15.

## § 89. Undertaking to keep the Peace.

STATE OF NEW YORK, }  
COUNTY OF                    } ss.  
OF

Whereas, an information was laid before....., esq., justice of the peace, In the..... day of..... 18 , that..... had, at said....., on the..... day of....., 18 , threatened to commit the crime of ..... against the person..... and said magistrate having examined on oath the complainant and witnesses, and reduced his examination to writing, and caused them to be duly subscribed;

Whereupon a warrant was issued, and proceedings were duly taken before such magistrate, and it appears by the evidence that there is just reason to fear the commission of the said crime, and the said person complained of is required to give security in the sum of \$.. ..... to keep the peace, pursuant to the provisions of the Code of Criminal Procedure;

Now, therefore, we, the undersigned, residing in the..... of....., N. Y., do hereby acknowledge ourselves to be jointly and severally indebted to the people of the State of New York, in the sum of..... dollars, to be well and truly paid, if default shall be made in the conditions following: THE CONDITIONS of this undertaking are such, that if the said person complained of ..... shall personally appear at, and abide the order of, the next court of sessions of the county of....., N. Y., and shall in the meantime keep the peace towards the people of this State, and particularly towards the said ..... the complainant, then this undertaking to be void, otherwise of full force.

Taken, subscribed and acknowledged, before me, }  
this..... day of....., 18 . }

[Signature.]

## No. 16.

## § 90. Warrant of Commitment—Security to Keep the Peace.

STATE OF NEW YORK, }  
COUNTY OF                    } ss.  
OF

In the name of the people of the State of New York:

To ..... of the..... of....., and to the keeper of 'the common jail of the county of.....

Whereas,....., of the..... of....., county of....., N. Y., was charged under an information duly laid before me, the undersigned justice of the peace, with threatening to commit the crime of....., against the ..... by .....

And such proceedings were thereupon had before me, pursuant to the provisions of the Code of Criminal Procedure, that there appeared just reason to fear the commission of the crime threatened by said person complained of;

Whereupon he, the said accused, was required by me to enter into an undertaking in the sum of..... dollars, with..... sufficient surety..... to abide the order of the next court of sessions of said county; and in the meantime to keep the peace towards the people of this State, and particularly towards the complainant.

And whereas, said accused has neglected and omitted to give or enter into said undertaking so required of him; by reason whereof he is hereby committed.

These are, therefore, to command you, the said constable, forthwith to convey and deliver him, the said....., into the custody of the keeper of the common jail of said county; and you the said keeper, are hereby required to receive the said..... into your custody in the said jail, and him safely keep and detain there, until he shall find such sureties as aforesaid, or be discharged according to law.

Given under my hand, at the said..... of....., this..... day of ..... 18 .

[Signature.]

## No. 17.

## § 93.

*A similar warrant when no complaint has been made, but where the offense was committed in the presence of the court or magistrate.*

Title of Court, etc.]

STATE OF NEW YORK, } ss :  
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

*To any constable, etc., of said county of .. .., and to the keeper of the common jail. GREETING:*

This is to command you, the said constable, forthwith to convey and deliver into the custody of the said keeper, the body of John Doe, charged by me with having, on this ..... day of ....., A.D., 18 .., at the city of ....., in my presence made an affray with one.....[or having threatened to injure the person or property of said.....], and the said John Doe having been then and there required by me without other proof to enter into a recognizance in the sum of \$ ....., with one sufficient surety, for his appearance at the next court of sessions, to be held in and for the said county of ....., at the city of ....., N. Y., and not to depart the same without leave, and in the meantime to keep the peace toward the people of the State, and especially toward....., the said John Doe having refused to find security.

And you, the said keeper, are hereby required to receive the said John Doe into your custody in the said jail and him there safely keep until he shall find security as aforesaid, or be otherwise discharged by due course of law.

Given under my hand this.....day of ..... , A.D., 18 .., at ....., N. Y.

*Police Justice.*

## No. 18.

## § 91.

*Warrant to release a prisoner committed under either of the foregoing warrants, he having subsequently given the required security.*

[Title of court.]

STATE OF NEW YORK, } ss :  
COUNTY OF

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

*To the keeper of the common jail of said county, GREETING:*

This is to command you forthwith to release from your custody the body of John Doe, if detained by you for no other cause than that specified in the warrant of committment by ....., police justice of the city of ....., N. Y., on the.....day of ....., A. D., 18 .. for not finding sureties of the peace upon the complaint of ....., he, the said John Doe, having since his said committment found sureties before us; and for your so doing let this be your sufficient warrant.

Witness, ....., justice of the said city of .....county, N. Y., this ..... day of ..... 18 ..

*Police Justice.*

## No. 19.

## § 88. Discharge for want of evidence.

POLICE COURT (OR OTHER COURT) OF.....

THE PEOPLE  
against  
JOHN DOE.

STATE OF NEW YORK, } ss :  
COUNTY OF

*Whereas, It appearing that from the evidence and proofs submitted to me on*



the examination heretofore had herein, that there is not sufficient reason to fear the commission of the crime alleged in the complaint to have been threatened, I do hereby order the said John Doe to be discharged.

Dated, etc.

*Police Justice.*

### No. 20.

#### § 102. Requisition of Sheriff for Military Aid.

“ To Brigadier-General (or other commanding officer):

SIR,—Having been this day resisted in the execution of a warrant of a magistrate for the arrest of A. B., charged with murder (or having reason to apprehend that resistance is about to be made to the execution of the process), I, the sheriff of the county of ....., in pursuance of the statutes of this State, in such case made and provided, do hereby require you and the military under your command (or men of your command), armed and equipped as the law directs, to aid me in the execution of said warrant (or other process, as the case may be), and that you report yourself forthwith to me (or on the.....day of....., 18 , at.....o'clock, noon) with your said command (or with the said number of men), ready for service at.....

Dated....., 18 .

Sheriff of.....county.”

### No. 21.

#### § 103. Certificate of Registers.

To the.....court (from which process issued):

I, the sheriff of.....county, do hereby certify to the court that the following are the names of the persons resisting the process (describing it) and their aiders and abettors.

Dated.....18 .

Sheriff of.....county.

### No. 22.

#### § 111. Requisition of Sheriff for Military to quell a Riot.

To Brigadier-General (or other commanding officer):

Sir,—A riot and breach of the peace (or unlawful assembly, as the case may be) having occurred at....., in the county of....., I, the sheriff of said county, in pursuance of the statute in such case made and provided, require you with (describe the kind and number of troops), armed and equipped as the law directs, to aid me in quelling said riot and breach of the peace; and that you report yourself forthwith to me at....., with your said command ready for service.

Dated....., 18 .

Sheriff of.....county.

### No. 23.

#### § 104. Return of names of aiders and abettors under the riot act.

To the Supreme Court of the State of New York :

I,....., sheriff of.....(or other officer), do hereby certify that pursuant to a process of this court duly directed to me for execution on the.....day of June, 18 , at.....N. Y., in the county of... , I attempted to execute said process, but that John Doe, the defendant named in said process, aided and abetted by.....all of the city of....., N. Y., did forcibly resist and prevent the legal execution of said process.

All of which is respectfully submitted.

Dated, etc.

*Sheriff.....Co.*

### No. 24.

#### § 138. Bond to Change Venue in Libel Cases.

Know all Men by these presents, that I,.....principal and....and

sureties, of the.....of ..... and State of New York, are held and firmly bound unto.....of.....and a resident of the State of New York, in the sum of.....dollars, to be paid to the said.....or to.....certain attorney, executors, administrators or assigns. For which payment well and truly to be made, we bind ourselves and our heirs, executors or administrators, jointly and severally, firmly, by these presents. Sealed this.....day of ....., in the year of our Lord one thousand eight hundred and.....

The condition of this obligation is such, that whereas an indictment has been found against the above named ..... in the court of ..... in and for the county of ....., for libel against the above named ..... in a certain paper published at .... and known as ....., and whereas the above named .....desires to have the place of trial changed to..... county where said libel was printed as alleged, now therefore if the above bounden ..... if the place of trial be changed as aforesaid, and he shall be convicted of the said libel, shall and do well and truly pay or cause to be paid to the above named ....., his reasonable and necessary travelling expenses in going to and from his place of residence and place of trial, and his necessary expenses in attendance thereon, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue.

[L. S.]  
[L. S.]  
[L. S.]

STATE OF NEW YORK, } ss:  
County of

On this... day of.. ..... in the year one thousand eight hundred and ..... before me, the subscriber, personally came ..... to me known to be the person described in and who executed the within instrument, and ..... acknowledged that he executed the same.

(Indorsed.) I do hereby approve of the sufficiency of the within named sureties.

Dated

Justice Supreme Court

No. 25.

§ 145 Information for warrant—General form.

To ..... one of the justices of the peace [or police justices] in and for the county of ..... [or city of, as the case may be]:

Richard Roe, of the town of ..... of said county, being duly sworn, says that on the ..... day of ....., 18 .., at the town of ..... aforesaid, in said county,..... late of the city of ....., in said county of....., did [here state with particularity the offense charged.] He therefore prays that legal process may be issued, and that the said ....., be apprehended to answer to said complaint, and be dealt with according to law.

Dated at ....., in the county of ....., this ..... day of ..... and held ....., A. D. 18 ..

Subscribed and sworn before me this ..... }  
day of ....., 18 ..

.....  
Justice of the Peace.

No. 26.

§ 151. Information for Affray.

..... county of....., ss:

..... been duly sworn, deposes and says, that he ..... in said ..... of .....; that, on the ..... day of ....., 18 .., at the ..... of ....., in said county, ..... did, with force and arms, make an affray, by fighting with ..... in a public place, to wit:..... against the peace of the people of the State of New York, and the form of the statute in such case provided.

Taken, subscribed and sworn to before me, this ..... day of .....

**No. 27.****Id. Information for Arson.**

..... county of ....., ss :  
 ..... being duly sworn, deposes and says: That he resides in the .....  
 of ..... that in the ..... time of the ..... day of .....  
 18 , one ..... did willfully set fire to or burn a certain ..... to wit:  
 ..... in the ..... of ..... (in which there were at the time  
 human beings,) to wit;

Taken, subscribed and sworn to before me, }  
 this.... day of.....18 . }

**No. 28.****Id. Information for Arson, 2d and 3d Degrees.**

... county of....., ss. :  
 ..... being duly sworn, deposes and says: That he resides in the.....  
 of.....; that in the..... time of the..... day of ..... 18 ..,  
 in the ..... of..... one..... did willfully set fire to or burn the shop,  
 warehouse or other building, to wit:..... in which there was not at the  
 time a human being; said..... adjoined to or was within the curtilage of an  
 inhabited dwelling-house, to wit:... so that the said house was endanger-  
 ed by such firing; in that said..... did

Taken, subscribed and sworn to before me, }  
 this..... day of.....18 ... }

**No. 29.****Id. Information for Assault and Battery.**

..... COURT,..... }  
 ..... COUNTY OF... , } ss:

..... being duly sworn, deposes and says: That he.... in the said....  
 ..... of....., that on the.... day of.. .... 18 ....., at the  
 ..... of....., in said county, one..... with force and arms, did  
 make an assault, and him the said ..... did then and there beat, wound and  
 ill-treat, without... cause or provocation by

Subscribed and sworn to before me, }  
 this..... day of.....18 .....

**No. 30.****Id. Information for assault with Intent to Kill**

..... county of..... ss:  
 ..... being duly sworn, deposes and says: That he resides in the.....  
 of....., that on the..... of..... 18 ....., at the....  
 of....., in said county,..... with force..... and arms, in and  
 upon the said. .... then and there being, feloniously did make an assault,  
 and ..... the said..... with a certain..... which the said.....  
 then and there in..... hand had and held, the said..... being then and  
 there a deadly weapon, and such means and force as were then and there likely  
 to produce death, feloniously did beat, strike, cut and wound with intent him,  
 the said..... then and there, feloniously and willfully to kill by.....

Taken, subscribed and sworn to before me, this..... day of.....,  
 18 .....

**No. 31.****Id. Information for Assault with Intent to Kill  
with Firearms.**

..... county of..... ss:  
 ..... being duly sworn, deposes and says: That he resides in the .....  
 of..... that, on the..... day of..... 18 ....., at the.....  
 of....., in said county,..... with force and arms, in and upon the body  
 of..... in the peace of the said people then and there being, feloniously did

make an assault, and to, or toward and against.....the said.....a certain.....then and there loaded and charged with gunpowder and lead, which the said.....then and there had and held the same, being then and there likely to produce death, willfully and feloniously did then and there shoot off and discharge with intent him the said ..... thereby then and there feloniously and willfully to kill by .....

Taken, subscribed and sworn to before me, this.....day of.....  
18 .....

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**No. 32.**

**Id. Information for Assault with Intent to Ravish Women Ten Years and over.**

.....county of....., ss:  
.....being duly sworn, deposes and says: That he resides in the.....  
of.....; that on the.....day of.....18 , at the..... of....  
.... in said county,..... with force and arms, in and upon... .., she then and there being a woman of the age of ten years and upwards, in the peace of God and of the said people then and there being, violently, forcibly and feloniously, did make an assault, and her, the said.....then and there violently, forcibly and against her will, feloniously did ravish and carnally know by .....

Taken, subscribed and sworn to before me, this .... day of .....,  
18 .

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**No. 33.**

**Id. Information for Assault, etc., on Child under Ten Years of Age.**

..... county of ....., ss:  
.....being duly sworn, says that he resides in ....., that, on the  
..... day of ....., 18 , at the ..... of ....., in said county, ....., with force and arms, in and upon one ....., she then and there being a female child under the age of ten years, to wit, of the age of years, in the peace of God and the said people then and there being, did make an assault, and her, the said ....., then and there did beat, wound and ill treat, so that her life was greatly despaired of, with intent, her, the said ....., feloniously, to unlawfully and carnally know by.....

Taken, subscribed and sworn to before me, {  
this ..... day of ....., 18 }

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**No. 34.**

**Id. Information for an Assault on an Officer.**

.....county of....., ss:  
.....being duly sworn. deposes and says: That he, ....., that on the  
..... day of ....., 18 , at the .. of ....., in said county, one ....., with force and arms, in and upon one ....., he then and there being a ..... and peace officer of the ..... said ..... of ....., and a ... .., unlawfully and violently, without justifiable or excusable cause, did assault, beat, bruise, wound and use personal violence upon, and him evil treat, while he, the said ....., so being a ..... and peace officer aforesaid, was then and there lawfully engaged in the discharge of his duties as such ..... and peace officer of said ..... of ..... and him, the said ..... peace officer as aforesaid, did unlawfully and willfully resist in the discharge of his duties as such ..... peace officer, against the peace of the people of the state of New York, and the form of the statute in such case provided by ....

Taken, sworn to and subscribed before me, {  
this.....day of....., 18 . }

**No 35.****Id. Information for Confining Cows in a Crowded Condition, etc.**

.....county of....., ss:

being duly sworn, deposes and says: That he resides in the.....of....., that on the.....day of....., 18 , at the..... of .. ..in the county of....., one... .. wickedly, unlawfully and wilfully then and there, to wit, in....., in said city, did keep divers cows for the production of milk for market, sale or exchange in a crowded and unhealthy condition, or did feed divers cows then and there kept by him, the said....., on food that produces impure, diseased and unwholesome milk, to wit, distillery waste, usually called swill, or ..... , in violation of the statutes in such case made and provided.

Taken, subscribed and sworn to before me, {  
this.....day of....., 18 . }

**No 36.****Id. Information for Injury to Animal by Act or Neglect.**

.....county of....., ss:

being duly sworn, deposes and says: That he resides in the.....of.....; that on the.....day of....., 18 , at the.....of....., in the .....of ....., one..... did by his act or neglect, wilfully wickedly and maliciously kill, maim, wound, injure, torture and cruelly beat a certain horse, mule, ox, cattle, sheep or other animal, to wit, ....., belonging to him, the said.... , or to one.....by then and there.....

Taken, subscribed and sworn to before me, {  
this... ..day of....., 18 }

**No. 37.****Id. Information for Keeping, etc., Place for Fighting Animals.**

.....county of....., ss:

.....being duly sworn deposes and says: That he resides in the.....of.....; that on the..... day of.....18 , at the..... of .....in the county of... .., one..... wilfully, unlawfully and wickedly, did keep, use, was connected with as.... , interested in the management of, did receive money for the admission of divers persons to a certain place, to wit: for the purpose of, and such place was then and there kept or used for the purpose of fighting or baiting certain bulls, bears, dogs, cocks or other creatures, to wit:

Taken, subscribed and sworn to before me, {  
this .....day of....., 18 . }

**No. 38.****Id. Information for Overdriving, etc., Any Living Creature.**

.....county of....., ss:

being duly sworn, deposes and says: That he resides in the .....of....., that on the.....day of ....., 18 , at the.....of.....one ..... , did wilfully, unlawfully, wickedly, or cause or procure to be overdriven, overload, torture, torment, deprive of necessary sustenance, unnecessarily beat, cruelly beat, needlessly mutilate, needlessly kill, a certain living creature, to wit:

by then and there

Taken, subscribed and sworn to before me, {  
this.....day of....., 18 . }

**No. 39.**

**Id. Information for Setting on Foot, etc., Fights  
Among Game animals.**

.....county of....., ss:

being duly sworn, deposes and says, that he resides in the..... of .. .., that on the ..... day of ....., 18 .., at the ..... of ..... in the county of ... .., one .... did wickedly, unlawfully and wilfully, set on foot, instigate, move to, carry on, promote, engage in as a witness, assistant, umpire or judge, or did.....towards the furtherance of a premeditated fight or contention between game birds, game cocks, dogs, bulls, bears, dogs and rats, dogs and badgers or other animals, to wit;

which had been theretofore and was then and there, to wit: on the day aforesaid at the .....and in the county aforesaid, premeditated by certain persons

.....who then and there, to wit: at the time aforesaid and in the place aforesaid did have the ownership or custody of such animals, to wit: of the aforesaid.....in violation of the statute in such case made and provided.

Taken, subscribed and sworn to before me, {  
this.....day of....., 18 .. }

**No. 40.**

**Id. Information Against Disorderly Child.**

STATE OF NEW YORK, {  
COUNTY OF....., } ss;

being duly sworn, deposes and says, that ..... he ..... in said ..... of .....; that ..... is a disorderly child, for that ..... he ..... deserted h... home without good and sufficient cause, and kept company with dissolute or vicious persons, against the lawful commands of h .. .. and is a disorderly child within the intent and meaning of the statute; and is of the age of ..... years, that the facts upon which this affidavit is based are as follows:

Taken, subscribed and sworn to before me {  
this.....day of....., 18 .. }

**No. 41.**

**Id. Information for Disorderly House.**

.....county of....., ss:

.....being duly sworn, deposes and says: That he resides in.....that the premises known as No. .... street, in the ..... of ..... in said county, were on the .... day of ..... 18 .., kept, maintained, conducted and occupied by ..... as a common, ill-governed and disorderly house, and common bawdy-house and house of prostitution, and a resort for tipplers, drunkards, common prostitutes and reputed thieves, with other vile, wicked, idle, dissolute and disorderly men and women, and reputed thieves, who, or most of whom, are in the practice of drinking, dancing, quarreling, fighting, whoring, rioting, disturbing the peace, cursing and swearing at almost all hours of the day and night, to the great damage and common nuisance of the people of the state of New York, there inhabiting, residing in the neighborhood, and passing thereby; that the grounds of deponent's knowledge are

Taken, sworn to and subscribed before {  
me, this ..... day of ..... 18 .. }

**No. 42.**

**Id. Information for Permitting, etc., Place to be  
Kept and Used for Fighting Dogs, etc.**

..... county of ....., ss:

.....being duly sworn, deposes and says: That he resides in the..... of .....; that on the.....day of....., 18 .., one..... did permit and suffer a certain place, to wit :.....to be kept and used for the purpose of fighting or baiting bulls, bears, dogs, cocks or other creatures, to wit: .....he, the said ... .. being the ..... thereof.

Taken, subscribed and sworn to before {  
me, this .....day of ....., 18 .. }



**No. 43.****Id. Information for False Pretenses.**

..... county of ....., ss:  
 ..... being duly sworn, deposes and says: That he resides in the .....  
 of .....; that, on the ..... day of ....., 18 .., at the .....,  
 of ... .., in said county, ....., with force and arms, with intent feloniously to cheat and defraud one ..... did then and there feloniously, unlawfully, knowingly and designedly, falsely pretend and represent to the said ..... that .....  
 and the said ..... then and there believing the said false pretenses and representations so made as aforesaid, by the said ....., and being deceived thereby, was induced by reason of the false pretenses and representations so made as aforesaid to deliver, and did then and there deliver to the said ... ..; ..... of the value of ..... dollars, of the proper moneys, valuable things, goods, chattels and personal property and effects of the said ....., and the said ..... did then and there deceive and obtain the said ..... of the value of ... .. dollars from the said ..... of the proper moneys, valuable things, goods, chattels and personal property and effects of the said ..... by means of the false pretenses and representations aforesaid, with intent feloniously to cheat and defraud the said ..... of the said ..... of the value of ..... dollars; that in fact and in truth the pretenses and representations so made as aforesaid by the said ..... to the said ..... was and were in all respects utterly false and untrue; that in fact and truth the said ..... well knew the said pretenses and representations as by him made as aforesaid to the said ..... to be utterly false and untrue at the time of making the same.

That the said ..... by means of the false pretenses and representations aforesaid, feloniously, unlawfully, falsely, knowingly and designedly did receive and obtain from the said ..... of the value of ..... dollars of the proper moneys, valuable things, goods, chattels and personal property and effects of the said ..... with intent feloniously to cheat and defraud the said ..... of the same.

Taken, subscribed and sworn to before me, }  
 this ..... day of ....., 18 .. }

**No. 44.****Id. Information for Felony or Misdemeanor.**

..... county of ...., ss:  
 ..... being duly sworn, deposes and says: That he resides in ....., that one ..... at the .... of ....., in the county of ..... aforesaid, on the .... day of ....., 18 .., did feloniously, wrongfully, unjustly, unlawfully, wickedly, willfully, corruptly, falsely, maliciously and knowingly violate chapter.... of the laws of the state of New York, passed ....., in that he did.

Taken, subscribed and sworn to before me. }  
 ..... this ..... day of ....., 18 ..... }

**No. 45.****Id. Information for Forgery.**

..... county of ....., ss:  
 ..... being duly sworn, deposes and says: That he resides in the ..... of .....; that one ..... at .... in ....., with intent to injure and defraud, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting a certain... .., which said false, forged and counterfeited ..... is as follows, that is to say, ..... by .....

Taken, subscribed and sworn to before me, }  
 ..... this ..... day of ....., 18 .. }

No. 46.

Id. Information for Assault—Sharp, Dangerous  
Weapon.

.....county of ..... , ss:  
.....being duly sworn, deposes and says: That he resides in the .....  
of ..... that on the..... day of 18 . at the ..... of .....  
in said county,..... with force and arms, in and upon the said .....  
then and there being, did make an assault, and ..... the said .....  
with a certain ..... the said ..... being then and there a sharp, danger-  
ous weapon, which the said ..... then and there, in his ..... hand  
had and held, then and there did beat, strike, cut, stab and wound, with intent  
upon him, the said ..... then and there feloniously to do bodily harm, with-  
out justifiable or excusable cause, by .....  
Taken, subscribed and sworn to before }  
me, this ..... day of ..... , 18 . }

No. 47.

Id. Information for Bigamy.

..... county of .... ss:  
..... being duly sworn, deposes and says: That ..... he resides in the  
..... of ..... that one ..... on the ..... day of .....  
18 , at the ..... of ..... did marry one ..... and ..... the  
said..... did then and there have for ..... and that the said .....  
being so married afterward, to wit: on the ..... day of ..... , 18 ,  
with force and arms at the ..... of ... in the county of .....  
feloniously did marry and take as ..... one ..... and to the said  
..... was then and there married, the said ..... being then and there  
living and in full life.  
Taken, subscribed and sworn to before }  
me, this .... day of ..... 18 . }

No 48.

Id. Information for Breach of the Peace.

..... county of ..... , ss:  
..... being duly sworn, deposes and says: That he is a ..... in said  
town of ..... in said county, that on the ..... day of ..... ,  
18 , one ..... did make a breach of the peace by quarreling, fighting and  
making a loud noise, and collecting a crowd in..... in said ..... of  
.....  
Taken, subscribed and sworn to before }  
me, this ..... day of ..... 18 . }

No. 49.

Id. Information for Acts Tending to Create a  
Breach of the Peace

..... county of ..... , ss:  
..... being duly sworn, deposes and says: That he ..... in said  
..... of ..... , that on the ..... day of ..... 18 , at the  
city of ..... , in said county, one ..... did ..... which had a  
tendency to excite h ..... , and cause h..... to create a breach of the  
peace against the peace of the people of the state of New York, and the form of  
the statute in such case provided.  
Taken, subscribed and sworn to before }  
me, this ..... 18 . }

No 50.

Id. Information for Burglary, First Degree,  
and Larceny.

..... county of ..... , ss:  
..... being duly sworn, deposes and says, that he resides in the .....

of .....; that, on the ..... day of ..... 18 , at the ..... of  
 ....., in said county, ..... with force and arms, about the hour of  
 ..... in the night time of the same day, the dwelling-house of another, to  
 wit, of one ..... there situate, feloniously and burglariously, did break into  
 and enter by forcibly bursting and breaking an outer door of the said dwelling,  
 or by ..... in which said dwelling-house there was then at the same time  
 some human being, to wit: ..... with intent feloniously and burglariously  
 to commit some crime therein, to wit: then and there the goods and chattels of  
 the said ..... in the said dwelling-house then and there being, and then and  
 there feloniously and burglariously to steal, take and carry away, and .....  
 of the value of ..... dollars, of the goods, chattels and property of the said  
 ... ..... in the said dwelling-house then and there being, feloniously, burgla-  
 riously, did steal, take and carry away by.....  
 Taken, subscribed and sworn to before }  
 me, this ..... day of ....., 18 . }

### No. 51.

#### Id. Information for Burglary and Larceny.

..... county of ..... , ss:  
 ..... being duly sworn, deposes and says. That he resides in the .....  
 of ..... that, on the ..... day of ..... , 18 , at the ..... of  
 ....., in said county, ..... with force and arms, the ..... of  
 one ..... there situate, feloniously and burglariously did break into and  
 enter, the same being a .... as above, in which divers, goods and mer-  
 chandise and valuable things were then and there kept for use, sale and deposit,  
 to wit, the goods and chattels of the said ..... in said ..... as above,  
 then and there being, then and there feloniously and burglariously to steal, take  
 and carry away ..... of the value of ..... dollars, of the goods and  
 chattels and property of the said ..... in the said ..... as above, so  
 kept as aforesaid, then and there being feloniously and burglariously did steal,  
 take and carry away by .....  
 Taken, subscribed and sworn to before me, }  
 this.....day of....., 18 . }

### No. 52.

#### Information against disorderly person, § 899, Sub. 2.

STATE OF NEW YORK, } ss.:  
 COUNTY OF..... }

..... of No.....street, in the city  
 of Troy, being duly sworn, says that she complains of her husband, .....  
 ..... of said city, of being a disorderly person, according to section 899 of  
 the Code of Criminal Procedure, for that he threatens to run away and leave his  
 wife and children a burden upon the public, and that such family is not pos-  
 sessed of property or of the means of obtaining a livelihood without the aid of  
 such husband.

Subscribed and sworn before me, }  
 this... day of..... 18 . }

### No. 53.

#### Information against disorderly person, § 899, Sub. 3.

STATE OF NEW YORK, } ss.:  
 COUNTY OF..... }

..... being duly sworn, says that he resides in .....; that  
 one ..... is a person in said city [or town], of ..... who pretends to  
 tell fortunes, and where lost and stolen goods may be found; in that he possesses

supernatural gifts, and to the end that he extort money [describe the manner of operation, etc.].

Subscribed and sworn before me, {  
this ..... day of .....

No 54.

*Information against disorderly person, § 899-Sub. 5.*

STATE OF NEW YORK, { ss.:  
COUNTY OF .....

..... being duly sworn, deposes and says that he resides in.....; that one ..... is a person in the city of ..... who has no visible profession or calling by which to maintain himself, but who does so for the most part by gaming, in that he.....

Subscribed and sworn before me, {  
this ..... day of.....

No. 55.

*Information against disorderly person, § 899, Sub. 6.*

STATE OF NEW YORK { ss.:  
COUNTY OF.....

....., being duly sworn, deposes and says that he resides in .....; that one ..... in the city of ..... is a juggler, common showman and mountebank, who exhibits and performs for profit, puppet shows, wire and rope dancers, and other idle shows, acts and feats, in that he [describe acts complained of].

Subscribed and sworn before me, {  
this ..... day of.....

No. 56.

*Information against disorderly person, § 899, Sub. 7.*

STATE OF NEW YORK, { ss.:  
RENSSELAER COUNTY.

....., being duly sworn, says that he resides in .....; that one .... in the said city of ....., is a person who keeps in a public highway or place in said city of ..... an apparatus or device for the purpose of gaming, and who goes about exhibiting tricks and gaming therewith, in that he [describe acts complained of].

Subscribed and sworn before me, { ss.:  
this ..... day of .....

No. 57.

*Information against disorderly person, § 899, Sub. 8.*

STATE OF NEW YORK, { ss.:  
COUNTY OF.....

....., being duly sworn, says that he resides in .....; that one.....

FORMS TO THE CODE

... is a person who plays in a public highway, or place, in said city [or town] with cards, dice and other apparatus or device for gaming; that [set out the specific acts complained of.]

Subscribed and sworn before me, }  
this ..... day of..... }

No. 58.

Information against disorderly person, § 899, Subd. 9.

STATE OF NEW YORK } ss.:  
COUNTY OF..... }  
..... being duly sworn, says that he resides in .....; that ..... who is an habitual criminal, and adjudged such at ..... in ..... in the State of New York, on the ..... day of ....., was found in ..... in said city of ..... as follows:..... under circumstances giving reasonable ground to believe that he was intending or waiting the opportunity to commit the crime of .....

Subscribed and sworn before me, }  
this ..... day of..... }

No. 59.

Information against habitual criminal, § 512, Sub. 1; § 899, sub. 9.

STATE OF NEW YORK, } ss.:  
COUNTY OF..... }  
... being duly sworn, says that he resides in .....; that ..... who is an habitual criminal, and adjudged such at ..... in ..... in the State of New York, on the ..... day of ....., was found in ..... in said city of ....., in possession of ....., a deadly and dangerous weapon, and in possession of ....., a tool, instrument and material adapted to and used by criminals for the commission of crime; said possession was as follows:.....

Subscribed and sworn before me, }  
this ..... day of..... }

No. 60.

Id. Information Against Persons Having Custody of Child Permitted to Beg, etc.

..... county of ....., ss:  
... being duly sworn deposes and says : That he resides in the..... of ..... that ..... has the custody of ..... a child under the age of fourteen years, and permits and neglects to restrain such child from begging, gathering, picking and sorting of rags, and from collecting cigar stumps, bones and refuses from markets in said ..... of ....., in that he.....  
Taken, subscribed and sworn to before me, }  
this ..... day of ..... 18 .... }

No. 61.

Id. Information as to Violation of Ordinances

..... county of ..... ss:  
..... being duly sworn, deposes and says: That he resides in the.....

of ..... , N. Y.; that on the ..... day of ..... , 18 ..... said  
 ..... one ..... did willfully and unlawfully violate chapter ....  
 of title ..... of the laws and ordinances of the ..... of ...  
 aforesaid, relating to ..... in that he did .....  
 Subscribed and sworn to before me, }  
 this ... day of ... 18 . }

**No 62.****Id. Information for Abandoning Maimed Creature  
in a Public Place.**

..... county of ..... , ss:  
 ..... being duly sworn, deposes and says: That he resides in the .....  
 of ..... that on the ..... day of ..... , 18 ..... , did willfully, un-  
 lawfully and wickedly then and there abandon to die in a certain public place  
 in said ..... of ... , to wit: ..... a certain maimed, sick, infirm  
 and disabled creature, to wit:  
 Taken, subscribed and sworn to before }  
 me, this ..... day of ..... , 18 . }

**No 63.****Id. Information for Aiding, etc., Persons to  
Fight Dogs, etc.**

..... county of ..... , ss:  
 ..... being duly sworn, deposes and says: That he resides in the .....  
 of ..... ; that on the ..... day of ..... , 18 ..... , at the .....  
 of ..... one ..... did willfully, unlawfully and wickedly  
 encourage, aid and assist one ..... to keep a certain place, to wit: .....  
 or to receive money for the admission of divers persons to a certain place  
 ..... for the purpose of, and such place was then and there, by the aid of  
 the said ..... unlawfully kept and used by the said ..... for the pur-  
 pose of fighting, baiting certain bulls, bears, dogs, cocks or other creatures, to  
 wit:  
 Taken, subscribed and sworn to before }  
 me, this ..... day of ..... , 18 . }

**No 64.****Id. Information for Allowing Disabled Animals  
to Lie in Highways, etc.**

..... county of ... , ss:  
 ..... being duly sworn, deposes and says: That he resides in the .....  
 of ..... ; that on the ..... day of ..... , 18 ..... , at the .....  
 of ..... one ..... then and theretofore being the owner, driver or in  
 possession of a certain old, maimed and diseased horse or mule, which had  
 theretofore been turned loose or left disabled in a certain street, lane or public  
 place in said ..... of ..... , to wit: ..... did unlawfully, willfully  
 and wickedly, for more than three hours after knowledge of such disability,  
 allow such horse or mule to lie in a certain street, lane, or public place in said  
 city therein, to wit:  
 Taken, subscribed and sworn to before }  
 me, this ..... day of ..... , 18 . }

**No 65.****Id. Information for Carrying Creatures in  
a Cruel Manner.**

..... county of .... , ss:  
 ..... being duly sworn, deposes and says: That he resides in the .....  
 of ..... ; that on the ..... day of ..... , 18 ..... , one ..... did  
 willfully, unlawfully and wickedly carry or cause to be carried in or upon a  
 ..... , a certain creature, to wit, ..... , in a cruel and inhuman man-  
 ner, by then and there  
 Taken, subscribed and sworn to before me, }  
 this ..... day of ... , 18 . }



**No 66.****Id. Information for Keeping, etc., a Room, etc.,  
for Gambling.**

..... county of ....., ss:

..... being duly sworn, deposes and says: That he resides in the ..... of .. ...; that ..... on the ..... day of ....., 18 .., and at the present time, he did and does keep a room, building, arbor, booth, shed, tenement, boat or float, to wit: ..... at ..... in the ..... of ..... , to be used or occupied for gambling, to wit: .. ..... or did and does knowingly permit the same to be used or occupied for gambling, to wit: ..... being the owner, superintendent or agent of a room, building, arbor, booth, shed, tenement, boat or float, to wit: ..... at ..... in the ..... of ..... did and does rent the same to be used or occupied for gambling to wit:

Taken, subscribed and sworn to before me, }  
this ..... day of ....., 18 .. }

**No 67.****Id. Information for Seizure, etc., of Gambling  
Apparatus.**

..... county of ....., ss:

..... being duly sworn, deposes and says: That he resides in the ..... of .....; that one ..... has committed an offense, ..... in that he did ..... and has as deponent has reason to believe and does believe upon his person or at ... ..... in the ..... of ..... certain articles of personal property, to wit: ..... or gambling tables, devices or apparatus for the purpose of ..... or public or private lottery policies, to wit: ..... the discovery of which may led to establish the truth of said charge for which complaint is hereby made against said. ....

Wherefore deponent prays that a warrant may issue as provided by law for the arrest of said ..... for diligent search to be made for such property, tables, devices or apparatus, and if found, to bring the same before the magistrate or justice issuing the warrant, or in case of his absence or inability to act, before the nearest or most accessible magistrate in the county of .....

Taken, subscribed and sworn to before }  
me, this ..... day of ....., 18 .. }

**No 68.****Id. Information for Interfering with an Officer.**

STATE OF NEW YORK, }  
COUNTY OF ....., }

..... being duly sworn, deposes and says: That he is a ..... in said ..... of .....; that on the ..... day of ....., 18 .., at the ..... of ....., in said county, ..... with force and arms, did unlawfully, designedly and feloniously, forcibly interfere with ....., he then and there being a ..... of the ..... of ....., and having in legal custody one ..... upon a criminal charge, to wit, upon the charge of ..... committed by him, the said ..... upon one ..... by

Taken, subscribed and sworn to before }  
me, this ..... day of ....., 18 .. }

**No 69.****Id. Information for Killing Unborn Quick Child.**

..... county of ....., ss:

..... being duly sworn, deposes and says: That he resides in the ..... of .....; that on the ..... day of ..... 18 .., at ..... in the county of ..... one ..... did feloniously and willfully kill an unborn quick child by an injury to the mother of such child, in that ..... he did .....

Taken, subscribed and sworn to before me, }  
this ..... day of ....., 18 .. }

**No 70.****Id. Information for Larceny.**

..... county of ....., ss:  
 .... being duly sworn, deposes and says: That he resides in the .....  
 of ....., that on the ..... day of ....., 18 .., at the ..... of  
 ....., in said county, divert goods and chattels of the value of .....  
 dollars and ..... cents, that is to say: ..... were feloniously stolen,  
 taken and carried away from the possession of the said ...., and that he  
 has just cause to suspect and believe, and does suspect and believe, and there  
 is probable cause to believe, that ..... did steal, take and carry away the  
 same; that the facts upon the affidavit is based are as follows:

Taken, subscribed and sworn to before me, {  
 this..... day of....., 18 ..... }

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**No 71.****Id. Information for Larceny from the Person.**

..... county of ....., ss:  
 .... being duly sworn, deposes and says: That he resides in the.....  
 of....., that, on the..... day of ....., 18 .., at the ..... of  
 ...., in said county,....., with force and arms, from the person of  
 ....., of the value of ..... dollars, of the goods, chattels and personal  
 property of the said ..... then and there being found, feloniously did steal,  
 take and carry away by

Taken, subscribed and sworn to before me, {  
 this..... day of....., 18 . }

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**No. 72.****Id. Information for Libel.**

... county of ... .., ss: ..... being duly sworn, deposes and  
 says: That he resides in the.... .. of.....; that on the..... day of  
 .... .. instant, at ..... in said county, one..... did falsely, mali-  
 ciously and scandalously frame, make, write and compose in a certain false,  
 scandalous and libellous writing of, concerning and against the said .....  
 to the purport and effect following, to wit:..... and that with intention to  
 scandalize and disgrace the said ...., and to bring him into contempt, in-  
 famy and disgrace, the said ....., did afterwards, to wit, on the .....  
 day of ....., 18 .. at the ..... aforesaid, openly deliver and publish  
 to ... .. the said false, scandalous and libellous ..... in that he did  
 .....

Taken, subscribed and sworn to before me, {  
 ..... this .....day of ....., 18 . }

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**No. 73.****Id. Information for Malicious Mischief.**

.....county of....., ss: ..... being duly sworn, deposes and  
 says: That he resides in .....; that one ..... on the ..... day  
 of ..... 18 .., at the ..... of ..... did maliciously or wantonly  
 injure, or deface a monument or work of art, building, fence or other structure,  
 or did destroy or injure an ornamental tree, shrub or plant, situated on a private  
 ground or on a street, public place, public or private way or cemetery; or did  
 paint, or print upon or in any other manner place upon or affix to any stone or  
 rock, not a part of a building, or upon or to any bridge or tree, words, letters,  
 characters or devices, stating, referring to or advertising, or intended to state,  
 refer to or advertise the sale or manufacture of any property or article, profes-  
 sion, business, exhibition, amusement or place of amusement, or other thing, or  
 did directly or indirectly cause any such act to be done, or did aid therein, by

Taken, subscribed and sworn to before {  
 me, this day of , 18 . }

**No 74.****Id. Information for Malicious Trespass.**

..... county of .. ...., ss: ..... being duly sworn, deposes and says: That he resides in ... .. street in the ... .. of ....., in the county aforesaid, that on the ..... day of .... in said ....., one ..... did maliciously, unlawfully, willfully and wantonly ..... by ....

Taken, subscribed and sworn to before {  
me, this day of 18 . }

**No 75.****Id. Information—Manslaughter, First Degree.**

..... county of....., ss : ..... being duly sworn deposes and says: he resides in the ..... of that ... ..: that on the ..... day of ..... 18 , at ..... in the county of ..... one did feloniously kill one ..... without a design to effect death, by the act, procurement or culpable negligence of said ..... while said..... was engaged in ....by .....

Taken, subscribed and sworn to before {  
me, this day of , 18 . }

**No. 76.****Id. Information for Mayhem.**

..... county of ....., ss: ..... being duly sworn, deposes and says: That he resides in the ..... of .....; that on the ... .. day of ...., 18 , at the..... of ....., one ..... then and there feloniously, wilfully and maliciously did on purpose, from premeditated design, or with intent to kill or commit a felony, to wit: cut out or disable the tongue of one ..... , put out the eye of one ..... , slit or destroy the lip, or slit or destroy the nose of one ..... , cut off or disable a limb or member, to wit : ..... of .....on purpose ..... by.....

Taken, subscribed and sworn to before me, {  
this day of , 18 . }

**No. 77.****Id. Information for Misdemeanor.**

COUNTY OF ORANGE, }  
CITY OF NEWBURGH. } Ss;

being duly sworn says, that on the ..... day of ..... 18 , at the City of Newburgh, in said County,

Wherefore deponent prays that said offender may be arrested and dealt with according to law.

Subscribed and sworn to before me, this {  
..... day of ..... ,

18

C. L. Waring..... Recorder.

**No. 78.****Endorsement on above.****RECORDER'S COURT, CITY OF NEWBURGH.**

Before ..... Recorder.

THE PEOPLE  
against }

DEPOSITION ..... It appearing to me by the evidence herein, that the crime of ..... has ..... been committed, and that there is ..... sufficient cause to believe the within named ..... guilty, I order ... .. to be .....

....., Recorder.

Bail required in the sum of \$ .....

**No. 79.****Id. Information for Murder Perpetrated by an Act Dangerous to Others.**

..... county of ... .. ss:

..... .. being duly sworn, deposes and says: That he resides in the ..... of ..... ; that on the ..... day of ....., 18 .., at the ..... of ....., in the county of ....., one ..... did feloniously, wilfully and intentionally, by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, did kill one ....., although without any premeditated design to effect the death of any particular individual in that ..... he did

Taken, subscribed and sworn to before me, {  
this ..... day of ....., 18 .. }

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**No. 80.****Id. Information for Murder Perpetrated in Commission of a Felony.**

..... county of ....., ss:

..... being duly sworn deposes and says: That he resides in the ..... of ....., that on the .... day of ....., 18 .., at the ..... of ... .., in the county of ....., one ..... did, feloniously and wilfully and intentionally, whilst engaged in the commission of a felony, kill one ..... in that he did

Taken, subscribed and sworn to before me, {  
this ..... day of ....., 18 .. }

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**No. 81.****Id. Information for Murder Perpetrated from Deliberate design.**

..... county of ....., ss:

..... .. being duly sworn, deposes and says: That he resides in the ..... of ....., that one ..... of ..... in the county of ....., on the ..... day of ....., 18 .., with force and arms, did then and there feloniously, wilfully and intentionally, and from a premeditated and deliberate design to effect the death of one ..... kill the said ..... by

Taken, subscribed and sworn to before me, {  
this ..... day of .... .., 18 .. }

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**No. 82.****Id. Information for Perjury.**

..... county of ... .., ss:

..... being duly sworn, deposes and says; That he resides in the ..... of ....., that on the ..... day of ....., 18 .., instant, at the ..... of ..... in the county of ..... .., a certain action in which ..... was plaintiff and ..... was defendant, was ..... before ..... and that upon the ..... .. of said action ..... appeared as a witness for and on behalf of the said ..... and was then and there duly and regularly sworn by the said ..... as such ... ..; that the evidence he should give relating to the matter in difference between the said parties should be the truth, the whole truth and nothing but the truth; and that upon the ..... of the said action it then and there became material to inquire whether .... .. and that thereupon the said ..... being so sworn as a witness as aforesaid, did then and there on the ..... of said action falsely, wilfully and corruptly depose, swear and testify among other things, that .....; whereas, in truth and in fact, the ..... whereby the said

..... did then and there wilfully and corruptly swear falsely and commit wilful and corrupt perjury.

Taken, subscribed and sworn to before me, }  
this .... day of ....., 18 . }

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### No. 83.

#### Id. Information to Obtain Warrant Against Fighting, etc.

..... county of ....., ss:

..... being duly sworn, complains, deposes and says: That he resides in the ..... of .....; that he has just and reasonable cause to suspect and does suspect that certain of the provisions of law relating to and affecting animals, and to prevent prize fights and fights among game animals, and for the prevention of cruelty to animals, are being and are about to be violated by ....., at and within the particular building and place within the ..... known as ..... and now occupied, kept and used by

Wherefore this deponent prays that a warrant may be immediately issued and delivered, pursuant to the statute in such case made and provided, to any person authorized by law to make arrest for such offenses, authorizing him to enter and search such building and place and to arrest the said ... .., by whatsoever names they may be known or called, or any or either of them there present found violating any of said laws, and to bring such person, when so arrested, before the nearest magistrate of competent jurisdiction to be dealt with according to law.

Taken, subscribed and sworn to before me, }  
this ..... day of ....., 18 . }

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### No. 84.

#### Id. Information as to Female under Sixteen Years Living in House of Prostitution.

..... county of ....., ss:

..... being duly sworn, deposes and says: That he resides in the ... .. of ....., that he has just and reasonable cause to suspect that ..... a female child, of the age of .... years, is living, detained and kept, in a house and place No. .... street, in said ..... of ....., for the purposes of prostitution. That the grounds of deponents suspicion are as follows:

Taken, subscribed and sworn to before me, }  
this ..... day of ....., 18 . }

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### No. 85.

#### Id. Information for Public Intoxication.

COURT,  
COUNTY OF .....

vs.

..... county, ss:

..... being duly sworn, deposes and says: That he is .....; that the aboved named defendant was on the day of ....., 18 , about .. M., intoxicated in a public street or place, to wit: ..... in said ..... of ....., contrary to the provisions of the act entitled "An act to revise and consolidate the laws regulating the sale of intoxicating liquors," passed April 30, 1892.

Subscribed and sworn to before me, }  
this ..... day of . . . . ., 18. }

The defendant, immediately on being brought before said justice, was inform-

## OF CRIMINAL PROCEDURE.

ed of the charge against h ..... and h ..... right to the aid  
in every stage of the proceedings, and before any other proceedings  
plead ..... guilty ..... Tried and convicted and fined \$  
and ..... \$ ..... costs, or be committed to the penitentiary  
said county, for the term of ..... days, unless the fine be soon

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### No. 86.

#### Id. Information for Receiving Stolen

..... county of ....., ss:  
..... being duly sworn says: That he resides in the ..... of  
that, on the ..... day of ..... 18 , at the ..... of ..  
said county, ..... being a person of evil name and fame and dis  
versations, and common buyer and receiver of stolen goods, with force  
..... of the value of ... dollars, of the goods and  
..... by ..... then lately before feloniously stolen of the said  
unlawfully, unjustly and for the sake of wicked gain, did feloniously  
and have the said ..... then and there well knowing the said  
chattels to have been feloniously stolen; that the facts upon which this  
is based are as follows:

Taken, subscribed and sworn to before me, }  
this ..... day of .... 18 . }

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### No. 87.

#### Id. Information for Reckless

..... county of ....., ss :  
..... being duly sworn, deposes and says: That he resides in the  
of ..... , that one ..... who was then and there driving a  
riage, to wit, a ..... upon a certain turnpike road or public high  
this state, to wit, upon a certain ..... in the ..... of .....  
then and there was such a turnpike road or public highway, with  
passengers, in said carriage, did then and there at the time and place  
wilfully, unlawfully, wickedly and maliciously run, cause or permit the  
horses then and there attached.

Taken, subscribed and sworn to before me, }  
this ..... day of .... 18 . }

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### No. 88.

#### Id. Information for Refusing to Aid a

STATE OF NEW YORK, }  
COUNTY OF ..... } ss:

..... being duly sworn, deposes and says: That he .....  
... of ..... ; that on the ..... day of ..... 1  
..... of ....., in said county, ..... did wilfully and  
disobey the command and request of ..... the said ..... 1  
time a ..... and peace officer of, in and for the said ..... of  
and an officer authorized to execute criminal process; and the said  
having as such officer, then and there commanded the assistance  
..... in securing and conveying to the .... one .....  
..... of ..... aforesaid, that had then and there been dis  
by the said ..... policeman, and police officer as aforesaid, to  
peace of the people of the state of New York, and the form of the  
such case provided.

Taken, subscribed and sworn to before me, }  
this ..... day of .... 18 . }

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### No. 89.

#### Id. Information for Rescuing a

..... county of ....., ss :  
..... being duly sworn, deposes and says: That he .....



..... of ..... , that on the ..... day of ..... 18 , that the  
 ..... of ..... in said county ... .. with force and arms, did un-  
 lawfully, designedly and feloniously, forcibly rescue from the custody of one  
 ..... he then and there being a .... and peace officer of the .....  
 of ..... one ... .. a prisoner, then and there held in the  
 legal custody of him, the said ..... upon a criminal charge, to wit, upon  
 the charge of ..... committed by him, the said .. ..... upon one  
 ..... by .....

Taken, subscribed and sworn to before me, }  
 this ..... day of ..... , 18 . }

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### No. 90.

#### Id. Information for Robbery—First degree.

..... county of ..... , ss:  
 ..... being duly sworn, deposes and says: That he resides in the .....  
 of ..... ; that on the ..... day of ..... , 18 , at the .....  
 of ..... , in said county, ..... with force and arms, in and upon one  
 ..... , in the peace of God and of the said people then and there being, fe-  
 loniously did make an assault, and him, the said ..... , did then and there  
 feloniously put in fear of some immediate injury to his person and in danger of  
 his life, did then and there feloniously and violently steal, take and carry away  
 from the person and against the will of the said ..... , value of .....  
 dollars, of the goods, chattels and property of the said ..... by .....

Taken, subscribed and sworn to before me, }  
 this ..... day of ..... , 18 . }

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### No. 91.

#### Id. Information for Seduction.

..... county of ..... , ss:  
 ..... being duly sworn, deposes and says : That she resides in the .....  
 of ..... ; that on the ..... day of ..... , 18 , at the .....  
 of ..... , in said county, one ..... with force and arms, under promise of  
 marriage, did seduce and have illicit connection with one ..... she, the  
 said ..... , then and there being an unmarried female of previous chaste  
 character.

Taken, subscribed and sworn to before me, }  
 this .... day of ..... , 18 . }

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### No. 92.

#### Id. Information Against Person Selling, etc., Chattels.

..... county of ..... , ss:  
 ..... being duly sworn, deposes and says: That he resides in .....:  
 that he did, on the ..... day of ..... , 18 , hire, loan and let to one  
 .... a ..... , and said ..... did, without the consent of ..... ,  
 who is the owner thereof, sell and deliver the same, or did pawn or pledge the  
 same at ... .. , to one ..... and obtain thereon and therefor the sum of

Taken, subscribed and sworn before me, }  
 this ..... day of ..... , 18 . }

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### No. 93.

#### Id. Information Against Person Selling Material, etc., Furnished to be Manufactured.

..... county of .... , ss:  
 ..... being duly sworn, deposes and says : That he resides in the .....  
 of ..... , that on the .. day of ..... , 18 at the .....

of ..... one ..... did wilfully pawn, pledge, sell and convert to his own use material, to wit: ..... of the value of ..... furnished to him by ..... for the purpose of being manufactured into ..... by

Taken, subscribed and sworn to before  
me, this ..... day of ....., 18 . }

**No 94.**

Id. Information for Selling, etc., Mortgaged Property.

..... county of ....., ss:  
..... being duly sworn, deposes and says: That he resides in the ..... of ....., that on the ..... day of ....., 18 , one ..... gave, executed and delivered to ..... a mortgage upon certain personal property, to wit: ..... of the value of ..... dollars.

That afterwards and on the ..... day ....., 18 , at ..... in said county of ....., while the said mortgage was a lien on the said personal property, the said ..... with intent to defraud said ..... the mortgagee of said property, or ..... a purchaser of said property from said ....., did wilfully, maliciously and unlawfully sell, assign, exchange and secrete the aforesaid personal property so mortgaged or sold as aforesaid by said ..... to said ..... by

Taken, subscribed and sworn to before  
me, this ..... day of ....., 18 . }

**No. 95.**

**WARRANT, GENERAL.**

§ 151.

COUNTY OF.....

In the name of the people of the State of New York:

To any peace officer in the .....

Information, upon oath, having been this day laid before me, that the crime of ..... has been committed, and accusing ..... thereof.

You are therefore commanded forthwith to arrest the above named ..... and bring him before ....., at .....

Dated at ....., this ..... day of ....., 18 .

.....  
*Justice of the Peace.*

**No. 96.**

*Endorsement thereon.*

RECORDER'S COURT, CITY OF NEWBURGH.

Before.....Recorder.

THE PEOPLE }  
AGAINST }

WARRANT.—Recorded on page.....served the .....day of... ..  
188 , by officer.....

*To the sheriff, or any other officer of the Peace in the County of Orange:*

You are hereby empowered and directed to arrest the within named defendant on Sunday or in the night-time.

C. I. Waring,  
Recorder, City of Newburgh.

No. 97.

*Return where all the defendants cannot be found.*

I have arrested the within ..... and ....., and have them here in my custody, but the within-named ..... cannot be found.  
Dated, etc.

.....  
Constable.

No. 98.

*Return where the magistrate issuing the warrant is absent, §§ 163, 166.*

As within commanded, I have arrested the within-named defendant, and I hereby return that on making the arrest I forthwith brought the said defendant to the office of the magistrate who issued the warrant, but that the said magistrate was absent therefrom.  
Dated, etc.

.....  
Constable.

No. 99.

*Return when the magistrate issuing the warrant has gone out of office.*

I hereby certify that I have arrested the within named defendant, and that at the time of such arrest, the magistrate issuing the warrant, had ceased to be such magistrate by the expiration of his term of office [or otherwise].  
Dated, etc.

.....  
Constable.

No. 100.

*Warrant after prisoner has escaped or been rescued, § 828.*

STATE OF NEW YORK, }  
COUNTY OF                    } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:  
To                               [as in No. 17.]

Information upon oath having been this day laid before me by a constable of this county, to whom a warrant had heretofore been issued for the arrest of                   that he had arrested the said                   by virtue thereof, and that the said                   had afterwards at the city of..... in said county of ....., on the tenth day of ....., escaped [or been rescued] from the custody of said ....., You are, therefore, again commanded to forthwith apprehend the said                   and bring him before me at my office in the ..... of ....., in said county of ..... aforesaid, to be dealt with according to law, or in case of my absence or inability to act, before the nearest and most accessible magistrate in this county.  
Dated, etc.

.....  
Justice of the Peace.

No. 101.

§§ 827-828. Warrant for the arrest of a fugitive from another state.  
[Formal part as in No. 94.]

Information upon oath having been this day laid before me by .....that had committed.....in the State of.....on the..... day of....., 18   , and is now a fugitive from justice in the county of..... in this state,  
You are therefore commanded forthwith to arrest the above-named

and bring him before me at my office in the.....of... .., N. Y., or in the case of my absence or inability to act, before the nearest and most accessible magistrate in this county.

Dated, etc.

Jus. of the Peace.

### No. 102.

§ 829. Form of commitment of fugitive, etc.

STATE OF NEW YORK, } ss;  
COUNTY OF....., }

The within named ..... having been brought before me under this warrant, and it appearing to me that from an examination by me had, that he is guilty of the crime charged, and that he is a fugitive from justice as therein set forth, I therefore commit the said ..... to the sheriff of the county of ..... [or to the keeper of the common jail] for the space of thirty days [or other reasonable time], or until he shall be discharged by due course of law.

Dated, etc.

Jus. of the Peace.

### No. 103.

§ 832. Notice to district attorney of commitment of a fugitive from justice.

To ....., district-attorney of ..... county:

SIR.—Please to take notice that I have this day committed ..... a fugitive from justice from the State of ....., charged with the crime of ..... committed in said state of ....., to the sheriff of ..... county to await the action of the authorities of the State of ..... aforesaid.

Dated, etc.

Yours, etc.,

Committing Magistrate.

### No. 104.

*Notice to the governor, etc, of the State having jurisdiction of the fugitive.*

(§ 833.)

To Hon. ...., Governor of the State of .....

SIR,—The sheriff of ..... county, State of New-York, has in charge and subject to your action one ..... charged with ..... committed within your State on the .... day of ..... 18 . Awaiting your motion, I remain,

Very respectfully yours,

.....  
Dist. Atty. of ..... Co., N. Y.

### No 105.

§ 151. Warrant for Seizure of Gaming Apparatus,

..... COURT, } ss.:  
..... OF ....., }

In the name of the people of the state of New York : To any peace officer of the county of ..... :

Whereas, complaint on oath, has been duly made before me, ..... a ..... justice ..... of the ..... of ....., that one.....

We, therefore, command you forthwith to arrest the said ..... to make diligent search for such property, tables, devices or apparatus; and after demanding entrance, to break open and enter said house or place, and any house or place wherein such such gambling tables, establishment, devices or apparatus shall be kept, and to seize the aforesaid gambling tables, establishment, apparatus or devices, and deliver the same to ..... of the ....., and to return this warrant with your doings thereon indorsed, to me, the said ....., at the ..... in the said ..... of ....., or, in case of my

absence or inability to act, before the nearest or most accessible magistrate in the county of ..... Hereof fail not at your peril.

Witness the said ....., at the ..... of ....., in the county aforesaid, the ..... day of ....., 18 ...

[Signature.]

By virtue of the within warrant I have seized the following: .....

Dated ....., 18 ...

---

**No. 106.**

**§ 151. Warrant as to Female Under Sixteen Years,  
Living, etc.; in House of Prostitution.**

**POLICE COURT,** } ss:  
**COUNTY OF**

In the name of the people of the state of New York : To any peace officer of the county of ..... :

Whereas, complaint has this day been made by.. .., of the ..... of.... .., in the county of ....., on oath, before ....., a ..... justice of the ..... of ....., that on the..... day of ..... 18 .., at the ....., in said county, one ....., a female child, of the age of ..... years, is living, detained and kept in a house and place No. .... street, in said ... of ....., for the purposes of prostitution ; and whereas, in the judgment of said justice, said..... has just and reasonable cause to suspect that said child is so living, detained and kept as aforesaid, against the peace of the people of the state of New York, and the form of the statute in such case provided:

We, therefore, command you forthwith to enter and search said house and place, and bring said child, together with all persons occupying said house or place or in charge thereof, before the said ....., at the ..... in the said ... of ....., with this warrant, and a return of your doings thereon indorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness, the said ....., at the ..... of ....., in the county aforesaid, the .... day of ....., 18 ..

[Signature.]

By virtue of the within warrant, I have arrested the within named ..... and now have her before the magistrate by whom this warrant was issued.

Dated ....., 18 ..

---

**No. 107.**

*Warrant for habitual criminal, § 512 subdiv. 1, § 899, sub. 2.*

**STATE OF NEW YORK,** } ss :  
**COUNTY OF**

**IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.**

To .....

Whereas, Complaint has this day been made by ..... of the..... of ..... on oath, before.....one of the justices of the peace of the .....(or police justice) of the said city, that on the .....day of... ..... 18 .. at the ..... in said county, one ..... who is an habitual criminal, was found in possession of ..... a deadly weapon and in possession of ..... tool, instrument or material adapted to and used by criminals for the commission of crime, without being able to account therefor to the satisfaction of the said justice, against the peace of the people of the state of New York, and the form of the statute in such case provided; we therefore command you forthwith to take the body of the said ..... and bring h ..... before the said ....., at the ..... court-room, in the said ....., with this warrant, and a return of your doings thereon indorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness, the said ..... at the ..... in the county aforesaid, the  
..... day of .....

.....

*Justice of the Peace (or Police Justice).*

### No. 108.

**Id. Warrant to Prevent Prize Fights, Cruelty  
to Animal, etc.**

COURT } ss:  
OF ,

In the name of the people of the state of New York : To any sheriff, constable, marshal or policeman of the ..... city and county of ....., greeting :

Whereas, .... has made oath, to and before me, ....., a...justice  
..... in and for the ..... of ....., that he has just and reasonable cause to suspect, and does suspect, that certain of the provisions of law relating to and effecting animals, and to prevent prize fights and fights among game animals, and for the prevention of cruelty to animals ; are being and are about to be violated by ....., at and within the particular building and place within the city and county aforesaid, known as ....., and now occupied, kept and used by.....

Now, therefore, I, ..... a ..... justice ..... as aforesaid, do authorize you to enter and search the said building and place within the ..... and ..... of ....., known as ....., and to arrest the said ..... by whatsoever names they may be known or called, or any or either of them there present found violating any of said laws, and to bring such person when so arrested before the nearest magistrate of competent jurisdiction to be dealt with according to law. Hereof fail not at your peril.

Witness, the said ....., at the ..... of ....., in the county aforesaid, the ..... day of ....., 18 .

[Signature.]

§ 193.

The within named ....., having been brought before me under this warrant, ..... committed for examination to the sheriff of the county of.....

§ 170.

I do hereby order and direct that the arrest on within warrant may be made on Sunday or at night.

### No. 109.

§§ 151-4. Warrant of Arrest for Misdemeanor.

..... court, ..... county of....., ss:

In the name of the people of the state of New York. To any peace officer in the county of ..... ;

Information upon oath having been this day laid before me, that the crime of ... has been committed, and accusing ..... thereof:

You are therefore commanded forthwith to arrest the above named ..... and bring h.... before me at the ..... court, in the ..... of ....., in the ..... county of ...., or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at the ..... of ...., this ..... day of ....., 18 .

### No. 110.

§ 157. Proof of Justice's signature.

..... of ..... county of ..... ss:

..... being duly sworn says, that he resides in the ..... of ... , that the name of ....., signed to the above warrant of arrest, is the handwriting of ....., who is a ..... justice ..... of the ..... of ....., in the county of ...., by whom the above warrant was issued.

Sworn before me, this ..... day of ..... 18 .



## No. 111.

Id. Return.

By virtue of the within warrant I have arrested the within named ..... at ..... in the county of ..... and now have h before the magistrate by whom this warrant was issued, or before ..... a magistrate in the said county of .... he having required me to do so.

Dated at ..... the .... day of ..... 18 .

[Signature.]

§ 156. Endorsement upon Warrant.

This warrant may be executed in the county of

## No 112.

§ 159. Undertaking to Appear Before Magistrate Issuing Warrant Taken in the County of .....

County of ..... ss:

We, ..... of ..... in the county of ..... by occupation a ..... defendant, and ..... of ..... in the county of ..... by occupation a ..... and ..... of ..... in the county of ..... by occupation a ..... sureties, acknowledge ourselves jointly and severally to owe the people of the state of New York, each the sum of ..... hundred dollars, to be made and levied of our respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made, in the condition following:

The condition of this recognizance is, that, whereas information has been made on oath, before ..... a ..... justice ..... for the ....., that on the ..... day of ....., 18 , at the ....., in said county, the crime of ..... was committed, and accusing ..... thereof. And, whereas, the said ..... justice ..... as aforesaid, did, on the ..... day of, ....., 18 , duly issue a warrant for the arrest of said ..... And, whereas, the said ..... has been duly arrested in the county of ....., and having required the officer making the arrest to take him before a magistrate in the said county of ....., he has this day been duly brought before me, the undersigned, one of the ..... of said county of

Now, therefore, if the said ..... shall personally be and appear before the said ..... justice ..... aforesaid, at the ....., in the ..... aforesaid, on the ..... day of ....., 18 , at ..... o'clock in the ..... noon, then this recognizance to be void, otherwise to remain in full force and virtue; and we, the said sureties, will pay to the people of the state of New York the said sum of ..... hundred dollars.

Taken, subscribed and acknowledged before }  
me this ..... day of ....., 18 . }

Add justification.

[Signature.]

## No. 113.

§ 159. Certificate of admission to bail.

I, ..... justice of ..... of the ..... of ..... do hereby certify, that I have, this ..... day of ..... 18 admitted the within named ..... to bail for his appearance before the magistrate named in the within warrant, and taken bail from h accordingly.

[Signature.]

## No. 114.

§ 117, Subd. 3. Information Against Person Arrested Without Warrant, for Committing a Felony.

... county of ....., ss: ..... being duly sworn, deposes and says:

That he is a peace officer in the ..... aforesaid; that having reasonable cause for believing that one ..... committed the crime of ..... in ..... he arrested him without a warrant on the day of ....., 18 .

said ; that the grounds of deponent for believing that said..... committed said crime are as follows:

.....  
Taken, subscribed and sworn to before me, {  
.....this day of ....., 18 .....

[Signature.]

No. 115.

§ 188-9. Statement and Questions Put to Defendant by Justice.

..... court ..... of ..... county of ..... 18 .  
Before ..... Justice.  
THE PEOPLE  
vs.

Before.....Justice. ....  
The defendant immediately on being brought before said justice was informed by said justice as follows :

You are charged with the crime of .....  
You have the right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

Question. Do you require counsel? If you do, you will be allowed a reasonable time to send for him, and the examination will be adjourned for that purpose.

Answer. ....  
(.....appeared as counsel for the defendant, or no counsel appearing, and after waiting a reasonable time therefor, the said justice put the following questions to defendant) :

Question. Do you desire an examination of this case, or do you waive examination and elect to give bail?

Answer.

[Signature.]

No. 116.

§ 192. Bail for Defendant's Appearance before Justice.

STATE OF NEW YORK, }  
COUNTY OF ..... } ss :  
.....OF..... }

THE PEOPLE  
against

defendant .

An information having been laid before .....Esq., justice of the peace, charging ....., defendant , with the offense of ....., and he having been brought before said justice for an examination of said charge, and the hearing thereof having been adjourned .....

We, ..... defendant ,  
residing at ....., in the ..... of ....., county of ....., N. Y., by occupation a ....., and ..... surety, residing at....., in the ..... of ....., county of ....., N. Y., by occupation a ....., hereby undertake that the above-named ....., defendant , shall personally appear before the said magistrate, during the said examination, or that we will pay to the People of the State of New York, the sum of ..... dollars.

Dated at ....., N. Y., }  
this....day of ....18 . }

[Signature.]

STATE OF NEW YORK, }  
COUNTY OF..... } ss.

On this ..... day of ....., A. D., 18 , before me, the subscriber, personally came ..... and ....., to me personally known to be the same persons described in and who executed the above undertaking of bail, and severally acknowledged that they executed the same.

[Signature.]

## No. 117.

COUNTY OF ..... } ss:  
 ..... OF ..... }

## Justification of Bail.

.....suret ..... to the foregoing undertaking of bail, being sworn, says that he is a resident of and a ..... holder within the state of New York and county of ....., and is worth ..... dollars over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this }  
 day of ....., 18 ... }

*Justice of the Peace.*

I hereby allow the foregoing undertaking of bail, and approve of the suret..

..... therein named.

Dated this ....., day }  
 of ....., 18 . }

[Signature.]

## No. 118.

## § 193. Commitment.

The within named A. B., having been brought before me under this warrant, is committed for examination to the sheriff of the county of ....., or in the city and county of New York, to the keeper of the city prison of the city of New York.

## No. 119.

## § 198. Statement of Defendant.

Question—What is your name and age ?

Answer—

Question—Where were you born ?

Answer—

Question—Where do you reside and how long have you resided there ?

Answer—

Question—What is your business or profession ?

Answer—

Question—Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation ?

Answer—

## No. 120.

## § 197.

At the close of the examination of the witnesses on the part of the people, the defendant was informed by me of h .. right to make a statement in relation to the charge against h...as required by section 196 of the Code of Criminal Procedure, and after being so informed, ..he did waive h .. right to make the same.

[Signature.]

## No 121.

## § 200. Authentication.

I, ....., a justice ..... of the ..... of ..... do hereby certify that at the close of the examination before me of the witnesses on the part of the people in the above action, I informed the defendant that it was h .. right to make a statement in relation to the charge against h....and the nature of the charge was stated to h....; that the statement was designed to enable h.... if h....saw fit to answer the charge and to explain the facts alleged against h....; that h....was at liberty to waive making a statement, and that h.... waiver could not be used against h....on the trial; that after being so informed h....made the following statement.

Dated at the ..... of ..... , }  
 this ..... day of ..... 18 . }

[Signature]

**No 122.****§ 201. After Statement or Waiver.**

After the waiver of the defendant to make a statement, or after the defendant made a statement, the following witnesses were produced, sworn and examined, by and on behalf of the defendant.

[Signature.]

**No 123.****§ 224. Testimony.**

THE PEOPLE

vs.

Before justice..... 18  
 Arrested by .....  
 being duly sworn, deposes and says :  
 Question—What is your name and age ?  
 Answer—  
 Question—Where do you reside ?  
 Answer—  
 Question—What is your business or profession ?  
 Answer—

COURT, }  
 COUNTY OF , } ss.

I, ....., a ..... justice of the ..... of ....., do hereby certify that the..... is the testimony given by ....., a witness sworn on the part of the ....., who stated his name to be ....., his age to be ..... his business or profession to be .....

Dated at the ..... of ....., this ..... day of ....., 18

[Signature.]

**No. 124.****§ 227. Indorsement to be made on deposition and statement of defendant in case of prisoner's discharge.**

There being no sufficient cause to believe the within named ..... guilty of the offense within mentioned, I order him to be discharged.

[Signature.]

**No. 125.****§ 207. Order of discharge when defendant is in jail**

POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, }  
 COUNTY, } ss :

To the keeper of the common jail of ..... county .

You are hereby required, on the receipt of this, to discharge from your custody ..... who was committed to jail by me, ....., justice of the peace of ..... county, charge with the offense of [set out in the charge].

Dated, etc,

.....  
*Justice of the Peace (or Police Justice).*

**No. 126.**

*Commitment for further examination*

POLICE COURT (or JUSTICES' COURT).

The sheriff of ..... county will receive and safely keep within the common jail of said county for further examination..... charged before me with the offense of (set forth briefly the offense).

Dated, etc.

.....  
*Police Justice (or Justice of the Peace).*

**No 127.**

§§ 208, 209. Indorsement to be made on depositions and statement of defendant if believed guilty.

It appearing to me by the within depositions and statement that the crime therein mentioned of ..... has been committed, and that there is sufficient cause to believe the within named ..... guilty thereof, I order that he be held to answer the same.

[Signature.]

**No 128.**

§§ 208, 209. Indorsement to be made on depositions and statement of defendant if believed guilty and crime be not bailable.

It appearing to me by the within depositions and statement that the crime therein mentioned of ..... has been committed, and that there is sufficient cause to believe the within named ..... guilty thereof, I order that he be held to answer the same, and that he be committed to the sheriff of the county of

[Signature.]

**No. 129.**

§ 208, 216. Indorsement to be made on depositions and statement of defendant if crime be bailable and bail taken.

It appearing to me by the within depositions and statement that the crime therein mentioned of ..... has been committed, and that there is sufficient cause to believe the within named ..... guilty thereof, I order that he be held to answer the same and I have admitted him to bail to answer by the undertaking hereto annexed.

[Signature.]

**No 130.**

§§ 208, 212. Indorsement to be made on depositions and statement of defendant if crime be bailable and defendant admitted to bail, but bail have not been taken.

It appearing to me by the within depositions and statement that the crime therein mentioned of ..... has been committed and that there is sufficient cause to believe the within named ..... guilty thereof, I order that he be held to answer the same, and that he be admitted to bail in the sum of ..... dollars, and be committed to the sheriff of the county of ..... until he give such bail.

[Signature.]

**No. 131.**

§ 209. Indorsement of Commitment, Offense not Bailable.

And that he be committed to the sheriff of the county of ....., or in the city and county of New York, to the keeper of the city prison of the city of New York.

**§ 210. Certificate of Bail.**

And I have admitted him to bail to answer, by the undertaking hereto annexed.

**No. 132.****§ 212. Order for Bail, on Commitment.**

(Must be added to the endorsement mentioned in § 208.)

And that he be admitted to bail in the sum of ..... dollars, and be committed to the sheriff of the county of ....., [or in the city and county of New York, to the keeper of the city prison of the city of New York,] until he give such bail.

**No. 133.****214. Commitment.**

CITY OF NEWBURGH, } ss.  
ORANGE COUNTY

To any Constable or other Officer of the Peace of said County, and to the Keeper of the Common Jail in said County :

These are, to charge and command you, the said Constable or other officer of of the Peace of said County in the name of the People of the State of New York forthwith to carry and deliver into the custody of the said Keeper of the said Jail the body of ..... this day brought before the undersigned, Recorder of said ....., and charged upon the oath of .....

And I, the said Recorder, after having examined witnesses on oath, and the said ..... in due form of law touching said charge and accusation, did adjudge that said offence had been committed, and that there was probable cause to believe the said ..... to be guilty thereof; and the said ..... not having offered sufficient bail for ..... appearance at the next court, having cognizance of such offence, and in which ..... may be indicted, [or and the said offence not being bailable by me, the said Recorder; ] and you the said Keeper, are hereby required to receive the said ..... into your custody in the said Jail, and ..... there safely keep for want of sureties, and until ..... shall be discharged according to law.

Given under my hand the ..... day of ..... 18 .....

C. L. Waring, Recorder.

**No. 134.****§ 192. Bond for adjournment.****RECORDERS, JUSTICE OR OTHER COURT.**

STATE OF NEW YORK, } ss:  
COUNTY OF ORANGE,

We, ..... in said County, acknowledge ourselves to be severally indebted to the People of the State of New York, that is to say; the said ..... in the sum of ..... dollars, and the said ..... in the sum of ..... dollars, to be well and truly paid, if default shall be made in the condition following: ....

*The Condition of this Recognizance is such,* That if the said ..... shall personally appear before the Recorder of the ..... of ..... at the ..... police court to be held in and for the said city, then and there to answer to .....

and to do and receive what shall by the Court be then and there enjoined upon him, and shall not depart the Court without leave, then this recognizance to be void, otherwise of force.

Taken, subscribed and acknowledged, the ..... {  
day of ..... 18..., before me. }

**No. 135.****§ 211. Undertaking to Grand Jury.**

KNOW ALL MEN BY THESE PRESENTS, An order having been made on the ..... day of ..... eighteen hundred and ....., by ..... a Justice of the Town of ..... in Orange County, and State of New York, that ..... be held to answer before the ..... of said County, upon a charge of ..... upon which he has been duly admitted to bail in the sum of ..... dollars



We, ..... defendant and ..... of ..... by occupation ....., and ..... of ....., by occupation ..... suret....., hereby undertake, jointly and severally that the above named ..... shall appear and answer the charge above mentioned, in whatever Court it may be prosecuted ; and shall at all times render himself amenable to the orders and process of the Court, and if indicted, shall appear and plead, and render himself into the jurisdiction of the Court ; or if he fail to perform either of these conditions, that we will pay to the People of the State of New York the sum of ..... dollars.

Sealed with our seals, and dated this ..... day of ..... 18 .....

COUNTY OF ORANGE, ss.

.....being duly sworn, ..... says that ..... he is a ..... holder in the State of New York, and resides in the County of ..... and is worth the sum of ..... Dollars, over and above all debts and liabilities and property exempt from execution. ....

Sworn to before me this ..... day of ....., 18 .....

COUNTY OF ORANGE, ss.

On this ..... day of ..... in the year 18 ....., before me personally came ..... to me known to be the individuals described in ..... and who executed the foregoing bond, and they acknowledged that they executed the same.

ENDORSEMENT THEREON.—

I approve of the within Bond, both as to its manner and form, and as to the sufficiencies of the sureties therein.

Dated ..... 18.....

---

### No 136.

#### § 215. Undertaking of Witness without Sureties.

..... court, ..... county of ....., ss :

I, ....., of No. .... street, of the ....., in said county, acknowledge myself to be indebted to and owe the people of the state of New York, the sum of ..... hundred dollars, to be made and levied of my goods and chattels, lands and tenements, to the use of the said people—if default shall be made in the condition following :

The condition of this recognizance is such, that if the above bounden ....., shall personally appear and testify at the next court of ..... to be held in and for the said ....., to give evidence as a witness on behalf of the said people against ..... arrested and held to answer the charge of ..... as well to the grand jury as to the petit jury, and do not depart the said court without leave ; then this recognizance to be void and of no effect ; otherwise to remain in full force and virtue, and the said ..... will pay to the people of the state of New York the said sum of ..... hundred dollars.

Taken, subscribed and acknowledged before me this ..... day of ....., 18 .

[Signature.]

---

### No. 137.

#### §§ 215, 216. Undertaking of Witness with Sureties.

.....Court, ..... county of ..... ss :

Be it remembered, that on this ..... day of ..... 18 ..... of ..... in the county of ..... by occupation a ..... and ..... of ..... in the county of ..... by occupation a ..... and ..... of ..... in the ..... county of ..... by occupation a ..... sureties, personally came before me, ..... justice of the peace ..... of the ..... of ....., in said county, and acknowledged themselves each, jointly and severally, to be indebted to the people of the state of New York, in the sum of ..... hundred dollars, to be made and levied of his goods and chattels, lands and tenements to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such that if the bounden ..... shall personally appear and testify at the next court ..... to be held in and for the said city or county of ....., to give evidence as a witness on behalf of the said people, against ....., arrested and held to answer the charge of ....., as well to the grand jury as to the petit jury, and do not depart the said court without leave, then this recognizance to be void and of no effect; otherwise to remain in full force and virtue. The said sureties will pay to the people of the state of New York the said sum of ..... hundred dollars.

Taken, subscribed and acknowledged the day and year first above written, before me.

*Signature.]*

Add justification.

**No. 138.**

**§ 216. Order that Witness give Security for Appearance.**

..... COURT, }  
..... OF . }  
THE PEOPLE  
vs.

Whereas, ....., a witness examined before me, on the part of the people in the above action, is a material witness for the people therein; and whereas, I am satisfied by proof on oath that there is reason to believe that said ..... will not appear and testify on the part of the people at the next court of ..... to be held in and for the county of ....., to which the statements and depositions in the above action are to be sent, I do hereby order that the said ..... enter into a written undertaking in the sum of ..... hundred dollars, with ..... surety .... that he will appear and testify on the part of the people at the next court of ..... to be held in and for the county of.....

Dated ..... the ..... day of ....., 18 .

*[Signature.]*

**No. 139.**

**§ 218. Commitment for Neglecting to give Security for Appearance.**

.....COURT, }  
COUNTY OF } ss:

To ..... of the said city, greeting:

Whereas, it appears by the examination of ..... taken on oath, on the day of ....., 18 ..... before me, ....., a justice of the peace of the ..... of ..... as a witness upon a charge made on oath by the said....., before me, the said justice, against ..... That he, the said ....., is a material witness against the said ..... in regard to the said charge.

And whereas, being satisfied by due proof on oath, that there was good reason to believe that the said ..... would not fulfill the conditions of a recognizance to appear and testify as a witness on the trial of the said ..... unless security was required for that purpose, I, the said justice, did require the said ..... to enter in a recognizance, with two sufficient sureties, in the sum of ..... dollars, conditioned for his personal appearance at the next court ....., to be held in and for the county of ....., to testify and give evidence on behalf of the people against the said ..... for the offense aforesaid: whereupon the said ..... neglected and refused, and still doth neglect and refuse to enter into such recognizance with such sureties as aforesaid.

These are, therefore, to command you, in the name of the people of the state of New York, the said ..... forthwith to convey and deliver into the custody of the said ....., the body of the said .....

And you, the said ....., are hereby required to receive the said ..... into your custody, in the place provided by you, pursuant to the statute in such

case made and provided, for the detention of witnesses who are unable to furnish security for their appearance in criminal proceedings, and h... there safely keep until he shall enter into such recognizance, with such surety as aforesaid, or be otherwise discharged according to law. Hereof fail not at your peril.  
Witness the said ..... at the ..... of ..... and county aforesaid, the ..... day of ....., 18 ..

[Signature.]

No. 140.

§ 227. Order to draw grand jury.

IN THE MATTER OF DRAWING GRAND  
JURORS, ETC. }

At a special term of the supreme court, held at the chambers of Hon. ....  
..... in the city of ....., on the .....  
Present — Hon. .... Court.

It is hereby ordered that the clerk of ..... draw according to law a grand jury to serve at the next court of sessions of ..... county, to be held at the court-house on the 25th day of June, 18 ...  
Dated June 1, 18 ..

No. 141.

§ 227. Order of board of supervisors to draw grand jury.

At a regular meeting of the board of supervisors of ..... county, held in the city of ..... on the 1st day of June, 18 .., it was, by unanimous consent...  
Resolved, That ....., the clerk of ..... be and he is hereby ordered to draw, according to law, a grand jury to serve at the next court of sessions of Rensselaer county, to be held at the court-house in the city of ..... on the .... day of June, 18 ...  
Dated June ....., 18 ...

Chairman of Board of supervisors, ..... County.

No. 142.

Indorsement of clerk upon copy of order drawing grand jury, § 227.

I, ..... clerk of the board of supervisors of ..... county, hereby certify that the within is a faithful copy of an order issued by the board of supervisors, passed June 1, 18 .., and the whole thereof.  
.....  
Clerk of Board, etc.

No. 143.

§ 245. Oath of Foreman of Grand Jury

You, as foreman of this grand jury, shall diligently inquire and true presentment make, of all such matters and things as shall be given you in charge; the counsel of the people of this state, your fellows and your own you shall keep secret; you shall present no person from envy, hatred or malice, nor shall you leave any one unrepresented through fear, favor, affection or reward, or hope thereof; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God !

## § 246. Oath of Grand Jurors.

\_\_\_\_\_

**§ 247. Separate Oath of Grand Jurors.**

\_\_\_\_\_

### Oath to witness before Grand Jury.

\_\_\_\_\_

**§ 268. Indorsement of indictment.**

.....

\_\_\_\_\_

### Indorsement where no indictment found.

.....

\_\_\_\_\_

## § 276. Indictment, General.

**County Court of the County of.....**

The grand jury of the [here insert the name of the county, or of the city, or of the city and county, in which the indictment is found], by this indictment accuse A. B. of the crime of [here insert the name of the crime, if it have one, such as treason, murder, arson, manslaughter, or the like, or if it be a misdemeanor, having no general name, such as libel, assault, or the like, insert a brief description of it as it is given by statute]; committed as follows:

**A. B.,**

*District Attorney of the county of*

No. 150.

§ 301 Bench Warrant.

STATE OF NEW YORK, } ss:  
COUNTY OF ORANGE.

In the name of the people of the State of New York:  
To any peace officer in this state.  
An indictment having been found on the.....day of.....eighteen  
hundred and .....in the court of....., in and for said county,  
charging.....with the crime of.....  
You are therefore commanded to arrest the above named.....and bring  
him before the court of....., to answer the indictment, or if the court have  
adjourned for the term, that you deliver him into the custody of the sheriff of  
the County of Orange.  
City of ....., the.....day of.....eighteen hundred and .....  
By order of the court.

District Attorney of the County of.....  
.....Clerk or.....

§ 303. Indorsement on Bench Warrant, Offense  
Bailable.

The defendant is to be admitted to bail in the sum of.....dollars.

No. 151.

§ 313. Affidavit to set Aside Indictment.

CRIMINAL TERM OF THE SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK }  
against  
JOHN DOE.

STATE OF NEW YORK, } ss:  
COUNTY OF.....

being duly sworn, says that he is the attorney for the above  
named defendant, and that he has examined the indictment presented to this  
court by the grand jury at the present term, charging the said defendant with  
the crime of ..... that said indictment, when returned to this court, was in-  
dorsed a "true bill," but was not signed by the foreman of the grand jury as  
required by section 268 of the Code of Criminal Procedure. Deponent further  
says that....., the district attorney of this county, was present in the  
room at the time when the members of said grand jury were giving their votes  
on said indictment.

Sworn before me, }  
18 . }

No 152.

§ 317. Order Setting Aside Indictment

CRIMINAL TERM OF THE SUPREME COURT.

PEOPLE OF THE STATE OF NEW YORK }  
against  
JOHN DOE.

At a special term of the supreme court of the State of New York, held,  
etc.

On reading and filing the affidavit of....., in support of a motion to  
set aside the indictment in the above entitled action, and after hearing said  
.....in support of said motion, and Hon... .., district attorney of  
.....county, opposed thereto, and it appearing that the irregularities set

forth in said affidavit are true, it is hereby ordered that said indictment be and the same is hereby set aside, and that said defendant be discharged from custody and his bail be exonerated [or that the case be again submitted to the grand jury for consideration].

By order of the court.

Dated etc.

.....  
Clerk

---

**No. 153.**

§ 312. Order of discharge if new indictment is not found by next grand jury.

[Formal part as in No. 152.]

It appearing to the satisfaction of the court that the indictment of was set aside at the last term of this court, and the present grand jury having been discharged without finding a new indictment against said now on motion of....., his attorney, it is hereby ordered that he be discharged from custody and his bail be exonerated.

By order of the court.

Dated, etc.

.....  
Clerk.

---

**No. 154.**

§ 324. Demurrer to indictment.

**CRIMINAL TERM OF SUPREME COURT—.....COUNTY.**

**THE PEOPLE OF THE STATE OF NEW YORK }**  
**against**

The defendant above named, demurs to the indictment presented by the last grand jury, on the ..... day of ....., 18 , charging him with the crime of ..... on the following grounds:

First. That the crime set forth in the indictment was committed in the county of ....., and was not within the jurisdiction of this court.

Second. The facts stated in said indictment do not constitute a crime.

Wherefore this defendant asks judgment of the court that he be dismissed and discharged from the said premises specified in said indictment.

Dated, etc.

Attorney for Defendant.

---

**No. 155.**

§ 334. Pleas.

If the defendant plead guilty to the crime charged in the indictment, the defendant pleads that he is guilty.

If he plead guilty to any lesser crime than that charged in the indictment, the defendant pleads guilty to the crime of ..... [naming it].

If he plead not guilty, the defendant pleads not guilty.

If he plead a former conviction or acquittal: the defendant pleads that he has already been convicted [or acquitted, as the case may be], of the crime charged in this indictment, by the judgment of the court of ..... [naming it], rendered at ..... [naming the place], on the ..... day of

---

**No. 156.**

Plea of insanity.

[Formal part as in No. 154.] The defendant herein, on being arraigned on the indictment charging him with the crime of arson, pleads not guilty thereto, and also further pleads that, at the time or times charged in the indictment, he was of unsound mind and wholly irresponsible for his acts.

## No. 157.

§ 346. Affidavit for Removal and Stay.

COURT OF ..... OF ..... COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK, }  
against,

City and county of ..... ss:

..... of said ..... being duly sworn says, that he is the defendant in the above entitled criminal action. That he has been indicted by the grand jury of ..... county ..... for the offense of ..... which offense is more specifically defined and is alleged to be in the indictment under the provisions of ..... That said indictment was returned by the said ..... grand jury on ..... the ..... day of ..... 18 .., to the court of ..... in and for the county of .....; that deponent was arraigned on said indictment on the ..... day of ..... 18 .., and as deponent is informed by his counsel and verily believes the trial of said indictment against him has been set down for trial on the ..... day of ..... 18 .., in said court of .....; that as deponent is informed and verily believes that this action against deponent involves the decision of very important matters, as .....

That great popular prejudice and feeling have been aroused by ex parte examinations as to, etc.

Deponent further says that the crime charged against him as he is advised and verily believes is a ..... and upon conviction he could be subjected to imprisonment in a state prison for .....

Deponent further says that as he is advised by his counsel ..... who resides in the ..... of ..... to whom he has fully and fairly stated the case in this action, he has a good and substantial defense upon the merits, to the indictment in this action as he is advised by his said counsel after such statement made as aforesaid and as he verily believes; deponent further says that he is advised by his said counsel that this is a proper case to be presented to the court of ..... and that his said counsel intends in good faith and on behalf of deponent to make application to the supreme court for the removal of said indictment into the court of ....., and therefore deponent desires that an order may be granted staying the trial herein upon said indictment until a proper application can be made for the removal of said indictment and until a decision upon said application. Deponent further says that he is advised and verily believes that such an application for removal can only be made to the supreme court, upon notice of at least ten days to the district-attorney of the county where the indictment is pending, and that therefore the first opportunity that his counsel would have to present such application would be at the special term of the supreme court which is stated to be held on the ..... of ..... 18 .., which would be the ..... day of ..... 18 ...

Deponent further says that no other previous application has been made for the order desired herein.

## No. 158.

§ 346. Notice to District Attorney.

COURT OF ..... OF ..... COUNTY:

The People of the State of New York, }  
against,

Please take notice, that upon an affidavit of ..... dated ..... 18 .., hereto annexed ....., and the order staying the trial of the indictment herein, dated ..... 18 .., copies of which have heretofore been served upon you and upon the indictment against the defendant herein, a motion will be made at a special term of the supreme court of the state of New York, to be held at the ..... at the ..... of ..... New York, on the ..... day of, ..... 18 .., at the opening of the court on that day, or as soon as counsel can be heard, for an order to remove the indictment presented by the grand jury to the court of ..... of ..... county, against the defendant from the said court of ..... of ..... county to the court of ..... of ..... county, and for such other and further relief as may be just, and the court deem proper to grant.

Dated ....., 18 .....

Yours, &amp;c.,

Att'y for defendant.

To ....., district attorney of ... .. county.



No. 159.

Order on application removing indictment from County Court to Supreme Court.

SUPREME COURT ..... COUNTY.

The People of the State of New York }  
against

At a special term of the supreme court of the State of New York, held at the court-house, in the city of....., on the .... day of ....., A. D. 18 ..

Present : Hon. ...., Justice Supreme Court.

Upon reading and filing the foregoing application of ..... and a certified copy of the indictment against the same charging him with ....., presented and filed at a court of ..... held in and for the county of ..... on the .....; and after hearing ..... in support of said application, and ....., district attorney of ..... county, in opposition thereto, it is hereby ordered that said indictment be and is hereby removed from the court of sessions of the county of ..... to the next court of oyer and terminer to be held in and for the said county of ....., and that the trial of the said ..... be had in the last mentioned court.

.....  
Justice Sup. Court.

No. 160.

§ 347. Affidavit to obtain order for stay.

..... COUNTY, ss :

....., of ..... N. Y., being duly sworn, says that he is one of the attorneys for ....., the prisoner under arrest, charged by indictment with the crime of ..... [state with particularity the nature of the crime ; also the facts and circumstances which render a removal necessary]; that the next term of court of sessions will be held on the .... of ....., 18 .., in and for the county of ..... aforesaid, and that this deponent is about to make a motion for the removal of the said indictment from the said court of sessions to the court of oyer and terminer, and that there is not now time to move the court for such an order before the convening of the said court of sessions.

Sworn before me, }  
....., 18 .. }

No. 161.

§ 348. Stay.

COURT OF ....., COUNTY OF.....

The People, etc., }  
vs. }

On reading and filing the affidavit of ....., bearing date the ..... day of ....., 18 .., hereto annexed, showing that an indictment for ..... has been presented by the grand jury of ..... county to the court of ..... thereof, against the above named defendant and is now pending therein, and that said defendant is about to make a motion to the supreme court at special term to have the said indictment removed from the said court of ..... of said county, to the court of oyer and terminer of said county.

It is hereby ordered that to enable this said motion to be heard, the trial and all proceedings upon such indictment be and the same are hereby stayed until the hearing and decision of such motion, viz.: until the ..... day of ..... for the hearing of such motion and thereafter until decision is entered thereon.

Dated at .....

No. 162.

Recognizance to accompany order removing indictment when the defendant is not in confinement.

CRIMINAL TERM OF SUPREME COURT.

The People, etc., }  
against }

STATE OF NEW YORK, } ss:  
COUNTY OF ..... }

Be it remembered that on this .... day of ....., A. D. 18 , .....  
..... of the city of ....., county and state aforesaid, personally came be-  
fore me, ....., a justice of the supreme court of the State of New York, and  
each of them separately and by himself and for himself acknowledged himself to  
be indebted to the people of the State of New York in the sum of ..... dol-  
lars if default be made in the following conditions:

Wherefore, upon the written application of the said ..... the above  
named justice of the supreme court, in pursuance of the provisions of the statute,  
has removed the indictment against the said ..... presented and filed in the  
court of sessions of the said county of ....., on the ..... A. D. 18 , for  
....., from the said court of sessions to the next oyer and terminer, to be  
held in and for the county of .....; and directed the trial of the said .....  
on said indictment to be held in the said last mentioned court.

Now, therefore, the condition of this obligation is such that if the said .....  
personally appear at the next oyer and terminer to be held in and for the county  
of ....., at the court house in the ....., on the ..... and at such  
other time as such court shall appoint, and shall stand trial upon the issue  
joined, and shall not depart said court of oyer and terminer without leave, then  
this recognizance to be void, otherwise to abide in full force and effect.

[L. S.]  
[L. S.]  
[L. S.]

Taken and acknowledged before }  
me, ..... }

.....  
Justice Supreme Court.

No. 163.

§§ 561, 562. Certificate Denying Application to Bail.

.....COURT, } ss:  
COUNTY OF }

I, ....., a justice of the ..... of ....., do hereby certify that an  
application was made to me on the ..... day of ....., 18 . for the ad-  
mission to bail of ....., held by me to answer the crime of ....., and I  
denied the said application.

Dated at the ....., this ..... day of ....., 18 .  
[Signature.]

No. 164.

§ 414. Oath of Officers.

You do solemnly swear that you shall retire with the jurors now present in  
court and in this trial; that you will safely keep them together until the next  
meeting of this court and return them thereto without delay, and that in the  
meantime you will suffer no person to speak to or communicate with them, nor  
to do so themselves, on any subject connected with this trial. So help you  
God.

## No. 165.

§§ 438, 440. *Form of special verdict.*

## CRIMINAL TERM OF SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK }  
*against*

We, the jurors in the above cause, find the following facts as established by the evidence submitted for our consideration:

*First.* We find that, as charged in the indictment,..... *Second.* That (state facts as found); *Third.* .....(state other facts).

[Signed by jurors.]

## No. 166.

§ 441. *Notice of argument on special verdict.*

## CRIMINAL TERM OF SUPREME COURT.

THE PEOPLE ETC.,  
*against*

To ....., Esq., *District-Attorney* :

SIR.—Please to take notice that the special verdict rendered in the above cause on the ..... day of ....., 18 .. will be brought to argument at the present term of this court, on the ..... day of ....., 18 .., at the opening of court on that day, or as soon thereafter as counsel can be heard.

Dated ....., N. Y., ....., 18 ..

Yours, etc.,

*Attorneys for Defendant.*

## No. 167.

§ 454. *Form of Verdict. Insanity.*

We find the prisoner not guilty, and acquit him upon the ground that he was laboring under such a defect of reason as not to know the nature and quality of the act he was doing [or not to know that the act was wrong.]

## No. 168.

§ 454. *Order of court where prisoner is acquitted on ground of insanity.*

## CRIMINAL TERM OF SUPREME COURT.

IN THE MATTER OF..... WHO HAS ESCAPED }  
 CONVICTION ON GROUND OF INSANITY.

Whereas, The jury have acquitted the said ..... of the crime of ....., whereof he was charged in the trial now just concluded, on the ground of insanity, duly certified by said jury, which certificate is now on file in the .. county clerk's office; and this court having thereupon carefully inquired and ascertained whether his insanity still continues, and being fully satisfied his insanity does still continue, it is hereby ordered, in pursuance of the statute in such case made and provided, that the said ..... be kept in safe custody, and for that purpose be sent to the State Lunatic Asylum at ....., and the sheriff of the county is hereby empowered and commanded to carry this order into effect, and to take the said ..... to said asylum, to be there kept until discharged by due course of law.

Dated at ....., this ..... day of ....., 18 ..

*Justice Supreme Court.*

No. 169.

§ 455. *Bill of exceptions.*

CRIMINAL TERM OF SUPREME COURT.

THE PEOPLE }  
    *against* }

At a criminal term of the supreme court, held in and for the county of..... at the court-house in the....., before Hon. ...., a justice of the supreme court, on the ..... day of ....., an indictment against, ..... of which the annexed marked "A" is a copy, came on to be tried, and a jury having been impaneled and sworn, the following testimony was then had, and the following proceedings were then and there had, to wit:

witness on behalf of the people, being duly sworn, testified as follows:

[Insert all testimony and exceptions.]  
The evidence here closed, and the above was all the evidence taken on said trial.

The court charged the jury, among other things, that [insert that part of the charge objected to,] to which portion of the charge the counsel for the prisoner duly accepted.

And the counsel for the prisoner thereupon requested the court to charge the jury as follows: [Insert request to charge.] The court refused so to charge, and the counsel for the prisoner then and there excepted.

The said cause was on the said ..... day of ..... submitted to the jury, who, on the same day, returned into court and rendered their verdict, by which they found the said defendant guilty of the crime charged in the indictment.

And because none of the said exceptions so offered and made do appear upon the record of said trial, therefore, in the presence of the defendant, the said court has signed the said exceptions according to the statute in such case made and provided.

Dated this ..... day of .....

*Justice Supreme Court.*

*Attorney for Defendant.*

"A."

At a court of oyer and terminer, held at the court-house, in the.....on the .....day of .....

This shedule consists of a copy of the indictment which should be attached to the bill of exceptions, and reference thereto made in the bill itself.

No. 170.

§ 458. *Notice to settle bill of exceptions.*

CRIMINAL TERM OF SUPREME COURT.

THE PEOPLE }  
    AGAINST }

SIR—Please to take notice that on the bill of exceptions served on you herein, and upon the amendments thereto served by you, the defendant herein,..... will make a motion before Hon....., at his chambers, in the city of ....., on the ..... day of ..... at 10 o'clock A. M. of that day, to have the said bill of exceptions settled, and for such such other relief as may be just.

Dated at ....., this ..... day of.....

Yours, etc.

*Defendant's Attorney.*

To      *District Attorney.....county,*

No 171.

§ 460. *Order enlarging time to settle bill of exceptions.*

(Title of cause and court.)

On reading and filing affidavit of ....., defendant's attorney, hereto an-

nixed, and, on motion of the same, it is hereby ordered, on good cause shown, that defendant's time for preparing and serving a bill of exceptions be and is hereby extended to and including ....., 18 ..

Dated this ..... day of .....

*Justice Supreme Court.*

**No 172.**

§ 456. Settling Exceptions.

The foregoing bill containing the exceptions herein are hereby settled and signed by me, this ..... day of.....18 ..

**No 173.**

§ 465. Sub.7. *Affidavit for a new trial,*

**CRIMINAL TERM OF SUPREME COURT.**

STATE OF NEW YORK, }  
COUNTY, } ss.:

THE PEOPLE }  
against }

..... being duly sworn, says that he resides at ..... in said county, that he is the attorney for the above named defendant, and as such attorney tried his case under the indictment charging him with arson at the present term of this court, at which he was found guilty by a jury as charged in said indictment. Deponent further says that since said trial closed he has discovered such new evidence as, in his judgment, if produced and received before, would have changed the verdict to one of acquittal; that said evidence is in substance as follows :— [here give nature of the evidence briefly]; that said evidence was wholly unknown to him and this deponent at the trial just had, and that their failure to produce it was not owing to any want of diligence on their part.

Subscribed and sworn before me, }  
this day of ..... 18... }

.....  
.....

**No 174**

§ 469. *Affidavit on motion for arrest of judgment.*

(Title of court and case.

STATE OF NEW YORK, }  
..... COUNTY. } ss.

....., being duly sworn, says that he resides that ....., in said county; that he is the attorney for ....., the defendant in this action; that said .... was tried on an indictment charging him with arson, before this court and a jury, on the ..... and was found guilty by said jury as charged on the same day.

Deponent further says that said indictment does not conform to the requirements of section 275 and 276 of the Code of Criminal Procedure in the following particulars : [state in what it is defective]; and also that the facts therein charged do not constitute a crime.

Subscribed and sworn before me, }  
this ..... day of..... }

.....  
.....

**No. 175.***Notice to district attorney of motion in arrest of judgment.*

(Title of court and cause.)

SIR—Please to take notice that on the indictment herein, on the evidence taken in the trial of this action, on the annexed affidavit, and upon all other proceedings heretofore had in this case, I will move the court on the ..... day of ..... for an order arresting judgment against said defendant, and for such other relief as may be just.

Dated at ....., this ..... day of .....

Yours, etc.,

*Attorney for Defendant.*To B. C., *District Attorney*, ..... *County*.**No. 176.****§ 487. Warrant of commitment after conviction.**

(Title of Court.)

STATE OF NEW YORK, }  
 COUNTY OF ....., } ss.:

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To .....and to the keeper of the jail or prison to which  
 the prisoner is sentenced :

Whereas, ..... was on the ..... day of ....., duly tried before me and a jury, and by said jury was convicted of the crime of ....., and afterwards was, by me, in due form of law, sentenced to imprisonment in the county jail for the term of one year [or fine and imprisonment, as the case may be]. Now, this is to command you to receive the said ..... into your custody and detain him until the judgment of the said court is satisfied.

Dated this ..... day of ....., 18 ..

*Justice Supreme Court (or other court.)***No. 176a.****Section 491. Death Warrant.**

The people of the state of New York to the agent and warden of the state prison at N. Y., greeting:

Whereas, at a court of oyer and terminer held in and for the county of ....., at the....., in the.....of.....N. Y., on the .....day of....., 18...., by and before ....., one of the justices of the supreme court of the state of New York presiding,..... was convicted of the crime of murder in the first degree, and was thereupon sentenced to the punishment of death, to be inflicted by causing to pass through his body a current of electricity of sufficient intensity to cause death, and continuing the application of such current until he be dead, within the.... week of.....18. ...;

Now, therefore, we do, by this warrant, command you to do execution of the foregoing sentence upon some day within the week thus appointed, at the place and in the manner prescribed by law.

Given under the hand and seal of the undersigned, who constituted the said court of oyer and terminer, this.....day of....., 18....

[L. S.]

Justice Supreme Court.

No. 176b.

§ 507. Invitation to Certain Officers to be Present at Execution.  
— Pursuant to section 507 of the Code of Criminal Procedure, you are invited to be present at the execution of .....at the state prison, .....N. Y., on the.....day of.....18...., at....  
.....M.

Hon..... Agent and Warden.  
Justice Supreme Court.

No. 176c.

§ 508. Certificate of Execution.

E OF NEW YORK, } ss.:  
NTY OF.....

....., the agent and warden of the state prison at....., and the other public officers, physicians, citizens and ministers of the .., whose names are hereto subscribed, do certify that....., who sentenced by the court of oyer and terminer, held in and for the county of ....., on the.....day of....., 18...., to be executed in the .....week of.....18...., was, on the... ..day ....., 18 ...., at.....o'clock M., in pursuance of the said sentence, ted by causing to pass through his body a current of electricity of suffi- intensity to cause death and continuing the application of such current he was dead, in the state prison at..... N. Y., and we, the under- l, do certify that we witnessed the said execution, and that the same was icted in conformity to the sentence of the court and the provisions of the nal Code.

witness thereof, we have, at the said state prison, subscribed our names , this.....day of....., 18 ....

....., Agent and Warden.  
....., Justice Supreme Court.  
....., Dist. Att'y.  
....., Sheriff.  
.....,

No. 177.

§ 491. Death Warrant.

people of the state of New York to the sheriff of.....county, greeting:  
ereas, at a court of oyer and terminer held at.....in the.....of y of ....., in and for said county on the.....day of.....18.... d before.....one of the justices of the supreme court of the state of York, presiding,.....was convicted of the crime of murder in the first e, in that he feloniously, willfully, of malice aforethought, and from a de- te and premeditated design to effect the death of....., killed and éred the said.....on the..... day of....., 18..., at.....by ng [or as the case may be], and was thereupon sentenced by the said court r and terminer to be hanged by the neck on Friday [or as the case may be] ....day of.....18...., between the hours of.....o'clock in the fore- and.....o'clock in the afternoon, until he should be dead. Now, ore, we do by this warrant, pursuant to the statute in such case made and led, require, direct and appoint that you cause the said sentence to be ted on the day and between the hours therein mentioned, to wit [naming y], and at the place and in the manner prescribed by law.

en under the hand and seal of the undersigned being the justice who con- d said court of oyer and terminer on this.....day of.....18....

[L. s.]

Justice of the Supreme Court.





**No. 178**

**§ 496. Inquiry into Sanity of Person Sentenced to Death.**

**STATE OF NEW YORK, } ss:  
COUNTY OF**

It appearing to me that there is reason to believe that \_\_\_\_\_ lately convicted of murder before \_\_\_\_\_, at a court of oyer and terminer, held at \_\_\_\_\_, \_\_\_\_\_, and who is now under sentence of death in the jail of said county, has become insane since the said conviction, I do therefore, in pursuance of § 496 of the Code of Criminal Procedure, concur with \_\_\_\_\_ sheriff of \_\_\_\_\_ county, in calling a jury to make inquest whether the said \_\_\_\_\_ be of sane mind or no. And I do hereby order and direct the said sheriff to impanel a jury of twelve persons of his county, qualified to serve as jurors in courts of record, to examine and make inquest as to sanity of said \_\_\_\_\_

**Dated.**

**Justice of the supreme court or county judge.**

**No. 179.**

**Id. Notice to District Attorney.**

**To \_\_\_\_\_ Esq., district-attorney:**

Sir: Take notice that with the concurrence of Hon. \_\_\_\_\_ justice of the supreme court [or county judge, as the case may be], I shall proceed to impanel a jury and made inquest to determine as to the sanity of \_\_\_\_\_ lately convicted of murder at a court of oyer and terminer held at \_\_\_\_\_, \_\_\_\_\_ and who is now under sentence of death in the jail of \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18.., at \_\_\_\_\_ o'clock, \_\_\_\_\_ M., at \_\_\_\_\_

**Dated \_\_\_\_\_, \_\_\_\_\_**

**\_\_\_\_\_ Sheriff of \_\_\_\_\_ county.**

**No. 180.**

**Id. Oath to Jurors.**

**“ You do each for yourself swear that you will well and truly inquire whether the prisoner now here, be of sane mind or no, and that you will true inquest make thereof, according to the evidence. So help you God.”**

**No. 181.**

**Id. Where Juror is Challenged.**

**“ You shall true answers make to such questions as shall be put to you touching the objection or challenge to you as a juror. So help you God.”**

**No. 182.**

**Id. To Witness where Juror is Challenged.**

**“ You shall true answers make to such questions as shall be put to you touching the challenge of \_\_\_\_\_ a juror. So help you God.”**

**No. 183.**

**§ 497. Subpœna by District Attorney.**

**In the name of the people of the state of New York : To**

**You are commanded that, laying aside all business, you be and appear at \_\_\_\_\_, in the \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18.., to testify and give evidence upon an inquest then and there to be taken before \_\_\_\_\_ sheriff of said county, to determine whether \_\_\_\_\_ a prisoner therein confined and now under sentence of death, be insane or no, and hereof fail not at your peril.**

**Dated \_\_\_\_\_**

**District-Attorney, county of \_\_\_\_\_**

**No. 184.****Id. Oath to Witness on Inquest.**

"The evidence you shall give touching the sanity of \_\_\_\_\_ the prisoner now here, shall be the truth, the whole truth, and nothing but the truth. So help you God."

**No. 185.****§ 498. Inquisition as to Sanity of Prisoners.**

STATE OF NEW YORK, } ss:  
COUNTY OF \_\_\_\_\_,

Inquisition taken before the undersigned, sheriff of \_\_\_\_\_ county, with the concurrence and by order of Hon. \_\_\_\_\_ justice of the supreme court, as to the sanity of \_\_\_\_\_ now confined in the jail of said county under sentence of death, at the said jail upon the oaths and affirmations of \_\_\_\_\_ etc., twelve qualified persons of said county summoned by me to inquire as to the sanity of the said

The said jurors being each duly sworn and charge to inquire touching the sanity of said prisoner, do upon their oaths and affirmations, say that the said \_\_\_\_\_ is not of sound mind but is of insane mind (as the case may be.)

In witness whereof, we, the said sheriff as well as the said jurors, have to this inquisition set our hands and seals at the time and place aforesaid.

Sheriff. [L. s.]

[L. s.]

{ }

Jurors.

**No. 186.****§ 658. Affidavit on application for appointment of commission on insanity of prisoner.**

THE PEOPLE  
against  
EUGENE HULSE. }

ORANGE COUNTY, ss.:

Lewis E. Hanmore being duly sworn deposes and says that he is the jail physician of the jail at Newburgh in said county, that he knows Eugene Hulse and has attended him since he has been an inmate of the Newburgh jail, that he has made a special examination of the said Eugene Hulse in regard to his mental condition and that as the result of said examination he is of the opinion that the said Eugene Hulse is of unsound mind and is not of sufficient mental capacity to undertake his defense.

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 18 .

**No. 187.****Petition for Commission to examine insane prisoner.**

To the county court of \_\_\_\_\_ county.

The petition of \_\_\_\_\_ respectfully shows to this court, that he is the attorney for \_\_\_\_\_. That Eugene Hulse, who resided in Orange County is in confinement in the county jail of said county, under indictment for arson in the second degree.

That as your petitioner is informed and believes, he is a lunatic and insane.

Your petitioner therefore asks that a commission may be appointed by said court according to Section 658 of the code of criminal procedure to examine said Eugene Hulse, and report to this court as to his sanity at the time of the examination.

Dated \_\_\_\_\_, 18 .

No. 188.

§ 638. Order of court appointing commission to inquire as to the insanity of prisoner before trial.

COUNTY COURT—ORANGE COUNTY.

Held at Goshen, N. Y. ,18 .

Present: Hon. John G. Wilkins, County Judge.

THE PEOPLE  
against  
EUGENE HULSE. }

It having been made to appear to me that Eugene Hulse a person indicted by the grand jury of , 18 , of the crime of arson in the second degree, is a person of unsound mind and wholly irresponsible, and an affidavit of ..... to the same effect having been filed, or other affidavits as the case may be), I do therefore in pursuance of the statute in such case made and provided, hereby appoint a commission forthwith to examine into the mental condition of said Eugene Hulse, and make their report thereon to this court with all convenient speed; and due notice of the time and place of executing this commission be given to the district-attorney of this county.

No. 189. (a)

§ 658. Notice to district-attorney of executing commission.

To Hon. ...., District-Attorney of ..... county:

SIR.—Please to take notice that pursuant to an order of the ..... court of the State of New York, heretofore duly made and filed, the undersigned as commissioners to inquire into the mental condition of ....., now confined in ..... jail charged with the crime of ..... will proceed to execute their said commission, at the said ..... jail on the ..... day of ....., 18 .. at eleven o'clock A. M. of that day.

Dated at ....., this ..... day of ....., 18 ..

Yours, etc.,

(Signed)

.....  
.....  
.....

Commissioners.

No. 190.

§ 658. Inquisition of commissioners on insanity of prisoner.

Name of court.

THE PEOPLE  
against  
EUGENE HULSE. }

To Hon. John G. Wilkin, County Judge of Orange County:

The undersigned, appointed by the county court of Orange County, held by the Hon. John G. Wilkin, county judge at Goshen, N. Y. on the ..... day of , 18 , commissioners under section 658 of the Code of Criminal Procedure, to inquire into the, and report upon the present mental condition, and alleged insanity of said Eugene Hulse, who stands indicted for arson in the second degree, respectfully report as follows: That we convened on the ..... day of , 18 , at ..... and proceeded to the examination of witnesses, under oath, reducing all their testimony to writing and all of which is herewith appended, and to which we respectfully refer, that in the examination ..... district attorney, appeared for the people and ..... counsel for said Eugene Hulse appeared in his behalf. That we examined on the ..... day of ..... witnesses, and also personally examined said Eugene Hulse at length. That as the result of said inquiry we find that he is about ..... years of age, and in ..... general state of health. That his business was that of a ..... (state all the facts) we therefore upon the testimony taken and personal

examination of the said Eugene Hulse find that he is now insane and incompetent to advise or conduct his defense on the trial for the crime for which he stands indicted.

.....  
.....  
.....  
Commissioners

No. 191.

Order of court to remove insane defendant to an asylum.  
COUNTY COURT—ORANGE COUNTY.

Held May 17th, 18 . at Goshen, N. Y.

Present: Hon. John G. Wilkin, county judge.

THE PEOPLE  
agst.  
EUGENE HULSE. }

The commission heretofore appointed by this court, to wit:  
To inquire into the sanity of the said Eugene Hulse, and the degree of mental capacity possessed by him, and to report thereon to this court, having concluded their inquiry and having made to this court a written report now on file, said report stating that the said commissioners having examined the said Eugene Hulse and inquired into the facts of the case by the evidence of sworn witnesses before them, and having found that the said Eugene Hulse is insane and not of sufficient mental capacity to undertake his defense, and the said finding having been approved by this court, thereupon it is hereby ordered, upon pleading and filing said report and the testimony accompanying the same, that the said Eugene Hulse be forthwith removed to.....there to be safely kept and detained in said asylum until he be restored to a sound state of mind and understanding, when he shall be returned to the county jail of Orange County and criminal proceedings be resumed or otherwise discharged according to law.  
It is further ordered that the sheriff of said county do forthwith convey said Eugene Hulse to said asylum.  
Dated,

No. 192.

Order to remove insane defendant after verdict by jury.

At a criminal term of the supreme court, holden in and for the city and county of New York, at the city hall of the said city, on.....day, the... day of ....., in the year of our Lord one thousand eight hundred and. .... Present: The Hon.....Justices of the sessions of the City of New York.

THE PEOPLE OF THE STATE OF NEW YORK, }  
against }

.....  
On indictment for the crime of.....  
.....  
An inquisition having been ordered by the court to inquire whether the defendant is of sound mind and understanding, or not, for the purpose of ascertaining whether he is now in a situation to be put upon his trial for said crime, and a jury having been impaneled and sworn, and by their verdict from the evidence having found that the said.....is not of sound mind and understanding, and the court being so certified of the fact. It is thereupon ordered, that said..... be forthwith removed to.... there to be safely kept and detained in said asylum until he be restored to a sound state of mind and understanding, and then to be returned to the city prison of the city of New York.  
It is further ordered that the sheriff of said city and county do forthwith convey said.....to said asylum.  
A true extract from the minutes.

.....  
Clerk of Court.

# OF CRIMINAL PROCEDURE.

## No. 193.

**§ 500.** Inquiry into pregnancy of female sentenced to death. Notice district attorney.

To district attorney,.....county.

Sir: Take notice that in pursuance of § 500 of the Code of Criminal Procedure, it appearing to me that there is reasonable ground to believe female convicted of murder at the court of oyer and terminer, held at, etc., & now in the jail of this county under sentence of death, is pregnant and quick with child. I shall proceed to impanel a jury of six physicians to inquire & make inquest as to her pregnancy at..... in the..... on the..... of....., 18..., at...o'clock in the .....noon

Dated.....,

Sheriff of.....county.

---

## No. 194.

Id. Subpoena of district attorney

In the name of the people of the State of New York.

To

You are commanded that laying all business aside, you be and appear at....., in the....., on the.....day of....., 18..., at...o'clock in the....., noon. to testify and give evidence upon an inquest then and there to be taken before sheriff of said county, to determine whether a female prisoner, now confined in the jail of said county under sentence of death, is pregnant or quick with child or no : and hereof fail not at your peril.

Dated.....,

District Attorney.....county.

---

## No. 195.

Id. Oath to Jurors

You do each for yourself swear that you will well and truly inquire whether A. B., prisoner now before you, be pregnant or quick with child or no, and that you will true inquest make thereof according to the evidence. So help you God.

---

## No. 196.

Id. Oath of Challenged Jurors

You shall true answers make to such questions as shall be put to you touching the objection or challenge to you as a juror. So help you God.

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## No. 197.

Id. Oath to Witness on Challenge to Jurors

You shall true answers make to such questions as shall be put to you, touching the challenge of a juror. So help you God.

---

## No. 198.

Id. Oath to Witness on Inquest

The evidence you shall give upon this inquest, whether the prisoner now here, be pregnant or quick with child or not, shall be the truth, the whole truth, and nothing but the truth. So help you God.

---

## No. 199.

*Oath to Interpreter.*

You solemnly swear that you will truly interpret to the witness the oath which shall be administered to him upon this inquest, and shall also truly interpret between the coroner, the jury and the witness. So help you God.

No. 200.

§ 500. Inquisition as to Pregnancy.

STATE OF NEW YORK, }  
COUNTY OF..... } ss.

Inquisition taken before the undersigned, sheriff of ..... county at ..... in said county on the ..... day of ....., 18 .., upon the oaths and affirmations of &c., six physicians of said county [or as the case may be], summoned by me to inquire whether a female prisoner now (in this jail of said county, under sentence of death, be pregnant or quick with child or no. And the said jurors each being sworn and charged to inquire whether the said be pregnant or quick with child, and upon their oaths and affirmations say that said is now pregnant and quick with child [or as the case may be].

In witness whereof we, the said sheriff as well as the said jurors, have to this inquisition set our hands and seal at the time and place aforesaid.

[L. C.] sheriff. } Jurors. [L. S.]

No. 201.

503. Order to bring Defendant Sentenced to Death, before the General Term or Oyer and Terminer.

SUPREME COURT :  
THE PEOPLE, ETC., {  
rs. }

On reading and filling the application of the attorney-general (or district-attorney) in the above entitled action, whereby it appears that ..... the above named defendant was on the ..... day of ....., 18 .., at a court of oyer and terminer held in and for the county of ....., at ..... in said county, before Hon. ...., justice of the supreme court, convicted of the crime of murder in the first degree, and was thereupon sentenced to the punishment of death, to be executed on the ..... day of ....., 18 ... and said sentence of death has not been executed, although the time specified thereby has passed, and that the said judgment and sentence still remain in full force, now on motion of ....., attorney-general of the state of New York, (or ...., district-attorney), it is ordered, that ....., sheriff of ..... county, be and he hereby is directed and commanded to bring and produce the said .... before our general term of the supreme court (or court of oyer and terminer) at the ....., on the ..... day of ....., 18 .., at ..... o'clock .... M. to do and receive what shall then and there be considered and adjudged concerning the said .....

Dated.....

Signed, T. R. W.,  
Justice Supreme Court.

No. 202.

§ 507. Invitation to Certain Officers, etc., to be Present at Execution.

SIR : Pursuant to § 507 of the Code of Criminal Procedure, you are hereby invited to be present at the execution of at the jail of said county, in the ..... of ....., on the ..... day of ....., 18 .., at ..... o'clock, ..... M. .... Sheriff.

To Hon, County Judge, &c.

No. 203.

§ 508. Certificate of Execution.

STATE OF NEW YORK, }  
COUNTY OF , } ss :

I, the sheriff of the county of ....., and the other public officers, physicians and citizens whose names are hereto subscribed, do certify that



who was sentenced by the court of oyer and terminer held in and for the county of ....., on the ..... day of ....., 18... to be executed on this day between the hours of ..... o'clock in the morning and ..... o'clock in the afternoon, was at the time mentioned, in pursuance of the said sentence executed by hanging by the neck until he was dead in the jail of said county; and we the undersigned do certify that we witnessed the said execution, and that the same was conducted in conformity to the provisions of law and of the said sentence.

In witness whereof we have at the said jail subscribed our names hereto this ..... day of ....., 18 ..

Signed,

Sheriff,  
County Judge,  
Surrogate, &c.

---

### No. 204.

#### § 532-3. Notice of Appeal by Defendant.

SUPREME COURT:

THE PEOPLE, ETC.

rs.

..... }

Gentlemen:

Take notice that the defendant above named appeals to the supreme court, at general term from the judgment of conviction of the crime of ..... rendered against him, by the court of ....., held at ....., in and for the county of ..... on the ..... day of ....., 18 .....

Dated ....., 18..

Yours, etc.,

Attorney for Defendant.  
district-attorney of .....

To the clerk of ..... county, and to  
county.

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### No. 205.

#### § 524. Notice of Appeal by People.

SUPREME COURT:

THE PEOPLE, ETC.

rs.

..... }

Gentlemen:

Take notice that the people of the state of New York appeal to the supreme court at general term from the judgment for the defendant above named on demurrer (or as the case may be) rendered by the court of ..... held at ..... in and for the county of ..... on the ..... day of ..... 18..

Dated.....

District-attorney, county of

To the clerk of ..... county and to ..... defendant, (or in case of his absence from the county to ..... his counsel.)

---

### No. 206.

#### § 524. Affidavit for publication of notice of appeal. (Title of court and case.)

STATE OF NEW YORK. } ss:  
COUNTY OF ..... }

....., being duly sworn, says that he is district attorney of the county of .....; that at a term of the court of ..... held in and for the county of ..... on the ..... day of ..... 18 ... judgment was rendered allowing the demurrer to the indictment interposed by this defendant; that the people have appealed from said judgment; that said de-

fendant cannot be found, after due diligence, so as to make service upon him of the notice of this appeal; that ..... the attorney who acted for the defendant on the argument of said demurrer, does not reside or transact business in the county of .....

.....  
Subscribed and sworn before me, }  
this .....day of ..... }  
.....  
.....

No. 207.

§ 524. *Order of publication.*

(Title of court and names of parties.)

On reading and filling the affidavit of ....., hereto annexed, and on motion of ....., district attorney of the county of ....., it is hereby ordered that the notice of appeal on behalf of the people be served on ....., the defendant herein, by publishing the same in the ....., a daily paper published at ....., in the State of New York, for the space of ..... week, in each issue thereof.

Dated this ..... day of ....., 18 ..

*Justice Supreme Court.*

No. 208.

§ 525. *Affidavit of publication.*

STATE OF NEW YORK, }  
COUNTY OF ..... } ss :

....., being duly sworn, says that he is the publisher and proprietor of the daily ....., published at ..... that the annexed notice of appeal was published in each issue of said paper for the space of ..... weeks, commencing on the ..... day of .....

.....  
Subscribed and sworn before me, }  
this ..... day of ..... }  
.....  
.....

No. 209.

§ 529. *Notice of application for certificate on appeal.*  
(Title of court and of case.)

SIR.—Please to take notice that the defendant herein will apply to Hon. ...., the judge who presided at the trial wherein he was convicted of the crime of ....., for a certificate that there is a reasonable doubt as to whether or not the judgment of said court should stand, pursuant to section 527 of the Code of Criminal Procedure.

Dated at ....., this ..... day of ....., 18 ..

*Defendant's Attorney.*

To        *District Attorney of ..... county.*

No. 210.

§ 527-8. *Certificate for Stay on Appeal.*

SUPREME COURT :  
THE PEOPLE &C. }  
                  *vs.* }  
..... }

I, the undersigned, a justice of the supreme court of the state of New York, do hereby certify that in my opinion there is reasonable doubt whether the judgment of conviction rendered in the court of ..... held at ..... in and for the county of ..... against the defendant above named for the crime of ..... should stand.

Dated ..... 18..

*Justice of Supreme Court.*

**No. 211.**§ 537. *Notice of argument.*

(Title of court and of case.)

*To ..... District Attorney of ..... county :*

SIR.—Please to take notice that defendant's appeal in the above entitled action will be brought on for argument before this court at the next general term thereof, to be held at ....., in the city of ....., or the ..... day of ....., at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated ....., this ..... day of ....., 18 ..

Yours, etc.,

*Defendant's Attorney.***No. 212.**

§ 543. Order of reversal and ordering a new trial.

At a general term of the supreme court of the State of New York, held in and for the ..... judicial district of said state, at ..... on the ..... day of .....

Present—Hon. .... }  
 “ ..... } Justices.  
 “ ..... }

The People }  
 against }

This cause having been heretofore, on the ..... day of ..... brought on for argument, and after hearing Mr. .... of counsel for defendant, and ....., district attorney of ..... county for the people, and the court having deliberated thereon,

It is ordered and adjudged that the judgment of conviction in the above entitled action be reversed [or as the case may be], and that said defendant ..... have a new trial, which is hereby ordered; and it is further ordered, the proceedings herein be and the same are hereby remitted to the court of oyer and terminer of ..... county.

Clerk.

**No. 213.**

§ 554. Bail by Police Officers.

We, ..... defendant, and ....., residing at number ....., in ..... and ..... residing at, ..... hereby jointly and severally undertake that the above defendant, shall appear and answer the complaint (describing it briefly) before the magistrate before whom he would be arraigned if not bailed on the ..... day of ..... eighteen hundred and ....., at ..... o'clock, and there remain to answer, subject to any order of the magistrate, and render himself in execution thereof, or if he fail to perform either of these conditions, then he will pay to the people of the state of New York the sum of .....

**No. 214.**§ 560. Order of Justice as to Notice to be Served  
District-Attorney of Application to Bail.

..... COURT, .... }  
 . . . . . OF ..... }  
 COUNTY OF ..... }  
 THE PEOPLE  
 against

An application having been this day made to me by the above named defendant for his admission to bail upon the charge of ....., upon which he has been held by me ....., and the said defendant having shown good and suf-

ficient reasons for a notice of less than two days to the district attorney of his application for admission to bail;

I do hereby order that a notice of ..... be served on the district attorney of ..... county of the application of the defendant for admission to bail on said charge.

Dated Albany, ....., 18 ...

[Signature.]

### No. 215.

#### §§ 561, 562. Certificate Granting Application to Bail.

..... COURT, } ss:  
COUNTY OF .....

I, ..... a ..... justice of the ..... of ....., do hereby certify that an application was, on the ..... day of ....., 18 .., made to me for the admission to bail of ....., held by me to answer the crime of ....., and I did grant the said application and fix the sum in which bail may be taken at ..... hundred dollars, with ..... suret .....

Dated at the ..... of ....., this ..... day of ....., 18 ...

### No. 216.

#### § 561, 562. Certificate denying application to bail.

(Title of court.)

STATE OF NEW YORK, } ss:  
COUNTY OF .....

I ..... a ..... justice ..... of the ..... of ....., do hereby certify that an application was made to me on the ..... day of ..... 18 .. for the admission to bail of ....., held by me to answer the crime of ....., and I denied the said application.

Dated at ....., this ..... day of ..... 18 ...

.....

### No. 217.

#### § 571. Notice of application for bail in cities.

To ..... esq., district-attorney:

Sir: Take notice that upon the ..... day of ....., 18.., at ..... o'clock, ... M., application will be made to Hon. ....., at his office in the ..... of ....., to admit to bail ....., now confined in the county jail [or, as the case may be,] on a charge of ....., and that the following persons will be proposed as sureties, viz. : merchant, residing at ....., physician, residing at .....

That the said ..... is the owner of real estate in the ..... of, ..... known as No. .... street, in said ..... valued at ..... dollars, on which there is a mortgage of ..... dollars, [or no incumbrance as the case may be.]

That the said ..... is the owner of certain bonds, stock, [or other personal property, describing it] valued at ..... dollars, and there are no judgments against him.

Dated ....., 18 .....

Attorney for .....

Def't.

### No. 218.

#### § 572. Affidavit of Justification.

COUNTY OF ..... } ss.  
..... OF .....

..... suret ..... to the foregoing undertaking of bail, being sworn, says that he is a resident of and a ..... holder within the state of New York and

....., and is worth ..... dollars over all the debts and liabilities  
owes or has incurred, and exclusive of property exempt by law from  
sale under an execution.  
before me, this..... }  
day of ....., 18 ... }

**No. 219.**

**§ 575. Order allowing or disallowing bail.**

COURT, }  
OF }  
NTY OF }  
PEOPLE, }  
18. }

reby ..... the bail given by the defendant in the above action  
e, on the ..... day of ..... 18 ..  
at Albany, this ..... day of ..... 18 ..

[Signature.]

**No. 220.**

**§ 576. Order for Discharge on Bail.**

sheriff of the county of ....., [or, in the city and county of New  
the keeper of the city prison of the city of New York] : A. B., who is  
by you on a commitment to answer a charge for the crime of [design-  
generally], having given sufficient bail to answer the same, you are com-  
forthwith to discharge him from your custody.

**No. 221.**

**§ 581. Bail after Indictment.**

INDICTMENT having having found on the..... day of ..... eighteen  
and ..... in the court of ..... of the county of .....  
..... with the crime of..... and he having being duly admitted  
the sum of ..... dollars, we ..... defendant, and ..... of  
by occupation ..... and ..... of....., by occupation.....  
....., hereby jointly and severally undertake that the above named....  
shall appear and answer the indictment above mentioned, in whatever  
may be prosecuted; and shall at all times render himself amenable to  
s and process of the court, and if convicted, shall appear for judgment  
ler himself in execution thereof; or if he fail to perform either of the  
is, that we will pay to the People of the State of New York the sum  
...dollars.

with our seals, and dated this .....day of .....18 ....

TY OF ORANGE, SS.

being duly sworn. .... says that ..... he is a ..... holder in  
of New York, and resides in the county of ..... and is worth the  
..... dollars, over and above all debts and liabilities and property  
from execution.

to before me this ..... day of ....., 18 ..

TY OF ORANGE, SS.

s ..... day of ..... in the year 18 ..., before me personally came  
to me known to be the individuals described in ..... and who exe-  
e forgoing bond, and they acknowledged that they executed the same.

*Endorsement on bond.*

ove of the within Bond, both as to its manner and form, and as to the  
cies of the sureties therein.

..... 18 .

No. 222.

§ 586. Certificate of Deposit Instead of Bail.

THE PEOPLE OF THE STATE OF NEW YORK  
against

Whereas, heretofore and on the ..... day of .....,18 ..., an order was made by ....., admitting the above named defendant to bail, on giving an undertaking in the sum of ..... dollars, on a certain charge [and indictment as the case may be] of [state offense.

This is to certify that the said ....., defendant above named has deposited with me, this day, the amount of ..... dollars, the sum mentioned in said order, as security for his appearance pursuant to such order, instead of the said undertaking of bail pursuant to § 586 of the Code of Criminal Procedure.

Dated ....., 18 ....

county treasurer,  
..... county.

No. 223.

§ 590. Certificate of Surrender by Principal in Exoneration of Bail.

THE PEOPLE, &c.,  
vs.

I, hereby certify that the defendant above named, who heretofore gave bail on his arrest on an indictment now pending against him for burglary [or as the case may be], has this day surrendered himself, in exoneration of his said bail by delivering himself into my custody together with a certified copy of the undertaking of bail so given as aforesaid.

Dated

Sheriff of ..... county.  
Id. Certificate of Surrender by Bail

THE PEOPLE OF THE STATE OF NEW YORK,  
v.

I hereby certify and acknowledge that ....., a surety given for the appearance of the above named defendant on an indictment now pending against him for burglary [or as the case may be] has this day surrendered the said defendant in exoneration of him as bail, by delivering him into my custody together with a certified copy of the undertaking of bail given by said surety, pursuant to § 590 of the Code of Criminal Procedure.

Sheriff of ..... County.

Dated

No. 224.

§ 591. Deputation to Arrest Principal, by Surety, Indorsed on Copy Undertaking.

Know all men by these presents that I, ..... of ....., being one of the sureties mentioned in the within copy undertaking of bail, have deputed, authorized and empowered, and by these presents do hereby deputize, authorize and empower in my place, stead and behalf ..... of the ..... of ..... at any place within the state of New York to take, arrest, secure, and surrender to the sheriff of the county of ..... in the state of New York, the defendant named in the within copy undertaking in exoneration and discharge of my said undertaking as bail for said ....., in the cause therein mentioned, and to employ such persons and assistants as may be necessary to effect such purpose.

In witness whereof I have hereunto set my hand this ..... day of ..... 18...

Signed,  
Executed and delivered in the presence of

## No. 225.

## § 605. Bail after Re-arrest.

An order having been made on the ..... day of ..... eighteen hundred and ..... by the court of [naming the court,] that ..... be admitted to bail on the sum of ..... dollars, in an action pending in that court against him in behalf of the people of the state of New York, upon an [information, presentment, indictment, or appeal, as the case may be.]

We, ..... defendant [if the defendant join in the undertaking,] and surety of [stating his place of residence and occupation,] and ..... surety of [stating his place of residence and occupation,] hereby jointly and severally undertake that the above-named ..... shall appear in that or any other court in which his appearance may be lawfully required, upon that [information, presentment or appeal, as the case may be] and shall at all times render himself amenable to its orders and process, and appear for judgment and surrender himself on execution thereof; or if he fail to perform either of these conditions, that we will pay to the people of the state of New York the sum of ..... dollars, inserting the sum in which the defendant is admitted to bail.]

## No 226.

Notice of application for remission of forfeiture,  
under § 597.

## ORANGE COUNTY COURT.

IN THE MATTER OF  
the application of ..... to have the for-  
feiture of his bond remitted. }

To ....., district attorney of the county of .....

Take notice upon the petition and affidavit, copies of which are herewith served upon you. I will apply to the county court of this county at ..... on the ..... day of ..... next at ..... o'clock a. m., or as soon thereafter as counsel can be heard, to have the forfeiture of the bond of ..... given upon the commitment of ....., for the alleged offense of ..... and bearing date the ..... day of ....., 18 .., remitted.

Dated .....

.....  
Attorney for

## No 227.

§ 597. Order remitting forfeiture  
of bail.

At a special term of the county court of the county of ....., held at the chambers of Hon. ...., on the ..... day of .....  
Present: ..... Judge of ..... County.

In the Matter of the Estreated Re-  
cognizance of ..... }

On reading and filing the affidavits and notice of motion of said ..... with proof of due service thereof, and after hearing ....., Esq., in support of said motion, and ....., district attorney of ..... county, in opposition thereto, it is now, on motion of said ....., hereby ordered, that the said order estreating the said recognizances and directing the same to be prosecuted, be vacated and set aside, and that [if action has been begun] the action commenced thereon by the district attorney of said county be discontinued, upon the payment of said ..... of the costs and expenses incurred therein, amounting to the sum of .....

.....  
County Judge.



## No. 228.

§ 594. Similar order entered at same term of court,  
at which bail was estreated,

At a term of the county court, held in and for the county of.....  
in the court house in the city of....., on the ...day of.....  
Present—Hon.....*County Judge*.

THE PEOPLE  
against.....

The recognizance of the above-named defendant with....., as bail  
having been estreated at the present term of the county court of this county,  
and the said ... having renewed his bail for his appearance at the next  
term of the county court, now, on motion of... Esq., counsel for  
....., it is hereby ordered that the order estreating said bail above men-  
tioned, and any order for the prosecution thereof, be vacated without costs.

.....  
*Judge of.....County.*

## No. 229.

*Complaint upon estreated recognizance.*

..... Court ..... County .....

THE PEOPLE OF THE STATE OF NEW-YORK,

*Plaintiff.*

AGAINST

.....

*Defendants.*

.....  
The above named plaintiff respectfully shows to this court, by this complaint,  
that heretofore to wit: On the ... day of ..., 18 .., at the Town of .....,  
in the county of ..... and within the jurisdiction of this court, the above  
named defendants personally came before ..... one of the justices of the  
peace for preserving the peace in the county of ..... as aforesaid, in their  
own proper persons, and there entered into a recognizance, in writing, signed  
with their own hands, by which recognizance the said defendant acknowledged  
to owe to said plaintiff the sums of ..... dollars respectively, and the said  
defendants did then and there agree that the said sum should be levied out of  
their goods and chattels land and tenements to the use of the said plaintiff, if the  
above named defendant ....., should fail in performing the condition of the  
said recognizance, which condition was, that ....., the said defendant, should  
personally appear at the then next court having criminal jurisdiction of said  
offense ....., to be holden in and for the county of ..... then and there  
to answer an indictment to be preferred against him for the offense of burglary  
in the third degree, and to do and receive what should by said court be then and  
there enjoined upon him, and to appear and answer the charge above mentioned  
in whatever court it might be called or prosecuted, and at all times render him-  
self amenable to the orders of the court, and if indicted or convicted should  
appear for judgment and render himself in execution thereof, or if he fail to  
perform either of these conditions that they would pay to the people of the State  
of New York the following named sums of money, viz: ..... the sum of .....,  
and ..... the sum of ....; which said recognizance, taken and acknowledged  
as above, before the said ....., a justice of the peace as aforesaid, he having  
full power and competent authority to take the same, that is to say on the ....  
day of ....., 18.., and was duly filed of record by the clerk of said county of  
....., at his office in the ..... of ....., N. Y., and said plaintiff avers  
that the next court ....., to be holden and held next after the signing and  
acknowledgment of said recognizance in and for the county of ...., com-  
menced its session and was held at the court house in the city of ..... in and  
for the county of ..... the .... day of ..... 18... And such proceedings  
were thereupon had in the said court, that, at the said court commencing its

session and held on the day and at the place aforesaid, an indictment was found and presented against the said ..... for burglary in the third degree, and such proceedings were thereupon afterwards had that the said recognizance was, in due form of law, respited and continued until and to the term of the said court of ....., held at the court house in the ..... of ....., N. Y.; on the ..... day of ..... 18...

And the before mentioned plaintiff does further say, that afterwards, at the said term of the last mentioned court, held in and for the said county of ....., to wit: the said court commencing on the ..... day of ..... 18., the said ..... failed in the performance of the condition of the said recognizance in this: that the said ....., being then and there called in open court, during the sitting of said court, to wit. on the ..... day of ..... 18., did not personally appear in and abide the order of the said court, but therein wholly failed and made default; whereupon an order was entered by the said court forfeiting the said recognizance, and directing the same to be prosecuted according to law, as by the record and proceedings of the said court will more fully appear. And the said plaintiff further says that the said defendants have not paid the sums of ..... respectfully, or any sum whatever so as aforesaid acknowledged separately by said defendants to be owing to the said plaintiff. And the said plaintiff avers, that the record of the said recognizance remains in full force, strength and effect, in no manner reversed, vacated or satisfied, and that they the said plaintiffs have not yet obtained satisfaction of the same, whereby an action has accrued to the said plaintiffs to demand and have of the said defendants the sums of ..... from each. Nevertheless the said defendants, although requested, have not paid the said sums of money or any part thereof, to the said plaintiffs, but hitherto hath refused and still doth refuse, to pay the same to the said plaintiffs.

Wherefore the plaintiffs pray for judgment against the defendant as follows, to wit: against the defendant ..... for the sum of ..... with interest thereon from the .... day of ....., 18., together with the costs of this action.

.....  
District-Attorney of ....., county.

Office address, Rooms Nos ..... Post-Office Address Lock Box....

..... County ss.:

..... being duly sworn deposes and says that he is the District Attorney of ..... county, and the Attorney for the Plaintiff herein and is acquainted with the facts stated in the foregoing complaint, and that the said complaint is true to the knowledge of deponent, except as to the matters therein stated and to be alleged on information and belief and as to those matters he believes it to be true, that the reason why this verification is not made by the plaintiffs is, that the said plaintiffs are the people of the State.

Sworn to ..... before me {

This ... , ....., 18... }

If suit is brought in a county court of sessions, the residence of the defendants must be alleged to confer jurisdiction. (*Burns v. O'Neil*, 10 Hun., 494.)

### No. 230.

§ 608. Justice's Criminal Subpoena.

COUNTY OF ORANGE  
CITY OF NEWBURGH, } ss.

You are hereby commanded, In the name of the People of the state of New York, to appear before the undersigned, Recorder of said city, at the Recorder's Court Room, Number 62 First Street in said city, on the ..... day of ..... 188..... at ..... o'clock ..... M., to give evidence in a ..... than and there to be ..... between the People of the State of New York against .... on the part of the .....

Dated at said city, this ..... day of ..... 18 ..

C. L. Waring, Recorder.

## No. 231.

## § 609. Subpoena—Grand Jury.

## THE PEOPLE OF THE STATE OF NEW YORK

To ..... of the ..... of .....

## GREETING :

We command you, that all business or excuses ceasing, you appear before the Grand Jury of ..... of the county of Orange, to be held in and for the said county, at the Court House in the ....., the ..... day of ..... 18 .. at ..... o'clock in the ..... noon, of the same day, to testify the truth, and to give evidence before the Grand Jury touching a certain complaint then and there pending against ..... And this you are not to omit to do under the penalty of two hundred and fifty dollars.

WITNESS, Hon..... at ..... the ..... day of ..... 18 ..

.....  
District Attorney, County.

## No. 232.

## Id. Proof of service.

STATE OF NEW YORK, } ss:  
COUNTY OF ORANGE.

.....being duly sworn, deposes and says he served a ..... subpoena, of which the within is a copy, upon ..... on the ..... day of ..... 188..., by .....

Sworn to before me, this ..... day }  
of ..... 18 ..

.....  
Notary Public.

## No. 233.

## § 612. Subpoena

## SUBPOENA.

## FOR A WITNESS TO ATTEND THE

## COURT OF

THE PEOPLE OF THE STATE OF NEW YORK }

To.....of.....

## GREETING :

We command you, that all business and excuses ceasing, you APPEAR in your proper person, before the Court of ..... to be holden in and for the county of Orange at the Court House, in the city of Newburgh, on the ..... day of ..... instant, at the hour of ..... in the forenoon of the same day to testify the truth and give evidence in our behalf, against ..... in a case of Felony, whereof .... HE STANDS indicted. And this you are not to omit to do under the penalty of two hundred and fifty dollars.

WITNESS, Hon..... at the ..... of ..... the ..... day of ....., in the year of Our Lord 18 ..

.....  
District Attorney.

## No. 234.

## SUBPOENA—(DUCES TECUM.)

## FOR A WITNESS TO ATTEND THE

## COURT OF

THE PEOPLE OF THE STATE OF NEW YORK. }

To.....of.....

## GREETING :

We command you, that, all business and excuses ceasing, your appear in your proper person, before the Court of ....., to be holden in and for the county of .....

of Orange, at the Court House in the city of Newburgh on the ..... day of ..... instant, at the hour of ..... in the forenoon of the same day, to testify the truth and give evidence in our behalf, against ..... in a case of Felony, whereof .... *he stands* indicted, and that you bring with you and produced, at the time and place aforesaid a certain ..... now in your custody and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises. And this you are not to omit, under the penalty of two hundred and fifty dollars.

WITNESS, Hon. .... of our said court, in our said county ..... in the year of Our Lord 18 ..

.....  
District Attorney.

---

**No. 235.**

§§ 614, 615. Return of Service of Subpoena.

STATE OF NEW YORK, }  
COUNTY OF ORANGE. } ss.

..... being duly sworn, deposes and says, he ..... served a subpoena, of which the within is a copy, upon ..... on the ..... day of ....., 18 . . , by

Sworn to before me, this ..... }  
day of ..... 18 ..

---

**No. 236.**

Warrant of attachment against witness.

STATE OF NEW YORK, }  
COUNTY OF ORANGE, } ss.

The People of the State of New York, to the Sheriff, Deputy Sheriffs, and Policeman of the County of Orange, Greeting:

**WE COMMAND YOU**, and each of you, that you attach and take the body of ..... who stands charged before our Court of Sessions, in and for the said County, with a Contempt, and him forthwith bring before our said Court, to be dealt with according to law.

WITNESS, Hon. .... of said County, this ..... day of ..... in the year of our Lord, one thousand eight hundred and eighty.

By the Court.

Endorsed, allowed this day of ..... 18 ..

Clerk of Court.

---

**No. 237.**

Attachment against a witness for disobedience of subpoena in a Court of Special Sessions.

STATE OF NEW YORK, }  
COUNTY OF ..... } ss.

**IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:**

To.....

You are hereby commanded to attach ....., and bring him before the undersigned, a justice of the peace of said county, at his office in the town of .... county of ....., and State of New York, forthwith to testify the truth, according to his knowledge, in an action now pending before the said justice of the peace between the People of the State of New York and ..... defendant, on the part of ....., and also to answer all such matters as may be

brought against him, the said ....., for not obeying a subpoena of this court duly served herein.

Dated at ....., this ..... day of ....., 18 ..

.....  
Justice of the Peace.

### No. 238.

§ 622. Affidavit to obtain order to examine witness conditionally.

STATE OF NEW YORK, }  
COUNTY OF ..... } ss.

.....being duly sworn says that he resides at ..... that at the last term of the court of ..... in and for the county of ..... he was indicted on a charge of arson; that immediately after said indictment, he gave bail to appear at the next term of said court to be held at the court house in the ..... on the ..... day of ..... That ..... who resides at ..... in the county of ..... is acquainted with all the facts of the case, and his evidence is very material to deponent's defense in this action. That said ..... above named is in such an enfeebled and infirm state of health that there is great probability that he will be unable, by reason of such infirmities, to attend the trial of this cause at the time and place above-named or at any subsequent time.

Sworn before me, this }  
.....day of ..... }

.....

.....

### No. 239.

§ 625. Order to examine witness conditionally.

SUPREME COURT—COUNTY OF.....

THE PEOPLE  
against }

On reading and filing the affidavit of the above-named defendant, hereto annexed, and on motion of ....., Esq., his attorney, it is hereby ordered that ....., residing at ....., in the county of ....., be examined conditionally before me on the ..... day of ....., 18 .., at the residence of said ..... in the county aforesaid; and that a copy of the order and of the annexed affidavit be served on the district attorney of the county of ..... on or before the ..... day of .....

Dated at ....., this ..... day of ....., 18 ..

.....  
Justice Supreme Court.

### No. 240.

§ 664. Compromise of Crimes. Acknowledgment  
of Satisfaction.

..... county of ....., ss:

I, ..... of ....., do hereby acknowledge to have received of ....., the sum of ..... dollars in full satisfaction for the injury and damage done to me at the said ..... on the ..... day of ....., 18 .. by the said ..... in assaulting and beating me (or as the case may be), and for which offense I made complaint on oath on the ..... day of ....., 18 .. to ....., police justice, and which said complaint is now pending and undetermined (or an indictment having been found against the said ..... thereon the ..... day of ....., 18 .., in the court of ..... in and for ..... county), and I desire that no further proceeding be had thereon against the said

Add acknowledgment.

**No. 241.**

Id. Order for Compromise.

Court of ....., county of .....

THE PEOPLE OF THE STATE OF NEW YORK, }  
 v. }

On reading and filing the acknowledgment of satisfaction executed by  
 for the injury and damage done to him by ..... indicted for ....., a mi  
 demeanor, which indictment is now pending in this court, (or who is under a  
 rest for) and on motion of the defendant it is ordered that on payment of ...  
 .... dollars costs incurred (or otherwise, if the court so direct) that all procee  
 ings be stayed upon the prosecution of said indictment, and the defendar  
 discharged therefrom.

(Signed), .....

**No. 242.**

Order discharging recognizance on settlement of case.

COUNTY OF ....., ss:

The within-named complainant ....., having this day appeared before m  
 ....., a justice of the peace of the county of ....., and acknowledged i  
 writing that he had received full satisfaction of the within-named ..... fo  
 the injury complained of, I do hereby order the within recognizance to be di  
 charged.

Dated at ....., this ..... day of ....., 18 ..

Justice .....

**No. 243.**

§ 676. Summons against corporation.

The summons must be in substantially the following form:

County of *Albany*, [or as the case may be.]In the name of the people of the state of New York: To the [naming th  
 corporation.]

You are hereby summoned to appear before me, at [naming the place], o  
 [specifying the day and hour], to answer a charge made against you, upon th  
 information of A. B., for [designating the offense generally].

Dated at the city [or town] of ....., the ..... day of ....., 18..

G. H., Justice of the peace.  
 [or as the case may be.]

County, ss:

.....being duly sworn says, that on the ..... day of .....  
 18 .., at ..... in the county of ..... state of New York, he served th  
 within summons upon ..... president or other head of the corporation, c  
 on the secretary, cashier or managing agent thereof, by delivering a true cop  
 thereof to, and leaving the same personally with, said

Subscribed and sworn to before  
 me, this .... day of .... 18 ..

Justice.

**No. 244.**

§§ 678, 679. Certificate on depositions.

Court, }  
 .... COUNTY OF ..... }  
 THE PEOPLE  
 vs.

I hereby certify that there is ..... sufficient cause to believe the abov  
 named defendant guilty of the offense charged.

[Signature.]

**No. 245.****§ 705. Venue—Criminal—Special Sessions.**

The People of the State of New York: To any Constable of the county of  
 ..... [or to any Marshall or Police Officer of the city or village of  
 .....], GREETING:

You are hereby ordered to summon the following-named persons [insert the names of the persons drawn] as jurors in a criminal action [or proceeding], to be tried in a court of special sessions in and for the town of ..... [or city or village of .....], between the said People and ....., defendant, to be and appear before said court at the office of the undersigned, in the ..... of ....., in said county, on the .... day of ....., 18 , at ..... o'clock in the ... noon for such purpose.

And have you then and there this order, with a certified list annexed thereto, of said persons upon whom you shall have served the same, and if you shall not have been able to serve it upon any one or more of them, state the reason thereof.

Dated this ..... day of ....., 18 , at the said ..... of .....  
 [Signature.]

STATE OF .....,  
 COUNTY OF ....., } ss.:  
 Town of .....

I hereby certify that I have personally served the annexed order upon the following persons named therein by exhibiting to each of them the same, and at the same time reading to [or stating to] him the substance thereof, viz. [name the persons so served]. And that I have been unable to serve the said order upon the following person [or persons, naming him or them] for the reason [state the reason for such non-service in each case].

Dated this ..... day of . . . . ., 18 .

To ....., Esq..  
 Justice.

.....  
 Constable.

**No. 246.****§ 711. Oath to Jury.**

You do swear [or you do solemnly affirm, as the case may be] that you will well and truly try the issue, between the people of the state of New York and A. B., the defendant, and a true verdict give, according to the evidence.

**No. 247.****§ 713. Oath of Officers.**

You do swear that you will keep this jury together in some private and convenient place, without food or drink, except bread and water, unless otherwise ordered by the court; that you will not permit any person to speak to or communicate with them, nor do so yourself, unless it be to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed, or when ordered by the court.

**No. 248.****§§ 717, 718. Judgment of Court of Special Sessions.**

COURT.....  
 CITY OR TOWN OF ....., COUNTY OF..... }

THE PEOPLE OF THE STATE OF NEW YORK }  
 against } Judgment, 188.

The defendant was this day convicted, on a trial by the court or a jury, or on a plea of guilty of the offense of ....., and the court sentenced h to imprisonment in the ..... of this county, ..... days, and pay a fine of ..... dollars, and be imprisoned until paid, not exceeding ..... days.

[Signature.]

**No. 249.****§§ 721, 722. Record of Conviction—Special Sessions.**

CITY OF NEWBURGH }  
 STATE OF NEW YORK, }  
 ORANGE COUNTY. }

BE IT REMEMBERED That at a court of Special Sessions held at the office of



the undersigned in the said City of Newburgh, in the said County, ..... was brought before the said Court, charged on the oath of ..... with having on the ..... day of ..... which charges being stated in the warrant of ..... were distinctly read to the defendant in open court, to which .. he pleaded ..... guilty; whereupon such proceedings were had in the said court, that the defendant was convicted of the charges above specified, and the court having rendered judgment thereon, that the said.....

*In Witness Whereof*, we have hereunto subscribed these presents the..... day of ..... one thousand eight hundred and.....

.....Recorder.

**No. 250.**

**§ 721. Certificate of Conviction—Plea of Guilty [or not Guilty].**

Court of special sessions or police court.

County of Albany, town of Berne, [or as the case may be.]

The People of the State of New York }  
against  
A. B.

January , 18 ...

The above named A. B. having been brought before C. D., justice of special sessions, justices of the peace [or other magistrate as the case may be] or police justice, of the town [or city or village] of [as the case may be] charged with [briefly designating the offense,] and having thereupon pleaded guilty or not guilty, [as the case may be] and demanded [or failed to demand, as the case may be] a jury, and having been thereupon duly tried, and upon such trial duly convicted. It is adjudged that he be imprisoned in the jail of this county, ..... days [or pay a fine of ..... dollars and be imprisoned until it be paid, not exceeding ..... days, or both as the case may be.]

Dated at the town [or city, ] of ....., the day of ....., eighteen hundred and ..... C. D., Justice of the peace or police justice or other magistrate [as the case may be] of the town [or city] of [as the case may be].

**No. 251.**

**§ 721. Warrant to commit a Child under Sixteen Years. Plea, Not Guilty.**

..... court, .....county of ....., ss:

In the name of the people of the state of New York: To any sheriff, constable marshal, or policeman in the county of ....., and to the superintendent of the House of Refuge ..... for the reformation of juvenile delinquents in the city of New York, greeting:

Whereas, on the ..... day of ....., 18 ..., ..... was brought before me, ....., a ..... justice ..... in and for the ..... and county of ....., charged on the oath of ....., which oath was believed by me, the said justice, with, on this present day, at the ..... of .....

And whereas the said justice immediately and before any further proceedings were had, informed the said ..... of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said ....., who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person.

And whereas the said testimony was given and evidence was had in the presence and hearing of the said ....., he ..the said ....., having previously thereto been allowed a reasonable time to send for and advise with counsel.

And whereas it was ascertained by said justice, that said ..... was .... years old on the ..... day of ....., 18 ..

And whereupon the said justice did thereupon adjudge and determine that the said ..... was guilty of the aforesaid charge and offense, and the said ..... was thereupon convicted of the charge and offense aforesaid; and it was adjudged and determined by me that the said ..... should be committed to and

confined in the House of Refuge for the reformation of juvenile delinquents, in the city of New York, until he should be thence discharged according to law.

Now, therefore, you, the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said ..... into the custody of the said superintendent. And you, the said superintendent, are hereby commanded to receive the said ..... into your custody, in the said House of Refuge, and ..... there safely keep until he shall be thence discharged according to law.

Given under my hand, at the ..... of ..... aforesaid, this ..... day of ....., 18 ...

[Signature.]

---

### No. 252.

#### § 722. Warrant to Commit Child under the Age of Sixteen Years. Plea of Guilty.

..... court, ..... county of ....., ss:

In the name of the people of the state of New York; To any sheriff, constable marshal or policeman of the county of Albany, and to the superintendent of the House of Refuge ..... for the reformation of juvenile delinquents in the city of New York, greeting:

Whereas, on the ..... day of ....., 18 ..., ..... was brought before me, ..... a ..... justice ..... in and for the ..... and county of ....., charged on the oath of ..... which oath was believed by me, the said justice, with on this present day, at the ..... of .....

And, whereas, the said justice immediately and before any further proceedings were had, informed the said ..... of the charge against h .. and of h .. right to the aid of counsel in every stage of proceedings, and the said charge was then and there distinctly read and stated to the said ..... and he the said ..... was given a reasonable time to send for and advise with counsel.

And, whereas, he, the said ..... did then and there plead guilty to the said charge.

And, whereas, it was ascertained by said justice that said ..... was ..... years old on the ..... day of ..... 18 ...

And whereupon the said justice did thereupon adjudged and determine that the said ..... was guilty of the aforesaid charge and offense, and the said ..... was thereupon convicted of the charge and offense aforesaid, and it was adjudged and determined by me that the said ..... should be committed to, and confined in, the House of Refuge for the reformation of juvenile delinquents in the city of New York, until he should be thence discharged according to law.

Now, therefore, you, the said sheriff, constable, marshal or policeman are commanded forthwith to convey and deliver the said ..... into the custody of the said superintendent. And you, the said superintendent, are hereby commanded to receive the said ..... into your custody, in the said House of Refuge, and h .. there safely keep until he shall be thence discharged according to law.

Given under my hand, at the ..... of ..... aforesaid, this ..... day of ..... 18 ...

[Signature.]

---

### No. 253.

#### Warrant of commitment for being intoxicated in a public place.

#### POLICE COURT (OR JUSTICES' COURT).

STATE OF NEW YORK, { ss:  
COUNTY OF ..... }

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To

GREETING:

Whereas, ..... has this day been duly examined, tried and convicted before

me, ....., one of the justices of the peace in and for the ..... county of ..... police justice of said ....., upon the information of oath of ..... and on competent testimony, of having been intoxicated in public street or place in said ....., contrary to law

And Wnereas, Upon such conviction, I did adjudge and determine that the said ..... should pay a fine of ..... dollars, and two dollars costs, and in default thereof that ..... be committed to the penitentiary of said county for the term of ..... days, unless the fine be sooner paid;

These are, therefore, to command you, the said sheriff, constable, marshal or policeman, forthwith to convey and deliver the said ..... to the said superintendent of the said penitentiary. And you, the said superintendent, are hereby commanded to receive the said ..... into your custody, in the said penitentiary, and h .. there safely keep until the expiration of the said ..... days, unless the fine be sooner paid, or ..... be thence discharged in due course of law.

Given under my hand, at ..... the ..... day of .....

.....  
Police Justice (or Justice of the Peace).

No. 254.

Certificate to add to copy to be delivered to officer as mittimus,  
under Code of Criminal Procedure, § 725.

STATE OF NEW YORK, } ss:  
COUNTY OF....., }

I certify that I have compared the foregoing with the original certificate made and signed by me as a court of special sessions, and that the same is a correct copy thereof and transcript therefrom, and of the whole thereof.

Witness my hand this.....day of....., 18 ..

.....  
*Justice of the Peace of the.....of.....in said county.*

No. 255.

§ 734. Commitment to special sessions.

.....COURT, }  
COUNTY OF..... }  
THE PEOPLE  
vs.

.....  
The sheriff of the county of.....is required to receive and detain..... who stands charged before me for.....to answer the charge before a court of special sessions, to be held in the.....of.....

Dated at the.....of.....the.....day of....., 18 ..  
[Signature.]

No. 256.

§ 738. Bail to special sessions.

A. B., having been duly charged before C. D., a justice of the peace in the town [or city] of....., [as the case may be] with the offense of [designating the offense generally]. We undertake jointly and severally that he shall appear thereon from time to time, until judgment at a court of special sessions in the town or village [or city] of....., (as the case may be) competent to try the case, or that we will pay to the county of..... (naming the county in which the court is held) the sum of.....dollars, (inserting the sum fixed by the magistrate).

Dated at the town (or city) of.....(as the case may be).

**No. 257.****§ 774. Oath to foreman of coroner's jury.**

"You do swear that you will well and truly inquire how and in what manner and when and where, the person lying here (or whose body you have just viewed, as the case may be), came to his death (or was wounded) and who such person was and into all the circumstances attending such death (or wounding), and by whom the same was produced; and that you will make a true inquisition thereof, according to the evidence offered to you, or arising from the investigation of the body. So help you God.

**No. 258.****Id. Oath to jurors.**

The same oath which.....the foreman of this inquest hath on his part taken, you and each of you do now take, and shall well and truly observe and keep on your part. So help you God.

**No. 259.****Id. Oath to witness.**

The evidence you shall give upon the inquest touching the death (or wounding) of....., (or of the person whose body has been viewed) shall be the truth, the whole truth and nothing but the truth. So help you God.

**No. 260.****§ 775. Subpoena by coroner.**

In the name of the people of the State of New York:

To.....:

We command you and each of you, that all business and excuses being laid aside, you be and appear before the undersigned, one of the coroners of the county of.....at.....on this.....day of.....18..... at.....o'clock in the.....noon (or forthwith), to testify upon an inquest then and there to be had upon the body of.....deceased, (or upon the body of a person whose name is unknown), and hereof fail not at your peril.

Witness the hand of said coroner this.....day of....., 18...

P. L., Coroner.

**No. 261.****§ 786. Attachment by Coroner against Witness.**

The people of the state of New York to the sheriff of the county of....., greeting:

We command you that your attach..... and bring him before the undersigned, one of the coroners of said county, at..... in said county, forthwith to testify upon a certain inquest (as set forth in the subpoena) and also to answer all such matters as shall be objected against him, for that he, having duly subpoenaed to attend upon such inquest has refused or neglected to attend in conformity to such subpoena, and have you then and there this writ.

Witness the hand of the said coroner this..... day of....., 18 ..

Coroner

**No. 262.****Return to attachment of coroner.**

COUNTY OF....., ss.

I, ....., hereby certify that I have arrested the within ....., and have him in my custody now here, as I am within commanded.

ed at ..... this ..... day of ..... 18 ..

.....

Sheriff.

**No. 263.**

*Recognizance by witness on coroner's inquest.*

ESSELAER COUNTY, ss :

it remembered that on the ..... day of ..... 18 .., A. B., C. D.,  
E. F., all of the city of Troy, in said county, personally came before me....  
a coroner of said county, and severally acknowledged themselves to be  
ted to the people of the state of New York, each separately, in the sum of  
... dollars, to be made and levied of their goods and chattels, lands and  
ents, to the use of said people if default shall be made in the following con-

condition of this obligation is such that if the above bounden A. B., C.  
and E. F., shall personally be and appear at the next term of the court of...  
..., to be held in and for the county of ..... on the ..... day of...  
to give evidence on behalf of said people against ..... for ..... as  
to the grand jury as to the petit jury, do not depart the said court without  
then the recognizance to be void and of no effect, otherwise to remain in  
force.

(Signed)

.....

ribed and acknowledged before }  
this.....day of ..... 18 .. }

.....

Coroner.

**No. 264.**

§ 777. Coroner's Inquest.

OF NEW YORK, }  
COUNTY OF..... } ss:

an inquest indented and taken this ..... day of ..... in the year of  
Lord one thousand eight hundred and ....., for the people of the  
of New York, in the ..... of ....., in said county, before .....,  
of the coroners of said county, on view of the body of ....., then and  
lying dead ..... upon the oath of ..... good and lawful men of  
county, who being sworn and charged to inquire how and after what  
er the said ..... came to ..... death, do say, upon oath  
aid, that ..... came to ..... death by....

**No 265.**

§ 778. Testimony taken by Coroner's Deposition.

.....county of ....., ss :

mination of witnesses produced, sworn and examined on the .....day  
..... 18 ... before one of the coroners of the said county and .....  
, good and lawful men of the said county duly summoned and sworn by  
id coroner to inquire how and in what manner, and when and where....  
rson unknown) came to his death (of was wounded) and who such person  
nd into all circumstances attending such death or wounding) and to make  
nquisition, according to the evidence, arising from the investigation of the

....being produced and duly sworn and examined testifies and says that  
testimony in full).

(Signed).....

ribed and sworn to before me }  
.....day of ..... 18 .. }

.....

Coroner.

I do hereby certify that the foregoing testimony of the several witnesses appearing upon the foregoing inquest was reduced to writing by me, and that the said testimony is the whole of the testimony taken on such inquest, and that the same is correctly stated as given by the witnesses respectively.

.....  
Coroner.

No. 266.

§ 781. Coroner's Warrant.

County of Albany, [or as the case may be.]  
In the name of the people of the State of New York:  
To any sheriff, constable, marshal or policeman in this county:  
An inquisition having been this day found by a coroner's jury, before me, stating that A. B. has come to his death by the act of C. D. by criminal means [or as the case may be], as found by the inquisition; or, information having been this day laid before me that A. B. has been killed or dangerously wounded by C. D. by criminal means, [or as the case may be].  
You are hereby commanded to arrest the above named C. D. and bring him before me, or in the case of my absence or inability to act, before the nearest or most accessible coroner in this county.  
Dated at the city of Albany [or as the case may be] this day of ..... 18...  
E. F.,  
Coroner of the county of Albany.  
(Or as the case may be.)

No. 267.

§ 788. Coroner's Statement to Supervisors.

Statement and inventory of all moneys and other valuable things found with or upon all persons on whom inquests have been held by and before the undersigned, one of the coroners in and for the county of ..... for and during the year commencing on the ..... day of ..... 18..

Upon whom found.	Articles found.	Disposition thereof.
A. B., etc.	Enumerate property.	Delivered to county treasurer, etc.

(Signed) P. L., Coroner.

..... county of ....., ss:  
P. L., one of the coroners of said county being duly sworn says that the foregoing statement and inventory is in all respects just and true to the best of his knowledge and belief, and that the moneys and other articles therein mentioned have been delivered to the treasurer of ..... county and to the legal representative of the persons therein mentioned as therein stated.  
P. L., Coroner.

Subscribed, sworn to before }  
me ....., 18.. }  
H. R., Notary Public.

No. 268.

§ 792, Subd. 1. Information for Search Warrant.

..... county of ....., ss:  
..... being duly sworn says: That he resides in ..... that the following property ..... has been stolen or embezzled from ..... at ..... that ..... is the owner thereof; that said property has been stolen by ..... and is now in his possession, or the possession of ..... at ..... the

... of aforesaid, or is concealed in ..... in said ..... of .....; that the facts upon which this affidavit is based are as follows:  
Subscribed and sworn to before me, this ..... day of ..... 18 .

---

**No. 269.**

**§ 170, Subd. 2. Information for Search Warrant.**

..... county of ..... ss:  
..... being duly sworn, says: That he resides in .....; that the following property ..... has been used as the means of committing a felony by ..... at ..... or is in the possession of ..... at ..... or is concealed in ..... in .....; that the facts upon which this affidavit is based are as follows:  
Subscribed and sworn to before me, this ..... day ..... 18 ..

---

**No. 270.**

**§ 797. Search warrant.**

County of Albany [or as the case may be.]  
In the name of the people of the state of New York:  
To any peace officer in the county of Albany, [or as the case may be:] Proof by affidavit having been this day made before me, by [naming every person whose affidavit has been taken,] that [stating the particular grounds of the application, according to section seven hundred and ninety-two, or if the affidavit be not "positive that there is probable cause for believing that," stating the ground of the application in the same manner.]  
You are therefore commanded in the day time, [or at any time of the day or night, as the case may be, according to section eight hundred and one,] to make immediate search on the person of C. D., or [ "in the building situated," describing it, or any other place to be searched, with reasonable particularity, as the case may be,] for the following property: [describing it with reasonable particularity,] and if you find the same, or any part thereof, to bring it forthwith before me at [stating the place.]  
Dated at the city of Albany [or as the case may be,] the ..... day of ..... eighteen hundred  
E. F.,  
Justice of the peace of the city [or town] of (or as the case may be)

---

**No 271.**

**§ 803. Receipt for Property taken under a Search Warrant.**

I, ....., a peace officer of the ....., have taken under a search warrant issued by ....., a ..... justice ..... of the ..... of ....., from whom it was taken or in whose possession it was found, or from ..... in the said ..... of ..... where the property hereinafter described was found, no person being there, the following described property:  
(Signature.)

---

**No 272.**

**§ 805. Return of Search Warrant.**

I have executed the within search warrant, as I am within commanded, by making diligent search in the place designated in the said warrant for the goods therein described, but cannot find the said goods or any part thereof (or find the goods described in the inventory returned herewith and none other.)  
A. B., Peace officer.



## No 273.

§ § 805, 806. Inventory and Affidavits thereto of  
Property taken under Search Warrant.

Inventory of property taken by the undersigned, under and pursuant to the annexed warrant, made publicly and in the presence of . . . . ., from whose possession it was taken, and of . . . . ., the applicant for the warrant.

Dated . . . . ., 18 ..

(Signature.

I, . . . . ., the peace officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

Taken, subscribed and sworn to, this {  
day of . . . . ., 18 .

## No. 274.

## Requisitions

STATE OF NEW YORK. {  
EXECUTIVE CHAMBER. }

The following rules will be observed by the Governor of the State of New York in reference to applications for requisitions on Governors of other States and Territories, and the Chief Justice of the Supreme Court of the District of Columbia (U. S. R. S. § 5278; R. S. relating to the District of Columbia, § 843.)

The application must be made by the District Attorney of the county in which the offense was committed, and must be in duplicate original papers, except indictments, which must be certified copies.

The following must appear by the certificate of the District Attorney:

A. The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be accurately spelled, in roman capital letters, for example, JOHN DOE.

B. That in his opinion the ends of public justice requires that the alleged criminal be brought to this State for trial, at the public expense, and that he is willing that such expense be a charge on the county in which the crime was committed.

C. That he believes he has sufficient evidence to secure a conviction of the fugitive.

D. That the person named as agent is a proper person, a public officer (naming his official position), and that he has no interest in the arrest of the fugitive.

E. If there has been any former application for a requisition for the same person growing out of the said transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

F. If the fugitive is known to be under either civil or criminal arrest, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

G. That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

H. That all papers in duplicate have been compared with each other and are in all respects, exact counterparts.

I. Whether the offense charged is a felony or a misdemeanor, with a concise definition thereof, and a particular reference to the statute, giving chapter, title article, page and section, together with any amendments thereto, defining the offense and stating the punishment therefor.

J. When more than one year has elapsed since the commission of the crime, a full explanation must be given and upon an application where no indictment has been found, the reasons therefore must be stated.

1. In cases of false pretenses, embezzlement or forgery, and all offenses known as such prior to the enactment of the Penal Code, the affidavit of the principal complaining witness or informant that the application is made in good faith, for

purpose of punishing the accused, and that he does not desire or expect the prosecution for the purpose of collecting a debt, or for any private purpose and will not directly or indirectly use the same for any of said purposes.

of by affidavit of facts and circumstances satisfying the Executive that the accused criminal has fled from the justice of the State, and is in the State on which the demand is requested to be made, must be given. No mere uncorroborated allegation will be received or accepted as conclusive upon this. In addition to the facts and circumstances required, it must affirmatively state that the occupation of the accused at the time of flight was; whether he was a resident or only in the State transiently; whether he was married; when the accused fugitive left the State, and in general the previous history of the accused so far as it can be ascertained—in short, the affiant's reasons for his belief that the accused is a fugitive from justice, and whether he is in the State or is making it his residence, and his occupation there. The affidavit must be made by the District Attorney or some public officer. The District Attorney must certify that the affiant is a respectable person and of good credit.

If an indictment has been found, certified copies, in duplicate, must accompany the application.

If an indictment has not been found the facts and circumstances, showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by depositions taken before a magistrate (a notary public is not a magistrate within the meaning of the statutes) in support of an information. An information must always be furnished in such case and no application will be received or considered which is based on an information standing by itself. Conclusions will not be considered except in connection with the facts and circumstances from which they are drawn.

If the crime of forgery is charged, an affidavit of the person whose name is alleged to have been forged, must be produced, or its absence satisfactorily explained.

If the crime charged is seduction, corroborative evidences must be furnished by an affidavit of one or more witnesses taken before a magistrate whether an indictment has been found or not.

Except as to the whereabouts of the accused, the sources of information must be stated, and the reason why such information is not verified by the person possessing it stated.

It should be shown that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, must be furnished upon application.

In all cases of extradition where the fugitive is beyond the jurisdiction of the United States, the application must, in the first instance, be presented to the Governor. All such papers must be presented in triplicate, and conform to the foregoing rules. The triplicate copies must each be certified by the State and must each contain a copy of the information, of the depositions and return thereof, and of a warrant issued thereon against the accused for the crime charged. Triplicate copies of all papers are absolutely necessary. In foreign countries indictments are not recognized and are absolutely useless.

In Canadian extradition each of the three sets of the papers required must contain one of the three triplicate copies of the information, depositions and one of the three triplicate original warrants issued thereupon; also each original must be accompanied by a copy of itself and all certified in the form set out on page 145, sixth Moak's English Reports. Follow closely the practice in this volume pages 144-147.

A copy of the rules governing United States extradition will be furnished on application to the State Department at Washington.

Applications will not be considered unless it affirmatively appears that the fugitive was in this State at the time of the commission of the offense. The crime must be within the extradition laws.

The official character of the officer taking the affidavits or depositions and the officer who issued the warrants must be duly certified.

The District Attorney asking a requisition must within six months after it is issued, make a return, accompanied by the

affidavit of the agent named therein, fully stating all proceedings had thereunder and upon the information or indictment on which the same was based.

13. The Governor of this State will deliver over to the Executive of any other State or Territory persons charged therein with crime, only when the demand is accompanied by documents and proofs which are in accordance with the extradition laws.

14. Upon the renewal of an application, for example; on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, new papers in conformity with the above rules must be furnished.

15. All rules heretofore issued by this Department, in the matter of the extradition of fugitives from justice, are hereby abrogated.

Approved January 1, 1892.

ROSWELL P. FLOWER,  
Governor.

### No. 275.

§ 827. District attorney's application to the governor for a requisition for a fugitive from justice, founded upon an exemplified copy of the indictment against the prisoner.

To the Hon.....Governor of the State of New York.

Application for a requisition is hereby made against.....That the party complained of, to wit; said.....is a fugitive from justice, and I believe him to be at this time in the state of.....That he fled from this state before arrest could be made, and that the ends of justice require that he be brought back to this state for trial at public expense, and I am willing that such expense be a charge on County.

That I have sufficient evidence to secure the conviction of the fugitive.

That this application is based upon an indictment, an exemplified copy of which is hereto annexed. No other application herein has for the same person been made previously.

That this application is not made for the purpose of enforcing a debt nor any purpose whatever of a private nature, and that the criminal proceedings shall not be used for any of said objects. That all papers in duplicate have been compared with each other and are exact counterparts. That the offense charged is burglary in the third degree, a felony, defined and punished according to penal code, §§ 498-507.

I hereby name the State of.....as the state upon which the requisition is asked, and name.....of the said County of.....as a proper person to whom the warrant is to issue, and certify that said.....has no private interest in the arrest of said fugitive.

Dated at....., 18....

.....  
District Attorney,  
.....County.

(Annex an exemplified copy of the indictment.)

### No. 276.

County clerk's certificate of official character.

STATE OF NEW YORK, } ss:  
COUNTY CLERK'S OFFICE. }

I,....., clerk of said county, and clerk of the county court, in and for said county, and one of the clerks of the supreme court in and for the State of New York, do hereby certify that.....is the district attorney in and for.....County, elected and sworn, and that his term of office commenced....., 18 , and will expire....., 18.....

In testimony whereof I have hereunto set my hand, and affixed the seal of the said court and county, this.....day of....., 18..

.....  
Clerk.

**Affidavit to accompany application for requisition.**

STATE OF NEW YORK, } ss.  
ORANGE COUNTY

That said defendant fled from the state of New York, and as deponent is informed and believes, is at present at....., in the state of..... That at the time of said defendant's flight he was a laborer by occupation, and a resident of this state, and was a single man to the best of deponent's belief ; that he left on or about.....18..

That deponent's reasons for believing that.....has left the state permanently are, that careful inquiries in the town of.....in said county, where he formerly resided, fail to result in any information concerning his whereabouts, intentions, or any information about him whatever since he fled from ..... county on or about....., 18..

That a bench warrant has been issued to the sheriff of.....county.  
Sworn to before me this.....of.....18..

**Certificate of migistrate to be attached to foregoing application.**

I ..... of ..... the magistrate before whom the foregoing affidavits were taken, do hereby certify that the parties making them are, in my opinion, to be believed, and that said affidavits present a proper case for a requisition.

**Dated at** ..... **this** ..... **day of** ....., 18 ..

**Justice of the Peace (or Police Justice).**

**County clerk's certificate of official character of magistrate.**

STATE OF NEW YORK, } ss:  
COUNTY OF .....

I ..... clerk of said county, do hereby certify that J. D., before whom the annexed affidavits were made, and whose names are thereto subscribed, and who has also signed the foregoing certificate, was, at the day of the date thereof, a justice of the peace in and for said county duly commissioned and sworn, and that his signature thereto subscribed is genuine.

In testimony whereof, I have this ..... day of ..... [L. s.] subscribed  
my name and affixed the official seal of said county.

**Clerk.**

**§ 840. Bastardy, Application in, by overseers.**

..... county, ss:

To ....., Esq., justice of the peace of the county of ..... :  
 ....., being pregnant with child, which is likely to be born a bastard, or hav-  
 ing been delivered of a bastard child, and become chargeable to said county (or  
 town or city, as the case may be) the undersigned, pursuant to section 840 of  
 the Code of Criminal Procedure of the state of New York, applies to you to  
 make inquiry into the facts and circumstances of the case.

Given under my hand, at the ..... of, ..... this ..... day of ....  
 ....., 18..

..... **Overseer of the poor.**

**No. 281.****§ 841. Bastardy. Affidavit of pregnancy.**

..... county, ss:

The voluntary examination of ....., of ....., in the ..... of ....  
 ....., taken in writing, upon oath before ....., one of the justices of the  
 peace of the ....., who saith she is now with child, and has been so for  
 about ..... months last past, and that the said child is likely to be born a  
 bastard, and to be chargeable to the said town of; that she is, and has for one  
 year past been, an unmarried women (or ....., her husband has continued  
 absent out of this state for one whole year previous to such birth, separate from  
 her and leaving her during that time continuing and residing in this state; and  
 that such child was begotten and will be born during such absence and separa-  
 tion; or that such child was begotten and will be born during the separation of  
 its mother from her husband, pursuant to a decree of a court of competent au-  
 thority,) and that ..... hath gotten her with child of the said bastard child.

Taken upon oath before me this ..... day of ....., 18..

....., Justice of the Peace.

**No. 282.****§ 841. Warrant Against Reputed Father prior to Birth of Child.**

..... county, ss:

To any peace officer of said county, greeting:

Whereas, upon the application of ....., overseer of the poor of said  
 ....., in said county, to me, ....., one of the justices of the peace of the  
 said county of ....., I have ascertained by the examination, on oath of  
 ....., that she is now pregnant of a child, likely to be born a bastard, and to  
 be chargeable to the said county, and (recite examination) ..... is the re-  
 puted father of such child; these are, therefore, to command you forthwith to  
 apprehend the said ....., and bring him before me, at my office, in the town  
 of ....., in said county of ..... for the purpose of having an adjudication  
 respecting the filiation of such child, likely to be born a bastard.

Given under my hand this ..... day of ....., 18..

....., Justice of the Peace.

**No. 283.****§ 841. Bastardy. Affidavit of Mother after Birth of Child.**

..... county, ss.

The voluntary examination of ....., of ....., in the ..... of ....  
 ....., taken on oath before me, ....., one of the justices of the peace of the  
 ..... of ....., who saith, that on the ....., day of ....., in the  
 year of our Lord one thousand eight hundred and ....., at the .....  
 of ....., she was delivered of a ..... male bastard child, and that the  
 said child is likely to be chargeable to the county of ....., aforesaid, and  
 that ..... hath gotten her with child of the said bastard child.

Taken upon oath before me,

this ..... day of ....., 18 }  
 ..... Justice of the Peace.

**No. 284.****§ 841. Warrant against the father after birth of child.**

..... county, ss:

To any peace officer of the county of ....., and to all and every one of them,  
 greeting:

Whereas, ....., of the said ..... of ....., a woman, hath, in her  
 examination, taken this ..... day of ....., 18.., in writing upon oath be-

fore me, ....., one of the justices of the peace of the said ..... of ....., declared on the ..... day of ....., 18.., at the said ..... of ....., she was delivered of a ..... male bastard child, and that said child now is, and is likely to continue to be, chargeable to said ..... of ....., and that ..... is the father of the said bastard child.

And whereas, application hath been made to me by ....., overseer of the poor of the town of ..... in said county, to make inquiry into the facts and circumstances of the case; and having, upon such inquiry, ascertained that said ..... is the reputed father of such child so born a bastard;

These are, therefore, in the name of the people of the state of New York, to command and authorize you, immediately, to apprehend the said ....., and forthwith to bring him before me, the undersigned justice of the peace, at the said ..... of ....., for the purpose of having an adjudication respecting the filiation of such bastard child.

Given under my hand, this ..... day of ....., 18..

....., Justice of the peace.

---

### No. 285.

§ 843. Indorsement to be made by Justice upon the Warrant when reputed father resides in, or is in, another county.

County of ....., ss:

I, the within named justice of the peace of the said county, hereby direct that the penal sum which any bond shall be taken of the within named ....., shall be ..... dollars.

Dated at ....., this ..... day of ....., 18..

....., Justice of the peace.

---

### No. 286.

§ 843. Indorsement to be made by the Justice in the county where warrant is to be executed.

County of ....., ss:

The within warrant, with the indorsement made thereon by the justice of the peace by whom it was issued, of the sum required to be put in the bond, having been presented to me, a justice of the peace of and residing in said county of ....., and due proof under oath having been made to me by the oath of ....., of the signature of the said justice who issued the said warrant, authority is by me hereby given to arrest the within named ....., in the said county of .....

Dated at ....., the ..... day of ....., 18..

....., Justice of the peace.

---

### No. 287.

§ 844. Bastardy—Putative father's bond on arrest in another county.

Know all men by these presents :

That we, ..... and ..... of ..... in the county of ....., are held and firmly bound, jointly and severally, unto the people of the state of New York, in the sum of ..... dollars, for the payment whereof to the said people we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this ..... day of ....., 18.....\*

Whereas, the said ..... has this day been brought before the undersigned, one of the justices of the peace of the county of ....., by virtue of a warrant issued by ..... one of the justices of the peace of the said county of ....., whereon the name of the said justice (or, of ..... one of the justices of the peace of the said county of ..... ) is indorsed, with an authority to arrest the said ..... in the said county of .....; in which warrant it is recited that ..... of ....., in said county of ....., upon her examination,

on oath, before the said justice, did declare herself pregnant of a child, which is likely to be born a bastard, and to become chargeable ) or did declare that she was, on the ..... day of ....., at ..... aforesaid, delivered of a bastard child, which is chargeable to said town (or county); and upon the said warrant is indorsed the directions of the said that the penal sum in which any bond should be taken, of the said should be \$ .....; now, therefore, if the said etc., (insert one of the conditions expressed in § 844), then the above obligation to be void, otherwise of full force.

Sealed and delivered in presence of, }  
....and the surety approved by me, }

{ (L. S.) }  
{ (L. S.) }  
Justice.

No. 288.

§ 845. Certificate to be indorsed upon warrant on discharge.

COUNTY OF ..... } ss.  
.....OF .....

I, ....., a justice of the peace of the county of ..... before whom the within named was brought, he having been arrested in said county of ...., after it had been indorsed by me [or by another justice of said county of .....], do hereby certify that the said has executed a bond, with two sureties, in the sum indorsed upon the warrant, and required according to the statute in such cases made and provided, and which is herewith delivered to...., the officer who brought the within warrant; and that I have thereupon discharged the said from arrest upon the within warrant.

Dated at ....., this ..... day of ..... 18 ...

Justice of the Peace.

No. 289.

§ 840. Bastardy; Bond on Adjournment.

Know all men (etc., as in ..... down to the \* and) the condition of this obligation is such that, whereas, the undersigned has this day been brought before ....., charged upon the oath of ..... aforesaid as the reputed father of a bastard child, with which the said.....alleges she is pregnant (or of a bastard child lately born of the said.....): and whereas, at the request of the said ....., and for sufficient reasons the said ..... determined to adjourn the examination and adjudication respecting such charge, upon the execution of this bond, until the ..... day of ....., .....M., in .....; now, therefore, if the said shall personally appear before the said ....., at the time and place last aforesaid, and not depart therefrom without leave, then this obligation is to be void, otherwise of force.

Sealed, etc.

[L. S.]  
[L. S.]

No. 290.

Subpœna in bastardy case.

STATE OF NEW YORK, } ss:  
COUNTY OF .....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To etc.,

You are hereby commanded that, laying all other matters aside, you and each of you personally appear before ....and ..... justices of the peace of the county of ..... at the office of....., in the....., on the.....day of..... at ten o'clock A. M. on that day, to testify the truth and give evidence, according to your knowledge, touching the father of a bastard child of which..... has been lately (or is about to be) delivered.

Dated at ....., this ..... day of ..... 18 ..

(Signed) .....  
Justice of the Peace.



No. 291.

§ 850. Order of Filiation.

.....court, county of ..... ss:  
Whereas, the undersigned; being of said county, having upon the application of ....., overseer of the poor of the town of .....in said county, this day associated for the purpose of making an examination touching a bastard child lately born in said town of the body of .....(or as the case may be) and chargeable (or likely to be chargeable) to said town of ....., and of which child the said ..... is alleged to be the father; and whereas, we have duly examined the said ..... on oath, in presence of the said .....  
....., in respect to such charge, and heard the testimony offered in relation thereto, whereby it appears that the said ..... was on the ..... day of ....  
....., delivered of a bastard child (or as the case may be) and which is chargeable (or likely to become chargeable) to the said town of ....., and that said ..... is the father of said child, we do, therefore, adjudged him the said....  
....to be the father of said bastard child, and order that he pay to the overseer of the poor of said town, for the support of said child, the weekly sum of ....., so long as the said child shall continue chargeable to said town; and inasmuch as it appears to us, and we find that the said ..... is in indigent circumstances, we determine that the said ..... pay to the said overseer to the poor, for the support of said ..... during the confinement and recovery, the sum of ..... And we hereby certify that the reasonable cost of arresting the said ..... and of this order of filiation is the sum of .....

Given under our hands, at the town of ..... this day of ....., 18 ....

} Justices.

Sealed, etc.

[L. S.]  
[L. S.]  
[L. S.]

No. 293.

§ 851. Bond on Appeal from Order of Filiation.

Know all men (as in No 287 down to the \*..... and). Now therefore if the said ..... shall personally appear at the next court of sessions of the county of ..... to answer the charge aforesaid and obey its order thereon and not depart said court without leave, then this obligation to be void; otherwise that we will pay the sum of \$... .. fixed and determined upon by the said justice as a full indemnity for supporting the said bastard and its mother.

Sealed, etc.

[L. S.]  
[L. S.]

No. 294.

§ 852. Commitment.

..... Court,.... }  
County of ..... }

The people of the state of New York:

To any peace officer of ..... county, and to the keeper of the county jail of said county, greeting:

Whereas, by an order made the ..... day of ....., 18 .., by ..... and ....., two of the justices of the peace of the ..... of ....., is adjudged to be the father of a bastard child born of the body of ..... (or with which she is now pregnant), and chargeable (or likely to become chargeable) to the said town of ....., which said order was duly made after due examination upon application by ....., overseer of the poor of the ..... of .....

And whereas, by said order the said ..... was further directed to pay to the overseer of the poor of ..... the sum of \$ ..... weekly and every week for the support of said bastard child for and during so long a time as said child so be and remain chargeable, and also the sum of \$ ..... directed to be paid by the said ..... for the support of the said ..... during her confinement and recovery, she being found to be an indigent person; and

in and by said order determination fixing the costs of apprehending the said ..... , and of such order of filiation at the sum of \$ ..... ; and whereas the said ..... , was present at the making of such order and determination, and which together with all other proceeding was by said justices reduced to writing and subscribed by them; and was required by them to pay the said costs and enter into an undertaking, with sufficient sureties to be approved by them, for the performance of such order, or his appearance at the next court of sessions of said county of ..... , to answer the charge and obey its order therein according to section 851 of the Code of the Criminal Procedure of the state of New York.

And whereas, the said ..... has neglected to pay said costs and to enter into such bond as aforesaid:

These are, therefore, to command you, the said peace officer, to take the said ..... and convey and deliver him to the keeper of the common jail of the county of ..... And you the said keeper, are hereby commanded to receive the said ..... into your custody in said jail, and there safely keep him until he shall pay the said costs and execute such bond aforesaid, or he be discharged by the court of sessions of said county.

Given under our hands at the ..... of ..... the day of .....  
[Signature.]

No. 295.

§ 855. Order of Filiation in the absence of the reputed father, apprehended in another county.

County of ..... ss:  
..... having been apprehended in the county of ..... , in the State of New York, by virtue of a warrant and the direction thereon indorsed, of which the following are the copies, to wit: [insert copies] was carried before ..... Esq., a justice of the peace of the said county of ..... , who took from him, the said ..... , a bond of the people of the state of New York, with good and sufficient sureties, in the sum directed in the indorsement on said warrant, conditioned that the said ..... shall appear at the next court of sessions to be holden in the county of ..... , and not depart the said court without its leave; and the said bond having been in due form of law returned to the undersigned ..... , the justice who issued the said warrant, he thereupon immediately called to his aid the undersigned ..... , another justice of the same county, and the said justice proceeded to make examination of the matter, on the ..... day of 188.., at ..... in said town, and then and there heard the proofs that were offered in relation thereto; by which it was proven that the said ..... , being in the said town of ..... has been delivered of a bastard child, etc., in said town [or, that the said ..... is now pregnant of a child, which, when born, will be a bastard], and which is chargeable [or, likely to become chargeable], to said town [or county], and that ..... is the father of said child.

We do, therefore, adjudge him, the said ..... , to be the father of the said bastard child; and, further, we do hereby order that the said ..... pay to the overseer of the poor of the said town of ..... , [or, to the superintendent of the poor of said county], for the support of said child, the weekly sum of one dollar, so long as the said child shall continue chargeable to said town or county; and inasmuch as it appears to us, and we find, that the said ..... is in

Given under our hands at the town of ..... this day of .....  
18 ..

} Justices.

No. 296.

Warrant for discharge of putative father after commitment.

COUNTY OF ..... ss.:  
IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:  
To the keeper of the common jail of the county of ..... :  
Whereas, ..... was, on the ..... day of ..... , duly committed to your

on a warrant issued under our hands, for disobeying an order of filia-  
 hereby he was adjudged to be the putative father of a bastard child, of  
 ..... was then supposed to be pregnant;  
*Whereas*, It now appears that said ..... was not in fact pregnant at  
 married before delivery];  
 you are hereby commanded to forthwith discharge from your custody the  
 unless he be there lawfully detained on some other warrant.  
 at ....., this .... day of ....., 18 ..

} Justices.

---

**No. 297.**

**§ 856. Warrant to Commit Mother Who Refuses  
 to Disclose the Name of the Father.**

ty of ....., ss:

ny peace officer of said county, greeting:

as we, the undersigned, justices of the peace of said county, are now as-  
 for the purpose of examining into the matter, and making order for the  
 ity of the town of ....., in said county (or for the indemnity of the  
 nty), against the support of a certain child, said to have been born a  
 of the body of ..... and chargeable (or likely to become chargeable) to  
 n (or county) upon the application of ..... overseer of the poor of said  
 r a superintendent of the poor of said county), have required the said  
 who is now before us, to submit to an examination on oath, in the pre-  
 ..... who has been brought before us, charged with being the father  
 child, to testify touching such charge, and to disclose the name of such  
 but the said ..... wholly refuses to testify and disclose; and inasmuch  
 w appears to us, upon due proof thereof, given an oath before us, that  
 an a month has elapsed since the said ..... was delivered of said child,  
 t she is now sufficiently recovered from confinement. You are, there-  
 rebly commanded, in the name of the people of the state of New York, to  
 a said ..... and convey her to the common jail of said county, the  
 whereof is required to detain the said ..... in his custody in said jail  
 e shall so testify and disclose the name of such father.  
 under our hands at ....., this ..... day of ....., 18..

} Justices.

---

**No. 298.**

**§ 856. Process to Compel Attendance of Mother  
 before Justices.**

ty of ....., ss:

ny peace officer of said county, greeting:

as we, the undersigned justices of the peace of said county, have, upon  
 lication of the overseers of the poor of the town of ....., in said  
 (or the superintendent of the poor of said county), associated for the  
 of examining into the matter of a certain complaint made to us by said  
 r (or superintendent), that ..... of said town, is now pregnant with a  
 which, when born, will be a bastard, and which is likely to become charge-  
 said town (or county; or that ..... has been delivered in said town of a  
 child, which is chargeable, or likely to become chargeable to said  
 county); and ..... having been brought before us this day, charged to  
 putative father of said child: Now, therefore, to the intent that the said  
 may be examined before us, on oath, and in the presence of the said  
 ing the father of said child, you are hereby commanded, in the name of  
 ple of the state of New York, to bring the said ..... forthwith. before  
 he office of the undersigned ..... in ..... aforesaid.  
 under our hands at ....., this ..... day of ....., 18..

} Justices.

**No. 299.****§ 857 Summons where mother has property  
in her own right.**

.....county of....., ss;  
To any peace office of said county, greeting :

You are hereby required to summon ..... of the town of.....in said county, to appear before us, the undersigned, justices of the peace of said county, on the .....day of....., instant, or.....in the.....noon, at the office of the undersigned, ..... to show cause, if any she may have, why we should not make an order for the keeping of a bastard child, said to have been lately born of said ..... and chargeable (or likely to become chargeable) to said county (or town), by charging the said ..... with the payment of money weekly, or other sustentation; ..... overseer of the poor of said town (or superintendent of the poor of said county), having applied to us for that purpose.

Given under our hands, at..... }  
this.....day of....., 18..... }

..... } Justices of the Peace.  
..... }

**No. 300.****§ 857. Support of child—Order to compel the mother  
to pay for the.**

..... county of ....., ss:  
Whereas ..... one of the superintendents of the poor of said county (or overseer of the poor of the town of....., in said county), has made application to us, two of the justices of the peace of said county, complaining that ..... of ....., in said county, was lately delivered at.....aforesaid, of a bastard child, which is chargeable (or likely to become chargeable), to said county (or town); and that said ..... is possessed of property in her own right, and is of sufficient ability to support said child, and desiring that we should examine into the matter, and make order for the indemnity of said county (or town), and whereas, upon examination into the matter of said application, and upon due proof thereof, on oath before us given, and the said ..... although present at such examination, not showing any sufficient cause to the contrary (or, and the said ..... neglecting to appear before us and show cause if any she might have, to the contrary, although duly summoned so to appear), we do, therefore, hereby order that the said ..... pay weekly to said superintendent (or to said overseer) the sum of....., for the support of said child (if necessary insert here, unless the said ..... shall nurse and take care of the said child herself).

Given under our hands at..... }  
this.....day of....., 18.. }

..... } Justices.  
..... }

**No. 301.****§858. Warrant to commit mother for  
not executing bond.**

County of ....., ss:  
To any peace officer of said county, greeting:

Whereas, by an order, duly made by us, the undersigned, justices of the peace of said county, bearing date the.....day of....., instant, in relation to the keeping of a certain bastard child lately born in said county, of the body of ....., which is chargeable to the town of ....., [or, said county], we directed, etc., [as in the order], which order was so made upon the application of ....., overseer of the poor of said town [or a superintendent of the poor of said county], and after due notice to the said....., to show cause, if any she might have, against the making of such order; and whereas, a copy of said order,

ed by us, has been served upon the said....., and she has neither  
 d the bond by law required for her appearance at the next court of ses-  
 tc., nor complied with requirements of said order. You are, therefore,  
 commanded, in the name of the people of the State of New York, to take  
 .....and convey her to the common jail of said county, there to re-  
 zithout bail, until she shall comply with said order, or execute the bond  
 zed by statute as aforesaid.

under our hands, at.....this....day of....., 18....

..... } Justices.  
 ..... }

---

**No. 302.**

**§ 859. Order reducing sum to be paid  
 by father or mother.**

ty of....., ss:

overseer of the poor of the town of....., in said county, [or, the  
 erintendent of the poor of said county]:

reas, by an order of filiation by us made, bearing date on.....day of  
 .last, we did determine that.....is the father of a certain bastard  
 hen lately born in.....aforesaid, and did therein order, among other  
 that the said..... should pay to you, the said overseer (or, superin-  
 ), for the support of said child, the weekly sum of....., so long as  
 ld should continue chargeable to said town (or county.) And, whereas,  
 ie application of the said..... we have this day inquired into the cir-  
 nces of the case, and heard the proofs and allegations to us submitted in  
 thereto; and it appearing to us upon such inquiry, that the circum-  
 in relation to said bastard child render it proper and expedient that the  
 quired to be paid by the said....., by our former order, should be re-  
 as hereinafter expressed. And inasmuch as you, the said overseer (or,  
 tendent), have shown before us no sufficient reason against such reduc-  
 though appearing before us (or, notified to appear before us and show  
 f any you might have), we do, therefore, reduce the sum required to be  
 the said...., by our former order as aforesaid, to the weekly sum of....  
 under our hands, this.....day of....., 18....

..... } Justices.  
 ..... }

---

**No. 303.**

**§ 859. Notice by Superintendent or Overseer, that  
 Application will be made to the County  
 Court to increase the Amount Payable in  
 the Order of Filiation.**

You will take notice, that I shall make application to the next  
 the County Court of the county of...., to be holden at.....,  
 county, on the ..... day of ....., at ten o'clock in the forenoon,  
 ase the sum directed to be paid by the order of filiation, of which the  
 d is a copy, for the support of the bastard child therein named; which  
 oplication will be founded on the affidavits, copies of which are also  
 d.

d at ....., this ..... day of ....., 18..

....., Superintendent of the poor.

---

**No. 304.**

**§ 859. Notice to be given to Superintendent or  
 Overseer for Reducing Amount in Order of  
 Filiation.**

superintendent (or overseer of the poor):  
 are hereby notified that I shall make application to the next term of the  
 Court of the county of ....., to be holden at ....., in said

county, on the ..... day of ....., 18..., at ten o'clock in the forenoon, to reduce amount directed to be paid by the order of filiation, of which the annexed is a copy, for the support of a bastard child therein named; which said application will be founded on the affidavits, copies of which are also annexed.  
 ....., Superintendent of the poor.

---

**No. 305.**

**§ 860. Warrant to seize the Property of Absconding Father or Mother.**

County of ....., ss:

To the overseer of the poor of the town of ....., in said county [or, to the superintendent of the poor of said county]:

It appearing to us, two of the justices of the peace of said county, as well by the representation and application to us made by the said overseer [or the said superintendent], as upon due proof of the facts before us given, that ..... is the father of a bastard child whereof ..... of said town, is now pregnant, and which, when born, is likely to become chargeable to said town [or county, or that ..... is the father of a bastard child lately born in said town, of ....., and which is chargeable or likely to become chargeable to said town or county], and that said ..... has absconded from said town, which is the place of his ordinary residence, leaving in said county some estate, real or personal:

We, therefore, authorize you, the said overseer of the poor, to take and seize the goods, chattels, effects, things in action, and the lands and tenements of said ....., wherever the same may be found in said county; and you will, immediately upon such seizure, make an inventory of the property by you taken, and return the same, together with your proceedings, to the next term of the county court of said county.

Given under our hands, in the town of ....., this ..... day of ....., 18...

..... } Justices.  
 ....., }

---

**No. 306.**

**§ 862. Notice of Appeal from Order of Filiation.**

County of ....., ss:

To .... and ....., Esqs., justices of the peace of said county:

You will take notice that the undersigned, conceiving himself aggrieved by the order made by you, of which a copy is annexed, hereby appeals therefrom to the next term of the county court to be holden in said county.

Dated at ....., this ..... day of ....., 18.

---

**No. 307.**

**Subpoena on appeal in bastardy case.**

..... COUNTY, ss.:

**IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:**

To ....., etc:

The court of sessions, in and for the county of ..... held at the courthouse in said county, commands you and each of you to personally appear before said court on the ..... day of ..... at ten o'clock A. M. on that day, to testify the truth according to your knowledge, in a certain appeal then and there to be heard, from an order of filiation in a bastardy case, heretofore made by ..... and ..... two of the justices of said county, and whereof you fail not under the penalty of fifty dollars.

Witness ..... county judge, this ..... day of .....

..... Clerk.

No. 308.

§ 887, Subd. 1. Complaint against vagrant.

Court,  
County of..... } ss:  
....., of the said ..... of ....., being duly sworn, makes complaint  
and says, that ....., who is now in said ..... of ....., is a person  
who, not having visible means to maintain himself, lives without employment,  
in that he  
Subscribed and sworn to before me, }  
..this ..... day of ....., 18 ... }

No. 308a.

(Follow last form down to last "who," and then proceed.)  
being an habitual drunkard, abandons, neglects and refuses to aid in the sup-  
port of his family, in that he, etc.  
Jurat.  
These forms may be adapted to complaints under the subsequent subdivision  
of this section.

No. 309.

§ 887 Subd. 8. Information against vagrant.

STATE OF NEW YORK, }  
County of..... } ss:  
....., being duly sworn, says that he resides in the ..... of .....;  
that ..... who resides in ..... is a person who has contracted an in-  
fectious and other diseases in the practice of drunkenness and debauchery, re-  
quiring charitable aid to restore him to health, in that he .....  
Subscribed and sworn before me, }  
this ..... day of ..... }  
.....  
.....

No. 310.

§ 887, Subd. 4. Information against vagrant.

STATE OF NEW YORK, }  
County of ..... } ss:  
....., being duly sworn, says that ..... who resides at ....., is a  
common prostitute, who has no lawful employment whereby to maintain her-  
self; that she [state facts and circumstances on which affidavit is based.]  
Subscribed and sworn before me, }  
this ..... day of ..... }  
.....  
.....

No. 311.

§ 887, Subd. 7. Information against vagrant.

STATE OF NEW YORK, }  
County of ..... } ss:  
....., being duly sworn, says that he resides in .....; that ..... in  
said city of ..... is a person who, having his face painted, discolored, covered  
and concealed and being otherwise disguised in a manner calculated to prevent  
his being identified, appears in a road and public highway in said city, and in a  
field, lot, wood and inclosure in said city, in that [give facts and circumstances  
in detail].  
Subscribed and sworn before me, }  
this ..... day of ..... }  
.....  
.....



## No. 312.

§ 887, Subd. 1. Warrant for vagrancy.

COURT  
COUNTY OF..... } ss:

In the name of the people of the state of New York:

To any peace officer in the county of.....:

Whereas, complaint has this day been made by ....., of the ..... of ..... in the county of ....., on oath, before ....., a.... justice.... of the said....., that on the ..... day of ....., 18 .., at the said .... of....., in said county, ....., was and is a person who not having visible means to maintain himself, lives without employment ..... against the peace of the people of the state of New York and the form of the statute in such case provided;

We therefore command you forthwith to take the body of the said ....., and bring him before the said ....., at the ....., in the said ..... of ....., for examination with this warrant, and a return of your doings thereon endorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness, the said ....., at the ..... of ....., in the county aforesaid, the ..... day of..... 18 ..

[Signature.]

By virtue of the within warrant, I have arrested the within named....., and now have him before the magistrate by whom this warrant was issued.

18 ..

Policeman.

## No. 313.

§ 888. Information as to truant child.

COURT,  
COUNTY OF....., } ss:

..... being duly sworn deposes and says, that he is a ..... in the ..... aforesaid, that on the ..... day of .... 18 .. one ..... a child, between the age of five and fourteen years, having sufficient bodily health and mental capacity to attend the public schools, was found by him wandering in ..... street of said ..... of ....., a truant without any lawful occupation.

Subscribed and sworn to before me, this ..... day of ..... 18 ..

(Signatures.)

## No. 314.

§ 893. Information against child begging, etc.,

COUNTY OF ....., ss. :

....., being duly sworn, deposes and says that he resides in .....; that on the ..... day of ....., 18 .., one ....., a child of the age of ..... years, was found begging for alms and soliciting charity from door to door in the said ....., and was found begging for alms and soliciting charity in a street, highway and public place in said city, to wit, ..... in that .. he .....

Subscribed and sworn before me, }  
this ..... day of ....., 18 .. }

.....  
Police Justice (or Justice of the Peace.)

## No. 315.

§ 888. Summons to Parent, etc., to Attend  
Examination of Truant Child

COURT, }  
COUNTY OF } ss:

In the name of the people of the state of New York:

To ....., parent, guardian or master of

Whereas, complaint and information on oath has been duly made by ....., of the ....., in the county of ....., before me, ....., a ..... justice of the ..... that on the ..... day of ....., 18 .., said ..... who is a child between the age of five and fourteen years, having sufficient bodily health and mental capacity to attend the public schools, was found wandering in the streets of the ..... of ..... aforesaid, a truant without any lawful occupation, and said ..... has been duly arrested and is now in custody on said charge, and is to be examined thereon before the said ....., at the ....., in the ..... of ....., on the ..... day ....., 18 .. You are hereby summoned and required to attend said examination at the time and place aforesaid.

Witness the said ....., at the ..... of ....., the ..... day of ....., 18 ..

(Signature.)

Endorse return.

## No. 316.

§ 888. Undertaking of parent, master or guardian  
of truant child.

COURT, }  
COUNTY OF .... }

Whereas, complaint having been duly made before ..... a ..... justice ..... of the ....., in the county of ..... and state of New York, that ..... residing in ..... in the ..... of ..... in the county of ..... and state of New York, a child of the age of ..... years having sufficient bodily health and mental capacity to attend the public schools, was on the ..... day of ..... 18 .. found wandering in the streets of the said ..... of ....., a truant, without any lawful occupation. And, whereas, the said justice, on such complaint being made, did duly cause a peace officer to bring such child before him for examination, and did duly cause ..... the parent, guardian or master of such child to be summoned to attend such examination. And, whereas, such examination was, on the ..... day of ..... 18 .. duly had before said justice, and said complaint satisfactorily established. And, whereas, on the establishment of said complaint, said justice did require the said parent, guardian or master of said child to enter into an engagement, in writing, with ..... suret ..... in the sum of ..... hundred dollars, to the ..... of ..... that .... he will restrain such child from so wandering about as aforesaid; will keep h .... in h .... own premises, or in some lawful occupation, and will cause h .... to be sent to some school at least four months in each year until .... he becomes fourteen years old.

Now, therefore, we, ..... the said parent, guardian or master, residing in ..... county of ..... by occupation a ..... and ..... residing in ..... county of ..... by occupation a ..... and ..... residing in ..... county of ..... by occupation a ..... sureties, hereby jointly and severally undertake that the said ..... will restrain said child from wandering about the streets of said ..... of ....., a truant, without lawful occupation; will keep h .... in h .... own premises or in some lawful occupation, and will cause h .... to be sent to some school at least four months in each year until .... he becomes fourteen years old; or if he fail to perform either of those conditions, we, the said sureties, will pay to the ..... of ..... the sum of ..... hundred dollars.

Dated at ..... day of ..... 18 ..

(Add acknowledgement and justification.)

## No. 317.

§ 888. Engagement of parent, master or guardian  
of truant child.

COURT  
OF ..... COUNTY OF }  
THE PEOPLE  
vs.

Whereas, the above named ....., residing in the county of ..... and state of New York, a child of the age of .... years, having sufficient bodily health and mental capacity to attend the public schools, was, on the .... of ... , 18 .., found wandering in the streets and lanes of .... of ....., a truant, without any lawful occupation.

And whereas, complaint was duly made to ..... a ..... justice ..... of the ..... of ....., against said child, therefore, .....

And, whereas, said justice did cause a peace officer to bring such child before him for examination on said complaint, and did cause ....., the parent, guardian or master of said child, to be summoned to attend such examination.

And, whereas, on such examination the said complaint was satisfactorily established, and the said justice did require the said parent, guardian or master of said child to enter into an engagement, in writing, to the ..... of ..... that he will restrain said child from so wandering about as aforesaid; will keep h.... in h.... own premises or in some lawful occupation, and will cause h.... to be sent to some school at least four months in each year, until ..he becomes fourteen years old.

Now, this agreement and engagement witnesseth : That the said ....., the parent, guardian or master of said child, hereby covenants, promises and agrees to and with the said ..... of ....., that he will restrain said child from so wandering about as aforesaid; and will keep h.. in own premises and in some lawful occupation, and will cause h... to be sent to some school at least four months in each year, until ..he becomes fourteen years old.

In witness whereof, I have hereunto set my hand and seal this ..... day of ....., 18 ..

Sealed and delivered in the presence of .....

[L. S.]

.....  
[Signature.]

## No. 318.

## § 888. Warrant of arrest of truant child.

..... COURT, } ss:  
COUNTY OF ....

In the name of the people of the state of New York : To any peace officer of the county of ....., greeting :

Whereas, information on oath has this day been duly made by ..... of the ..... in the county of ....., before me, ....., a ..... justice ..... of the said ....., that on the ..... day of ..... , 18 ....., at ....., in said county, one ..... a child between the age of five and fourteen years, having sufficient bodily health and mental capacity to attend the public schools, was found wandering in the ..... of the ..... of ..... aforesaid, a truant, without any lawful occupation.

You are, therefore, commanded and required, forthwith to apprehend and take the body of the said ..... and bring him before the said ....., at .... in the said ..... with this warrant and a return of your doings thereon indorsed, for examination, and to answer the said complaint, and to be dealt with according to law. Hereof fail not at your peril.

Witness, the said ....., at the ....., in the county aforesaid, the ..... day of ..... 18 .....

.....  
[Signature.]

## No. 319.

§ 888. Warrant to commit truant child having parent, guardian or master. Plea, not guilty.

COURT, } ss :  
 .... COUNTY OF.....

To any sheriff, constable, marshal or policeman of the county of....., and to the superintendant and principal keeper of the alms-house of the said county, greeting :

Whereas, on the..... day of..... 18 ....was brought before me,....a justice of the peace in and for the.... and county of ....., charged on the oath of..... which oath was believed by me, the said justice, with being a vagrant, within the intent and meaning of the statute and subdivision 8 of section 887 of the Code of Criminal Procedure, in that he is a child of the age of.....years, having sufficient body, health and mental capacity to attend the public schools, and was, on the.....day of..... 18 .., found wandering in the streets in said.....of....., a truant, without any lawful occupation.

And, whereas said.....on being brought before said justice, was immediately informed by said justice of said charge against h.... and of h.... right to the aid of counsel in every stage of the proceedings, and before any further proceeding were had.

And, whereas, ..... the parent, guardian or master of said ..... was duly summoned to attend the examination of said ..... on said charge.

And, whereas, the said charge was then and there distinctly read and stated to the said ..... who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person.

And, whereas, the said testimony was given and evidence was had in the presence and hearing of the said ..... and ..... said parent, guardian or master, ..... he the said ..... having previously thereto been allowed a reasonable time to send for and advise with counsel.

And, whereupon, the said justice did thereupon adjudge and determine that the said ..... was guilty of the aforesaid charge, and the said ..... was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that ..... the said ..... is a child of the age of ..... years, having sufficient bodily health and mental capacity to attend the public schools, was on the ..... day of ....., 18 .., found wandering in the streets of said ..... of ....., a truant, without any lawful occupation.

And, whereas, after the said complaint was satisfactorily established, the said justice did require the said parent, guardian or master to enter into an engagement in writing to the ..... of ....., that he would restrain said child from so wandering about; would keep h.. in h.. own premises or in some lawful occupation, and would cause h.. to be sent to some school at least four months in each year, until h.. becomes fourteen years old; and the said parent guardian or master, having refused or neglected within a reasonable time so to do, it was adjudged and determined by me that the said ..... should be committed to the alms-house of said county, there being no other place provided for h.. reception.

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said ..... into the custody of the said superintendant and principal keeper of the said alms-house. And you, the said superintendant and principal keeper, are hereby commanded to receive the said ..... into your custody, in the said alms-house, and there safely keep h.. until ..he shall be discharged according to law.

Given under my hand, at the ..... of ..... }  
 aforesaid, this ..... day of ..... 18 .. }

[Signature]

## No. 320.

§ 888. Warrant to commit a truant child, having parents, guardian or master. Plea of guilty.

.....COURT,  
COUNTY OF....., } ss:

In the name of the people of the state of New York:  
To any sheriff, constable, marshal or policeman of the county of ....., and to the superintendent and principal keeper of the alms-house of the said county, greeting:

Whereas, on the ..... day of ....., 18 .., ..... was brought before me, ..... a justice of the peace in and for the ..... and county of..... charged on the oath of ..... which oath was believed by me, with being a vagrant within the intent and meaning of the statute and subdivision eight of section 887 of the Code of Criminal Procedure, in that he is a child of the age of ..... years, having sufficient bodily health and mental capacity to attend the public schools, and was on the ..... day of ....., 18 .., found wandering in the streets in said ..... of ....., a truant without any lawful occupation.

And, whereas, the said ..... on being brought before said justice, was immediately informed by said justice of said charge against h.. and of h.. right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had.

And, whereas, ....., the parent, guardian or master of said child was duly summoned to attend the examination of said child on said charge.

And, whereas, the said charge was then and there distinctly read and stated to the said ..... and h.. the said..... having been given a reasonable time to send for and advise with counsel, did then and there plead guilty to the said charge in the presence of and before said justice, and of h.. said parent, guardian or master.

And whereupon the said justices did thereupon adjudge and determine that the said ..... was guilty of the aforesaid charge and the said ..... was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that .. he the said ..... is a child of the age of ..... years having sufficient bodily health and mental capacity to attend the public schools, was, on the ..... day of ....., 18 .., found wandering in the streets of said ..... of ..... a truant without any lawful occupation.

And, whereas, after the said complaint was satisfactorily established, the said justice did require the said parent, guardian or master to enter into an engagement in writing to the ..... of ....., that he would restrain said child from so wandering about; would keep h.. in his own premises or in some lawful occupation and would cause h..... to be sent to some school at least four months in each year, until .. he becomes fourteen years old. And the said parent, guardian or master having refused or neglected within a reasonable time so to do, it was adjudged and determined by me that the said ..... should be committed to the alms-house of said county, there being no other places provided for h.. reception.

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said ..... into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper, are hereby commanded to receive the said ..... into your custody in the said alms-house, and ..... there safely keep until .. he shall be discharged according to law.

Given under my hand, at the ..... of ..... }  
aforesaid, this ..... day of ..... 18 . }

[Signature.]

## No. 321.

§ 888. Warrant to commit truant child, having no parent, guardian or master. Plea of Guilty.

COURT,  
COUNTY OF....., } ss.

In the name of the people of the state of New York:

to any sheriff, constable, marshal or policeman of the county of . . . . ., and to the superintendent and principal keeper of the alms-house of the said county, greeting:

Whereas, on the . . . . . day of . . . . ., 18 . . . . . was brought before me, . . . . ., a . . . . . justice of the peace in and for the . . . . ., and county of . . . . ., charged on the oath of . . . . ., which oath was believed by me, with being a vagrant, within the intent and meaning of the statute, and subdivision 8 of section 887 of the Code of Criminal Procedure, in that . . he is a child of the age of . . . . . years, having sufficient bodily health and mental capacity to attend the public schools, and was, on the . . . . . day of . . . . ., 18 . . . . ., found wandering in the streets in said . . . . . of . . . . ., a truant, without any lawful occupation.

And, whereas, said . . . . . has no parent, guardian or master, or no parent, guardian or master can be found.

And, whereas, said . . . . ., on being brought before said justice, was immediately informed by the said justice of said charge against him . . and of his . . right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had.

And, whereas, the said charge was then and there distinctly read and stated to the said . . . . ., and . . he, the said . . . . ., having been given a reasonable time to send for and advise with counsel, did then and there plead guilty to the said charge.

And, whereupon, the said justice did thereupon adjudge and determine that the said . . . . . was guilty of the aforesaid charge, and the said . . . . . was whereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that . . he, the said . . . . ., is a child of the age of . . . . . years, having sufficient bodily health and mental capacity to attend the public school, was, on the . . . . . day of . . . . ., 18 . . . . ., found wandering in the streets in said . . . . . of . . . . ., a truant, without any lawful occupation. It was adjudged and determined by said justice that the said . . . . . should be committed to the alms-house of said county, there being no other place provided for his . . reception.

Now, therefore, you, the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said . . . . into the custody of the said superintendent and principal keeper of said almshouse. And you, the said superintendent and principal keeper, are hereby commanded to receive the said . . . . . into your custody, in the said almshouse, and . . . . there safely keep until he shall be discharged according to law.

Given under my hand at the . . . . of . . . . . aforesaid, this . . . . day of . . . . .  
 . . . .

[Signature.]

### No. 322.

#### § 891. Certificate of conviction of Vagrant.

I certify that . . . ., having been brought before me, charged with being a vagrant, I have duly examined the charge, and that upon his own confession in my presence, (or "upon the testimony of . . ." etc., naming the witnesses), by which it appears that he is a person (pursuing the description contained in the subdivision of section 887, which is appropriate to the case), I have adjudged that he is a vagrant.

Dated at the town (or city) of . . . . ., the . . . . day of . . . . ., 18 . . . . .

Justice of the peace of the town  
 of . . . ., (or as the case may be.)

### No. 323.

#### § 892. Warrant to commit a vagrant after trial Plea, Not guilty.

. . . . . COURT, . . . . } ss:  
 COUNTY OF . . . . . }

In the name of the people of the state of New York:

to any sheriff, constable, marshal, or policeman in the county of . . . . ., and

to the superintendent and principal keeper of the almshouse and penitentiary of the said county, greeting :

Whereas, on the.....day of....., 18 ..,.....was brought before me,....., a justice of the peace in and for the.....county of....., charged on the oath of....., which oath was believed by me, the said justice, with, on this present day, at the.....of.....and being a vagrant within the intent and meaning of the statute.

And whereas the said justice, immediately and before any further proceedings were had, informed the said.....of the charge against him and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said....., who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon bear testimony on oath in support of said charge, and in defense thereof, and on behalf of said person.

And whereas the said testimony was given and evidence was had in the presence and the hearing of he said....., the said....., having previously thereto been allowed a reasonable time to send for and advise with counsel.

And whereupon the said justice did thereupon adjudge and determine that the said.....was guilty of the aforesaid charge, and the said.....was thereupon convicted of the offense aforesaid, to wit, of being a vagrant. in that..... the said....., on this present day, at the.....of.....aforesaid,..... was.....and is a vagrant within the intent and meaning of the statute; and it was adjudged and determined by me that the said....., who is not a notorious offender, should be committed to the almshouse of the said county of..... (or being a notorious offender and improper person to be sent to the almshouse, should be committed to and confined in the alms-house or penitentiary of said county for the term of....., at hard labor,)

Now, therefore, you the said sheriff, constable, marshall, or policeman, are commanded forthwith to convey and deliver the said.....into the custody of the said superintendent and principal keeper of the said alms-house or..... And you, the said superintendent and principal keeper, are hereby commanded to receive the said.....into your custody, in the said alms-house or..... for the term of.....at hard labor, and.....there safely keep until the expiration of the said.....)

Given under my hand, at the.....of.....aforesaid, this day.....of.....18 .

(Signature.)

#### No. 324.

#### § 892. Warrant to commit a vagrant. Plea of guilty.

..... COURT, } ss:  
COUNTY OF....., }

In the name of the people of the state of New York.  
To any sheriff, constable, marshal or policeman of the county of ....., and to the superintendent and principal keeper of the alms-house or ..... of the said county, greeting:

Whereas, on the ..... day of ..... 18 .., ..... was brought before me, ..... a justice of the peace in and for the ..... and county of ....., charged on the oath of ..... which oath was believed by me, the said justice, with, on this present day, at the ..... of ....., .....and being a vagrant within the intent and meaning of the statute.

And, whereas, the said justice immediately and before any further proceedings were had informed the said ..... of the charge against him and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said ..... and he, the said ..... was given a reasonable time to send for and advise with counsel; and, whereas, he, the said ..... did then and there plead guilty to the said charge, and in the presence of the said court, by said plea of guilty, did voluntarily admit and confess that he, the said ..... was and is a vagrant within the intent and meaning of the statute.



And whereupon the said justice did thereupon adjudge and determine that the said ..... was guilty of the aforesaid charge, and the said ..... was thereupon convicted of the offense aforesaid, to wit, of being a vagrant, in that ..... the said ..... was on this present day, at the ..... of ..... aforesaid, ..... was ..... and is a vagrant within the intent and meaning of the statute; and it was adjudged and determined by me that the said ..... who is not a notorious offender, should be committed to the alms-house of said county of ....., (or being a notorious offender and improper person to be sent to the alms-house, should be committed to and confined in the alms-house or ..... of said county for the term of ..... at hard labor.)

Now, therefore, you the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said ..... into the custody of the said superintendent and principal keeper of the said alms-house or ..... (And you, the said superintendent and principal keeper, or ..... are hereby commanded to receive the said ..... into your custody, in the said alms-house or ..... for the term of ..... at hard labor, and ..... there safely keep until the expiration of the said)

Given under my hand, at the ..... of ..... aforesaid, this ..... day of ..... 18 ..

[Signature.]

**No. 325.**

§ 893. Information against child begging, etc.

..... county of ....., ss:

..... .. being duly sworn, deposes and says: That he resides in ....., that on the ..... day of ....., 18 .., one ..... , a child of the age of ..... years, was found begging for alms and soliciting charity from door to door in the said ..... of ....., and was found begging for alms and soliciting charity in a street, highway and public place in said ....., to wit: ..... in that he

Taken, subscribed and sworn to before me this ..... day of ....., 18 ..

**No. 326.**

§ 893: Warrant against a child begging, etc.

COURT, } ss:  
COUNTY OF

In the name of the people of the state of New York : To any peace officer of the county of .....

Whereas, complaint has this day been made by ..... of the ..... of ... .., in the county of ....., on oath, before ..... a ..... justice of the said ....., that on the ..... day of ..... 18 .. at the ..... of ..... in said county, one ..... a child of the age of ..... years was found begging for alms and soliciting charity from door to door, and was found begging for alms and soliciting charity in a street, highway and public place in said ..... to wit: ..... against the peace of the people of the state of New York and the form of the statute in such case provided;

We therefor command you forthwith to take the body of the said ..... and bring h.. before the said ..... at the ..... in the said ..... of .... .., with this warrant, and a return of your doings thereon indorsed, to be dealt with according to law. Hereof fail not at your peril.

Witness the said ..... at the ..... of ..... in the county aforesaid, the ..... day of ..... 18 ....

.....  
(Signature.)

**No 327.**

§ 893. Warrant to commit a child found begging. Plea, Not guilty.

COURT, } ss:  
COUNTY OF .....

In the name of the people of the state of New York.

To any sheriff, constable. marshal or policeman in the county of ....., and

to the superintendent and principal keeper of the alms-house of the said county, greeting :

Whereas, on the.....day of....., 18 .., .....was brought before me,....., a..... justice of the peace in and for the.....and county of .....charged on the oath of....., which oath was believed by me, the said justice, with being a child of the age of.....years who was, on the .....day of....., 18 .., found begging for alms and soliciting charity from door to door in said ..... of .....and who was on the same day found begging for alms and soliciting charity in a street, highway and public place in said city, to wit :

And, whereas, the said justice, immediately and before any further proceedings were had, informed the said....of the charge against him, and of his right to the aid of counsel in every stage of the proceeding and the said charge was then and there distinctly read and stated to the said....., who then and there pleaded not guilty thereto, who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and in defense thereof and on behalf of said person.

And, whereas, the said testimony was given and evidence was had in the presence and hearing of the said....., he..., the said....., having previously thereto been allowed a reasonable time to send for and advise with counsel.

And whereupon the said justice did thereupon adjudge and determine that the said ..... was guilty of the aforesaid charge, and the said.....was thereupon convicted of the charge aforesaid, to wit, of being a child of the age of ... years, who was, on the ..... day of ....., 18 .., found begging for alms and soliciting charity from door to door in said ..... of....., and who was, on the same day, found begging for alms and soliciting charity in a street, highway and public place in said city, to wit :

And it was adjudged and determined by me that the said..... should be committed to the alms-house of the said county of.....to be kept and employed and instructed in useful labor until discharged by the county superintendent of the poor, or bound out as an apprentice by him as prescribed by special statutes.

Now, therefore, you, the said sheriff, constable, marshal or policeman, are commanded forthwith to convey and deliver the said.....into the custody of the said superintendent and principal keeper of the said alms-house. And you, the said superintendent and principal keeper, are hereby commanded to receive the said.....into your custody, in the said alms-house, and keep him employed and instructed in useful labor until discharged by the county superintendent of the poor, or bound out as an apprentice by him, as prescribed by special statutes.

Given under my hand at the.....of..... aforesaid, this ..... day of ....., 18 ..

.....  
(Signature)

### No. 328.

§ 803. Warrant to commit a child found begging.  
Plea, Guilty.

.....COURT,.... } ss :  
COUNTY OF .....

In the name of the people of the state of New York :

To any sheriff, constable, marshal or policeman in the county of ....., and to the superintendent and principal keeper of the alms-house of the said county, greeting :

Whereas, on the ..... day of ....., 18 .., ..... was brought before me, ..... a justice of the peace in and for the ..... and county of ....., ..... charged on the oath of ....., which oath was believed by me, the said justice, with being a child of the age of ..... years, who was on the ..... day of ..... 18 .., found begging for alms, and soliciting charity from door to door in said ..... of ....., and who was on the same day found begging for alms and soliciting charity in a street, highway and public place in said city, to wit :

And, whereas, the said justice immediately and before any further proceedings

ere had, informed the said ..... of the charge against h .... and of ..... right to the aid of counsel in every stage of the proceedings, and the id charge was then and there distinctly read and stated to the said ....., and .. he, the said ....., was given a reasonable time to send for and ad-se with counsel; And, whereas, he, the said ..... did then and there plead ilty to the said charge, and in the presence of the said court.

And whereupon the said justice did thereupon adjudge and determine that the id ..... was guilty of the aforesaid charge, and the said ..... was there-pon convicted of the offense aforesaid, to wit, of being a child of the age of ..... years, who was, on the ..... day of ..... 18 .., found begging or alms and soliciting charity from door to door in said ..... of ....., and who was on the same day found begging for alms and soliciting charity in street, highway and public place in said city, to wit: ..... And it was ad-judged and determined by me that the said ..... should be committed to the ms-house of said county of ....., to be kept employed and instructed in seful labor until discharged by the county superintendent of the poor, or bound it as an apprentice by him as prescribed by special statutes.

Now, therefore, you the said sheriff, constable, marshal or policeman, are mmanded forthwith to convey and deliver the ..... into the custody of the id superintendent and principal keeper of the said alms-house. And you, the id superintendent and principal keeper, are hereby commanded to receive the id ..... into your custody, in the said alms-house, and keep h. employed and structed in useful labor until discharged by the county superintendent of the or, or bound out as an apprentice by him as prescribed by special statutes.

Given under my hand, at the ..... of ..... aforesaid, this ..... day ..... 18 .

(Signature.)

No. 329.

§ 899. Subd. 1. Affidavit for disorderly person.

..... COURT,.... } ss :  
OUNTY OF.....,

....., of ..... in the said ..... of ....., being duly sworn, says, at she is the wife of ..... of said ....., that she complains of her said usband of being a disorderly person, according to section 899 of the Code of riminal Procedure, for that he has actually abandoned his wife and children ithout adequate support, and has left them in danger of becoming a burden pon the public, and he neglects to provide for them according to his means. eponent further says that for several days last past he has actually abandoned is family without adequate support, and left them in danger of becoming a urden upon the public, and that such family is not possessed of property or of e means of obtaining a livelihood without the aid of such husband.

taken and sworn to this ..... day {  
of ....., 18 ., before me.

(Signature.)

No. 330.

§ 899. Subd. 1. Warrant for disorderly person.

..... COURT,.... } ss:  
OUNTY OF.....,

In the name of the people of the state of New York. To any peace officer in he county of .....

Whereas, complaint, and on oath, has this day been duly made by ..... f the ..... of ....., in the county of ....., before me, ..... justice ..... of the said ..... of ....., that on the ..... ay of ..... 18 , ..... at the ..... of ..... in said county, nd for several days last past, one ..... was and is a disorderly person, for hat he has actually abandoned his wife and children without adequate support, nd has left his wife and children in danger of becoming a burden upon the ublic; and has neglected to provide for his wife and children according to his

means, against the peace of the people of the state of New York and the form of the statute in such case provided.

We, therefore, command you forthwith to apprehend and take the body of the said ..... and bring him before the said ....., at the ..... in the said ..... of ..... , for examination, with this warrant and a return of your doings thereon indorsed, to answer the said complaint, and to be dealt with according to law. Hereof fail not at your peril.

Witness, the said ....., at the ..... of ... , in the county aforesaid, ..... the ..... day of ..... 18 .

(Signature.)

By virtue of the within warrant, I have arrested the within named ..... and now have him before the magistrate by whom this warrant was issued.

Dated ....., 18 .

### No. 331.

§ 889, subd. 1, 2. Recognizance of disorderly person.

#### POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss:  
COUNTY OF .....

Be it remembered that on this.....day of....., in the year of our Lord one thousand eight hundred and ....., of the....., in said county, and....., both of the same place, personally came before me..... one of the justices of the peace in and for the....., or police justice of the said....., and severally and respectively acknowledged themselves to be indebted to the people of the State of New York, in the sum of.....hundred dollars each, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the conditions following, viz:

Whereas, On the.....day of....., 18 ....., .....did make complaint on oath before the said....., one of the justices of said....., or police justice of the....., against....., in which complaint the said..... alleges that the said....., and the said justice having caused the said.....to be brought before him and examined touching the offense in said complaint alleged, and it appearing to the said justice, upon such examination, by the confession of said....., and by competent testimony, that ... was guilty of the offense in said complaint alleged, and was and is a disorderly person, and, for the reasons set forth in said complaint, the said justice did thereupon require the said.....to enter into a recognizance with..... suret....., approved by the said justice, in the sum of..... hundred dollars, that he will support his wife and children, and will indemnify the..... against their becoming within one year chargeable upon the public.

Now, therefore, we hereby undertake that the said.....will support his wife and children, and will indemnify the.....against their becoming within one year chargeable upon the public, or we will pay to the people of the State of New York the sum of.....hundred dollars.

Subscribed and acknowledged before }  
me this.....day of.... , 18.... }

### No. 332.

§ 899, subd. 1-2. Recognizance for support of wife and children of disorderly person taken after commitment.

#### POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss:  
COUNTY OF.....

Be it remembered, that on this.....day of....., 18 .., .....

of the.....in said county, and.....of the same place, personally came before us,..... and.....two of the justices of the peace (or police justices) of the said. ....county, and jointly and severally acknowledged themselves to be indebted to the people of the State of New York, in the sum of .....hundred dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the conditions following:

Whereas,.....was on the.....day of....., 18 ....., duly convicted before.....justice of the peace (or police justice) of said..... upon the.....in which complaint the said.....alleges that the said ..... and the said justice having caused the said..... to be brought before him and examined touching the offense in said complaint alleged, and it appearing to the said justice, upon such examination, and by competent testimony that.....was guilty of the offense in said complaint alleged, and was and is a disorderly person, and, for the reasons set forth in said complaint, the said justice did thereupon require the said.... to enter into a recognizance with.....suret.....in the sum of... ..hundred dollars, for the good behavior of the said..... for the space of one year.

Now, therefore, we hereby undertake that the said ..... will be of good behavior for the space of one year next ensuing the date hereof, and not be guilty of the acts set forth in said complaint, or we will pay to the people of the State of New York, the sum of ..... hundred dollars.

Subscribed and acknowledged before me, }  
..this ..... day of ..... 18 .. }

.....  
.....

**No. 333.**

**Commitment in default of sureties to keep the peace.**

**CITY OF NEWBURGH,** } ss:  
**COUNTY OF ORANGE,** }

*To any Constable or other Officer of the Peace of said County:*

Whereas, Complaint in writing and on oath was made before me, ..... Recorder of said City of Newburgh, by ..... that ..... of ..... had threatened to do h... bodily harm, to wit.....and that he was in fear that said .....would do h... bodily harm as threatened by h... as aforesaid, and whereas, the said .....was this day brought before me by a warrant duly issued under my hand, and it having appeared to me by said complaint, and the examination of said ..... (and witnesses) that said ..... had made such threats, and that there was probable cause to believe that ..... he would do h... bodily harm as threatened, *I did therefore* require the said ..... to enter into a recognizance with sufficient sureties in the penalty of ..... dollars, conditioned for his appearance at the next term of the County Court to be held in said County, and not to depart the same without leave, and meanwhile to keep the peace toward the people of the State of New York, and particularly towards the said . . . . ., and the said .... having failed or refused, and still failing to enter into such recognizance and to find such sureties.

You are therefore hereby commanded, in the name of the People of the State of New York, to convey the said .... to the Common Jail of the County of Orange, the keeper whereof is hereby required to detain h.... therein for the term of ....., at hard labor, or until .... he shall enter into such recognizance as aforesaid, or be thence discharged according to law.

Witness my hand at the City of Newburgh, aforesaid, this . . . . . day of ..... , 18

C. L. WARING,  
Recorder of the City of Newburgh.

## No. 334.

Recognizance for good behavior of disorderly person—taken after commitment.

## POLICE COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss:  
COUNTY OF ..... }

Be it remembered, that on this ... day of ..... 18 ..... of the ..... in said county, and ..... of the same place, personally came before us .... of the same ..... and ..... two of the justices of the peace [or police justices] of the said ..... and county, and jointly and severally acknowledged themselves to be indebted to the people of the State of New York, in manner following, in the sum of ..... hundred dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

Whereas ..... was on the ..... day of ..... 18 ..... duly convicted before ..... justice of the peace (or police justice) of said ..... upon the complaint made before him, of the offense of being a disorderly person; for that the said.....

And prior to such conviction the said justice did require of the said ..... that ..... he give security by a written undertaking with ..... surety ..... approved by him, in the sum of ..... hundred dollars for his good behavior for the space of one year; and not giving the said undertaking the said ..... was by the said justice convicted of being a disorderly person as aforesaid, and a record of said conviction was duly made by the said justice, and signed by him with his name of office, and filed in the office of the clerk of the county of ..... and said ..... was, by a warrant signed by the said justice, with his name of office, committed to the county jail of the said county of ..... for the term of ..... at hard labor, or until he give the said security required as aforesaid, and still remains in the county jail of said county; and application having been made to us, the said two justices, to take such undertaking so as aforesaid required of and on behalf of the said .....

Now, therefore, we hereby undertake that the said ..... will be of good behavior for the space of one year from the time of the said conviction, and shall not, during such time, be guilty of any of the acts ..... he was so as aforesaid convicted of being a disorderly person, or we will pay to the people of the State of New York, the said sum of ... hundred dollars.

Subscribed and acknowledged before us, the }  
day and year first above written.

.....  
Justices of the Peace (or Police Justice).

## No. 335.

## § 902. Certificate of Conviction—Disorderly Person.

I certify that ..... having been brought before me charged with being a disorderly person, I have duly examined the charge, and that upon his own confession in my presence, (or "upon the testimony of ..... etc., naming the witnesses), by which it appears that he is a (pursuing the description contained in the subdivision of section 899, which is appropriate to the case), I have adjudged that he is a disorderly person.

Dated at the town (or city) of ....., the ..... day of ....., 18....

Justice of the peace of the town  
of ....., (or as the case may be.)

## No. 336.

## § 915. Application for order to compel the support of poor relative.

To the Court of Sessions of the county of.....

We, the overseers of the poor of the town of ....., in the county of ....., and state of New York, respectfully show to the court that one..... is an indigent person and without the means of necessary support, and is a charge upon the town of....., where the said..... resides; that .... is a son of said..... and is also a resident of the same place, who, although perfectly able, refuses to support the said....., or to contribute thereto. Your petitioners, therefore, pray that an order may issue out of this court, directed to the said....., compelling him, the said....., to provide for the support and maintenance of the said..... forthwith.

Dated at ....., this ..... day of ....., 18..

Overseers of the poor of the town of.....

### No. 337.

§ 915, *Notice to person liable to support relative.*

To.....

SIR.—Please to take notice that the undersigned, overseers of the poor of the town of ....., will apply to the county court of the county of ....., at the opening of court on the .... day of ....., at the court-house in the county of ....., for an order compelling you to support and maintain one ....., and for such other relief as may be just.

Dated at ....., this ..... day of ....., 18...

Overseers of the poor, etc.

### No. 338.

§ 916. *Order compelling relative to support poor person.*

COUNTY COURT—COUNTY OF .....

IN THE MATTER OF THE APPLICATION OF THE  
OVERSEERS OF THE POOR IN BEHALF OF....  
A POOR PERSON.

At a term of the county court of the county of....., held at the court-house in and for the county of..... on the..... day of..... 18 ..

Present—Hon....., Judge of..... county.

On reading and filing the application of..... and....., overseers of the poor of..... county, and on due proof of the service of notice of said application upon....., and after hearing the proofs and allegations of the respective parties, it is hereby ordered that the said..... pay to the said overseers, the weekly sum of..... dollars each and every week, for the support and maintenance of the said ....., so long as he shall remain and be a charge upon the said town of..... as aforesaid; and that he also pay to said overseers the sum of..... dollars, as and for their costs and expenses in procuring this order.

County Judge.

### No. 339.

§ 927. *Complainst against apprentice or servant.*

STATE OF NEW YORK, }  
COUNTY OF..... } ss:

....., being duly sworn, says that he resides in the city of .... in said county .....; that..... is an apprentice lawfully bound to serve him as prescribed by the special statutes in such cases made and provided; that the said..... willfully absents himself from duty without the consent of his master, and refuses to serve this deponent according to his duty.



Subscribed and sworn before }  
me, this ..... day of .. .., 18... }

Justice of the Peace (or other officer named in § 926).

No. 339a.  
§ 931. Complaint against Master.

STATE OF NEW YORK, }  
COUNTY OF..... } ss.:  
....., being duly sworn, says that he resides in the ..... of .....  
in said county, and is the apprentice [or servant] of one ....., lawfully  
bound to him to service as prescribed by the special statutes in such cases made  
and provided; that the said ..... is guilty of cruelty to deponent [or mis-  
usage, etc. One of the grounds enumerated in section 930. State the facts  
showing the truth of such charge.]  
Jurat.

No. 339b.  
§ 931. Summons to Master.

STATE OF NEW YORK, }  
COUNTY OF..... } ss.:  
IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:  
To .....:  
Whereas, complaint has been made this day to me, a justice of the peace of  
the town of ....., in said county, by ..... against you, that you are  
guilty of cruelty to ....., who is your lawfully bound apprentice [name  
the ground shown in the complaint]:  
You are hereby summoned to appear before me, at my office in the .....  
of ..... in said county, on the ..... day of ....., 18..., at .....  
o'clock in the .....noon of said day to answer the complaint made and filed  
in this matter.  
Witness the said ....., at the ... of ....., in the county afore-  
said, the ..... day of ... .., 18...  
.....  
Justice of the Peace.

No. 339c.  
§ 935. Undertaking for Appearance.

STATE OF NEW YORK, }  
COUNTY OF..... } ss.:  
Whereas, complaint has been duly made to ....., a justice of the peace  
of said county by ..... that one ..... is guilty of cruelty to .....  
his lawfully bound apprentice under a contract whereby ..... has received  
(or is entitled to receive) a sum of money with him as a compensation for his  
instruction;  
And whereas, the said ..... has been brought before the said justice on  
a warrant issued on such complaint, and such complaint cannot be com-  
promised;  
Now, therefore, we, ..... of the ..... of ....., in said county,  
by occupation a ....., and ..... of the .... in said county, by  
occupation, a ....., are held and firmly bound unto the people of the  
state of New York in the sum of ..... dollars, for the payment of which  
sum we jointly and severally bind ourselves, our and each of our heirs, execu-  
tors and administrators firmly by these presents.  
The condition of this obligation is such that if the above bounden ....  
appear at the next term of county court of the county of ....., and there  
render himself amenable to the orders and process of the court, then this under-  
taking to be void; otherwise to remain in full force and effect.  
Dated at ....., this ..... day of ....., 18...  
(Acknowledgment and justification clauses.)

.....  
.....  
.....

**No. 339d.**

§ 937. Form of Undertaking under Section 935 can readily be adapted to the Requirements of this Section.

**No. 340.**

§ 928. Warrant for arrest of apprentice.

STATE OF NEW YORK, } ss:  
COUNTY OF .....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To any constable [or other peace officer] of the county [or city] of .....

Whereas, Complaint has been this day made to me ..... a justice of the peace of the town [or city] of ..... in said county by ..... against one ..... a person regularly apprenticed to the said ..... according to law, showing that the said ..... has willfully absented himself from duty and refuses longer to serve the said .....

Now this is to command you that you arrest the said ..... and forthwith have him before me at my office in the ..... of ..... on the ..... day .....

Dated at ..... this ..... day of ..... 18 ..

.....  
Justice of the Peace.

**No. 341.**

Notice of application of motion to have case sent from Special Sessions to Grand Jury under § 57.

To ..... District Attorney of the County of .....

Take notice, that on the ..... day of ....., 18 ..... upon the complaint of ..... I was arrested for assault in the third degree alleged to have been committed upon the person of the said ..... in the town of ..... Co. N. Y. That ..... a justice of the peace of the town of ..... issued the warrant, and I was brought before him and plead not guilty, whereupon the case was adjourned until the ..... day of ....., 18 ....., meanwhile I am held to bail upon said charge. You will therefore take notice that the charge made against me is assault in the third degree of which the justice has exclusive jurisdiction as provided by section 56 of the Code of Criminal Procedure and that I shall apply to the County Judge of the County of ..... at his office in ..... N. Y. on the ..... day of ....., 18 ....., at ..... m. for a certificate that it is reasonable that such charge be prosecuted by indictment, and fixing the sum in which I shall be held to bail to appear before the Grand Jury as provided by Section 57 of the Code of Criminal Procedure.

Dated ..... N. Y., ....., 18 .....

.....  
Def't.

.....  
Att'y.

**No. 342.**

Affidavit on motion for transfer under § 57.

COURT OF SPECIAL SESSIONS, ..... COUNTY.

The People of the State of New York,  
against

STATE OF NEW YORK, } ss:  
COUNTY OF ....., }

..... of ... ..... in said county being duly sworn says he is the defend-

ant named in the above entitled proceedings. That deponent was arrested herein at said .....on the ..... day of ....., 18    upon a warrant issued by ....., Esq. a justice of the peace of the town of ..... in said County of ..... (a copy of which warrant is hereto annexed) in which warrant deponent was charged with assault in the third degree upon the person of one ..... That under said warrant deponent was on said ..... day of ... .. , arraigned before said justice and entered a plea of "not guilty" thereto, and asked for an examination thereunder whereupon such examination was upon consent of parties hereto adjourned until the .... day of ..... at the office of said justice at which time witnesses in behalf of the complainant were examined. That upon such examination deponent was not examined and witnesses in behalf of deponent were not produced and at the conclusion thereof said justice held deponent for trial before said justice under the charge stated in said warrant, and fixed the .... day of ....., at 9 o'clock A. M. as the day and hour for such trial.

Deponent further says that he is advised by ..... his counsel herein and verily believes that the offense charged against him herein is a misdemeanor, and that upon conviction thereunder deponent could be subjected to imprisonment for a term of ..... or to a fine of ..... or both, and that deponent is also advised by his said counsel and verily believes that this proceeding and any trial therein involves the decision of very important questions of law which decisions should be made by a judge of a court of record and that the questions of fact to be presented in this proceeding and upon any trial hereof should be passed upon by a jury of disinterested persons and persons who are not prejudiced against deponent from ex parte statements of this matter from the complainant and his witnesses, and temporary friends of complainant whose ill-feeling toward this deponent for both political and personal reasons are obvious and well known in said town of .....

That by reason of such ex parte statements and such ill-feeling upon the part of those whom deponent is informed are prosecuting and aiding in the prosecution of this matter, popular prejudice and ill-feeling to a considerable extent have been aroused against deponent in said town of ..... and that from exaggerated statements as to the injury to the complainant ..... and the indignity to the complainant ..... deponent verily believes that he cannot, and is advised by his counsel and from such advise verily believes that he cannot secure either a fair trial herein or a fair and unprejudiced and unbiased jury herein in said town of ..... or in the court in which this matter is pending in said town. Deponent further says that he is advised by his said counsel ..... Esq., who resides at ....., to whom he has fully and fairly stated his defense in this proceeding that he has a good and substantial defense upon the merits to the charge stated in said warrant as he is advised by his said counsel after such statement made as aforesaid and as deponent verily believes.

Deponent further says that he is advised by his said counsel and verily believes that from the facts aforesaid and from the testimony adduced on said examination that this is a proper case to be presented to a Grand Jury of said county of ..... for indictment and that his said counsel intends in good faith in behalf of deponent to make application to the County Judge of ..... County or to a Justice of the Supreme Court for a certificate from such County Judge or from a Justice of the Supreme Court directing that all proceedings herein be transferred from said Special Sessions, and that the charge herein against the defendant be prosecuted by an indictment pursuant to the law and practice in such cases made and provided.

Deponent further says that no previous application has been made for the certificate or relief now asked for.

Further deponent saith not.

Sworn to before me,        }  
                                      , 18 . }

.....  
.....  
Notary Public.

No. 343.

§ 57 Order granting application on motion under.

Court of Special Sessions,

Town of....., County.....

THE PEOPLE OF THE STATE OF NEW YORK }  
Against  
.....

Upon the annexed affidavit, of....., the defendant herein verified..... and notice of application herefor, returnable at this time, for a certificate that it is reasonable that the charge against the defendant for assault in the third degree upon the person of....., be prosecuted by indictment, with proof of their service of such notice upon the District Attorney of....., County, and upon hearing in support of such application, on behalf of the defendant, and .....in opposition thereto, and due deliberation having been had thereon.

I do hereby certify that it is reasonable that the charge against the defendant, set forth in the complaint and warrant herein and upon which he has been arrested, be prosecuted by indictment, and I do hereby order that the defendant shall give bail with sufficient sureties in the sum of.....dollars, to appear before the next Grand Jury of the County of.....

It is further ordered that upon the filing of this certificate, with the magistrate who issued said warrant, and before whom the said proceedings are pending, and upon the defendants giving bail in the sum herein before fixed, to appear before the grand jury, all proceedings herein before said magistrate.....be and the same are hereby stayed and the said magistrate shall within the time required by law make a return herein to the district attorney of the County of .... in accordance with the provisions of sections 57 of the Code of Criminal Procedure of the State of New York.

Dated.....18 ..

No. 344.

Application for Habeas Corpus.

To Hon.....

The petition of.....respectfully shows that.....is imprisoned or restrained in h.....† liberty at.....by.....that he has not been committed and is not detained by virtue of any judgemet decree, final order, or process issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceed- ings in such a court; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish h.....for a contempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order; that the cause or pretence of the imprisonment or restraint.....according to the best know- ledge and belief of your petitioner, is ..... That a copy of the mandate by virtue of which such imprisonment or restraint is claimed to be made, is hereto annexed. Wherefore your petitioner prays that a Habeas Corpus issue, directed to said.....commanding ..h.....that...h. ...have the body of said .....by..h.....imprisoned and detained, together with the cause of such imprisonment and detention, before.....at the.....

Dated the.....day of.....18 ..

STATE OF NEW YORK { ss  
COUNTY OF..... }

...being duly sworn, says, that he has heard the foregoing petition read and knows the contents thereof, and that he believes it to be true.

Subscribed and sworn to, before me, {  
the.....day of.....18 .. }

## No. 345.

## Writ of Habeas Corpus.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

'To.....

We command you that you have the body of.....cause of such imprisonment and detention by whatsoever name the said.....is called or charged, before.....at.....to do and receive what shall then and there be considered concerning the said.....and have you then there this writ.

Witness Hon. ....one of the.....Court of.....the..... day of  
.....one thousand eight hundred and.....

..... Clerk.

..... Attorney.

Endorsement in writ of Habeas Corpus.

THE PEOPLE, *EX REL*,  
Against

WRIT OF HABEAS CORPUS.

.....  
Attorney for Petitioner.

Office address,.....

New York.

Post-office address.....

New York.

Allowed\* this.....day of.....18....

## No. 346.

Application by district attorney for writ of habeas corpus  
to bring prisoner to testify.

THE PEOPLE  
against

.....

.....county, ss:

.....Being duly sworn, says that he is the district attorney of.....county, in the State of New York, and that said action is brought in the court of.....in said county, and is triable in the county of.....; that the crime charged is burglary in the third degree. That the said.....is a material and necessary witness for the people on the trial of this action, and that without the benefit of his testimony he cannot safely proceed to the trial of said action, and that said trial will take place and is noticed for the.....day of.... .., 18 ..

That said.....is now a prisoner, and is now confined in the ..... penitentiary at ....., N. Y. under a sentence for felony, to wit: burglary in the third degree.

Sworn to before me, this.....day of.....18 ..

.....

.....

Attorney Public.

.....County.

## No. 347.

Writ of habeas corpus to bring prisoner to testify.

THE PEOPLE, OF THE STATE OF NEW YORK  
*ex rel.*

.....

To the superintendent of the.....penitentiary at....., N. Y., greeting:

We command you that you have the body of.....detained in our penitentiary at....., N. Y., under your custody, as it is said, under safe and secure conduct at or before a court of .....to be held in and for the county of..... at the city of....., N. Y., in the court-house therein on the.....day of ....., 18 .., at .....o'clock in the....noon, to testify all and singular,

what he may know in a certain action now pending in said court, then and there to be tried between the people of the State of New York, plaintiff, and..... and....., defendants.

And....immediately after the said....shall then and there have given his testimony before said court of.....in the said action, that you return him to our said penitentiary under safe and secure conduct, and have you then and there this writ.

Witness, Hon....., one of the justices of the supreme court of the State of New York, at....., N, Y., this....day of....., 18 ..

.....  
Clerk.

.....  
District Attorney,.....County.  
**Endorsement**—Allowed this.....upon the application of.....district attorney of.....county.

.....  
Justice Sup. Court.

No. 348.

§ 618. Affidavit by district attorney for order of attendance of witnesses out of the county.

.....County, ss:  
.....being duly sworn, deposes and says that he is the district attorney of ..... New York State: that the foregoing witnesses are material and necessary upon a trial to be held at ....., at the next term of the supreme court of ... county, wherein the people are complainants and ..... is defendant. That the said witnesses are as follows: ..... That said witnesses reside at ..... and are out of the County of.....

Sworn to before me this {  
....day of ....., 18... }

.....  
District-Attorney.

.....  
Notary Public, ..... County.

**Endorsement on subpoena.**—It is hereby ordered that the within named witnesses ..... attend at the time, court and place, and in the action, as is in said subpoena set forth.

.....  
Justice Sup. Court.

No. 349.

§ 510. Order declaring defendant an habitual criminal.

At a term of the County Court, held at the City of ....., in and for the county of ....., commencing on the .... of ....., 18...  
**Present**—....., County Judge.

THE PEOPLE OF THE STATE OF NEW YORK, }  
AGAINST } ..... 18...

The defendant, ....., having been duly convicted, at the present term of Court, of a felony, to wit: petit larceny, 2d offense, and he having been sentenced by said Court to be imprisoned at hard labor in the Albany penitentiary for the term of four years, and it appearing by proper evidence to the satisfaction of said Court that before such conviction the said ..... had been convicted in the State of New York of a felony, to wit: of grand larceny.

Now, on motion of ....., District Attorney of ..... county, it is ordered that the said ..... be and he hereby is, in addition to the punishment above mentioned, adjudged to be an "Habitual Criminal."

STATE OF NEW YORK, } ss:  
 .....COUNTY CLERK'S OFFICE, }

I, ....., clerk of the County of ....., and of the Supreme and County Courts therein, which are courts of record, do hereby certify that I have compared the foregoing copy of judgment entered ....., 18..., with the original thereof, now remaining on record in this office; and that the same is a correct copy of such original, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County and Court, at ....., this .... day of ....., 18....

....., Clerk.

**No. 350.**

§ 600. *Order for commitment after forfeiture of bail*  
 [Name of Court.]

STATE OF NEW YORK, } ss.:  
 COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To any sheriff, constable, marshal or policeman of this State:

Whereas, It appears to the satisfaction of the court that ..... was indicted by the grand jury of the county of ..... on the ..... day of ..... for the crime of ....., and was duly recognized to appear at the court of ..... held in and for the county of ....., at ....., on the ..... day of.....

And Whereas, It also appears that he wholly failed and made default in appearing;

Now this is to command you forthwith to arrest the said ..... and to deliver his body to the sheriff of the county of ....., to be detained until legally discharged.

Dated at ....., this ..... day of ....., 18 ..

.....  
 Police Justice (or Justice of the Peace).

**No. 351.**

§ 363. *Challenge to the panel*

CRIMINAL TERM OF SUPREME COURT—..... COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK }  
 against  
 .....

The defendant, ....., hereby challenges the panel returned for present term of this court, on the following grounds:

First. That the sheriff of ..... county intentionally omitted to summon ..... of ..... who was regularly drawn as a juror for the present term of this court.

Second. [State any respect in which the drawing and return of the jury was not according to the forms of the Code of Civil Procedure, whereby the defendant was prejudiced.]

Dated, etc.

.....  
 Attorney for Defendant

**No. 352.**

§ 993. *Warrant to commit a disorderly person for not giving security to support his wife and children, etc.*

JUSTICES' COURT (OR OTHER COURT).

STATE OF NEW YORK, } ss.:  
 COUNTY OF.....

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To

Whereas, On the ..... day of ..... was brought before me, ....., one of the justices of the peace, in and for the ..... and county of ....., and police justice of said city, charged upon the complaint, on oath, of ..... with having on ..... day of ....., at the ..... aforesaid, been a disorderly person, for that the said.....

And, whereas, The said justice immediately, and before any further proceed-



ings were had, informed the said ..... of the charges against him and of his right to the aid of counsel in every stage of the proceedings, and the said charge was then and there distinctly read and stated to the said ....., who then and there pleaded not guilty thereto (or if he pleads guilty, the said ..... was hereupon convicted of the offense aforesaid, of being a disorderly person, in that he, the said ..... at the ..... aforesaid, on the ..... day of ..... 3.. did.....) who was then and there tried upon the said charge by the said justice, who did thereupon hear testimony on oath in support of said charge, and a defense thereof, and on behalf of the said .....

*And, Whereas,* The said testimony was given and evidence had in the presence and hearing of the said ..... he, the said ..... having previously hereto been allowed a reasonable time to send for and advice with counsel ;

*And Whereas,* The said justice did thereupon adjudge and determine that the said ..... was guilty of the aforesaid charge, and the said ..... was thereupon duly convicted of the offense aforesaid, to wit, of being a disorderly person, that the said ..... at the ..... aforesaid on the said ..... day of ..... did .....

*And Whereas,* Prior to such conviction, the said ..... was required to give security by a written undertaking with ..... suret....., in the sum of ..... hundred dollars; that he would support his wife and children, and would indemnify the ..... against their becoming within one year chargeable upon the public; and inasmuch as the said ..... did not give the said undertaking required as aforesaid, the said ..... was by the said justice convicted of being a disorderly person as aforesaid, and the said justice having duly made up and signed by him with his name of office, and immediately filed in the office of the clerk of the county of ..... a record of such conviction of the said ... ..

These are, therefore, to command you, the said constable, marshal or policeman, forthwith to carry and deliver the said ..... into the custody of the said sheriff; and you, the said sheriff, are hereby commanded to receive the said ..... into your custody in the county ..... of said county, and there safely keep him in said county jail for the term of ..... hard labor, or until he give the said security required as aforesaid.

Given, under my hand, at the ..... aforesaid, this .... day of .....

.....  
Justice of the Peace (or Police Justice.)

### No. 353.

*Information for wrongs affecting public moneys, etc.*

STATE OF NEW YORK, { ss.:  
COUNTY OF..... }

....., being duly sworn, deposes and says that he resides in the .....  
[.....]; that one ..... with intent to defraud, did wrongfully obtain, receive, convert, pay out and dispose of, or who, with like intent, by willfully saying, allowing or auditing a false or unjust claim, or did aid or abet ..... in wrongfully obtaining, receiving, converting, paying out or disposing of money, funds, credits and property held or owned by this State, or held or owned, officially or otherwise, for or on behalf of a public or government interest, by a municipal or other public corporation, board, officer, agency or agent of a city, county, town, village and civil division, subdivision, department or portion of this State, to wit: ..... by.....  
Subscribed and sworn before me, {  
this ..... day of ..... }

.....  
.....

### No. 354.

§ 605. *Undertaking of bail upon recommitment.*

..... COURT, { ss.:  
COUNTY OF..... }

An order having been made on the ..... day of ..... 18 .. by the court [.....] that ..... be admitted to bail in the sum of ..... dollars, in an action pending in that court against him in behalf of the people of the State of New York, upon an ..... we ..... defendant ..... surety of ..... in the county of ..... State of New York, by occupation a ..... and ..... surety of ..... in the county of ..... State of New York, by occu-

pation a ..... hereby jointly and severally undertake that the above-named  
 ..... shall appear in that or any other court in which his appearance may be  
 lawfully required upon that ..... and shall at all times render himself  
 amenable to its orders and process, and appear for judgment and surrender  
 himself in execution thereof, or if he fail to perform either of these conditions,  
 that we will pay to the people of the State of New York, the sum of .....  
 dollars.

Dated at ..... this ..... day of ..... 18 ..

In the presence of .....

.....  
*Police Justice (or Justice of the Peace).*  
 (Justification of sureties as in No. 117.)

### No. 355.

#### § 68. Albany Special Sessions. Order for Bench Warrant.

At a court of special sessions, held at the City Hall, in the city of Albany,  
 on the ..... day of ....., 18..

Present — Hon. ...., Recorder.

THE PEOPLE }  
           *vs.* }  
 ..... }

The above named having neglected to appear before this court, agreeably to  
 a recognizance given by him to appear thereat. Now, on motion of .....,  
 district attorney, it is ordered that a warrant issue for the arrest of said  
 ....., directing the officer executing the same to bring the said...  
 before this court, if the court be then in session, and if the court is not then in  
 session, that the said officer commit the said ..... to the common jail of  
 Albany county, there to remain until delivered by due course of law.

### No. 356.

#### § 68. Bench Warrant.

CITY OF ALBANY, }  
 COURT OF SPECIAL SESSIONS. }

To the sheriff of the county of Albany, the constables of the city of Albany,  
 the members of the police force of the city of Albany, and to the special offi-  
 cers of the district attorney of Albany county, and to each of you, and to the  
 keeper of the common jail of the city of Albany :

The people of the state of New York command you take ...., who was  
 duly recognized pursuant to law, to appear in our court of special sessions of  
 the city of Albany, to answer to a complaint for ..... triable therein, and  
 who has neglected to appear thereat, agreeably to the requirements of such  
 recognizance, and forthwith bring h.... before our said court, at the City  
 Hall, in the city of Albany, in said county, if our said court shall be at the  
 time of such arrest in se-sion, together with this warrant; but if the said court  
 be not in session, you are hereby commanded to commit the said .... to  
 the common jail of the county of Albany, there to remain till h.... be de-  
 livered by the due course of law.

Witness: Hon. ...., recorder of the city of Albany, at the City  
 Hall, in the city of Albany, this ..... day of ....., 18..

....., Clerk.

### No. 357.

#### § 148. Information for Embezzlement.

....., county of ... .., ss.:

....., being duly sworn, deposes and says: That he resides in the  
 ..... of .....; that on or about the ... .. day of ...., 18..  
 at the ..... of ....., in said county, one ..... being a servant or  
 agent of ..... and not an apprentice, nor within the age of eighteen years,  
 did feloniously embezzle, and convert to his own use, without the assent of the  
 said ... .., the property of the said ..... which had come into the pos-  
 session of said ..... as such servant or agent by

Taken, subscribed and sworn to before }

me, this ..... day of ....., 18.. }

[Signature.]

.....  
 Justice of the Peace.

**No. 358.****§ 151. Warrant of Commitment.**

OF NEW YORK, } ss.:  
 COUNTY OF.....

name of the people of the State of New York:  
 by sheriff, constable, etc.:

..... has this day been duly examined, tried and convicted be-  
 ..... one of the justices of the peace of the town of ....., in  
 county, upon the information or oath of ..... and on competent testi-  
 f having been intoxicated in a public place in said town of .....,  
 to the provisions of section 35 of an act entitled "An act to revise and  
 amend the laws regulating the sale of intoxicating liquors," passed April

whereas, upon such conviction, he was adjudged to pay a fine of  
 ..... dollars, and ..... dollars costs, and in default thereof to be com-  
 mitted to the ..... of said county for a term of ..... days, unless the  
 same be sooner paid;

you are hereby commanded forthwith to convey and deliver the said  
 ..... to the keeper of the said ..... And you, the said keeper of  
 ..... are hereby commanded to receive the said ..... into your custody.  
 and ..... and him there safely keep, until the expiration of the said  
 ..... days, unless the fine be sooner paid, or ..... be thence discharged  
 in due course of law.

Witness my hand, at ....., the ..... day of ....., 18..

.....  
 Justice of the Peace.

**No. 359.****§ 151. Return of Warrant.**

OF NEW YORK, } ss.:  
 COUNTY OF.....

....., hereby certify that I have arrested the within ....., and  
 have him in my custody now here, as I am within commanded.  
 Witness my hand at ....., this ... day of ....., 18..

.....  
 Sheriff.

**No. 360.****§ 302. Bench Warrant.**

Use of misdemeanors, add to the body in No. 150, the following clause),  
 he requires it, that you take him before any magistrate in that county,  
 the county in which you arrest him, that he may give bail to answer the  
 indictment."

**No. 361.****§ 344. Application for the Removal of an Indictment.**

THE COURT — COUNTY OF ... ..

PEOPLE OF THE STATE OF NEW YORK, }  
 vs. }  
 .....

Supreme Court:

Petition of ..... respectfully shows that, at a stated term of the  
 sessions, held in and for the county of ....., in said State, on the  
 Monday of ....., 18.., (or as the case may be), an indictment was  
 presented by the grand jury of said county to said court against your

petitioner, wherein your petitioner was charged with having, on the ... day of ....., 18... at the ..... of ....., N. Y., committed the offense of .....; that a certified copy of said indictment is annexed to, and made part of, this petition (here state facts showing present condition of case), that your petitioner has fully and fairly stated the case to ... .., his counsel who resides at ....., N. Y., and that he has a good and substantial defense upon the merits of said indictment, as he is informed by said counsel, after such statement made as aforesaid, and verily believes to be true (here set forth, with clearness and particularity, the peculiar facts and circumstances which render a removal expedient and proper, under either subdivision of section 344); that no prior application has been made for this purpose.

And your petitioner will ever pray, etc.

Dated ....., 18..

[Signature.]

STATE OF NEW YORK, }  
COUNTY OF..... } ss.:

....., the petitioner above named, being duly sworn, says that he has heard read the foregoing petition, subscribed by him, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters, therein stated to be alleged on information and belief, and, as to those matters, he believes it to be true.

Sworn to before me, this }  
.... day of ...., 18.. }

[Signature.]

### No. 362.

#### § 380. Challenges for Actual Bias.

COURT OF....., COUNTY OF.....

THE PEOPLE, ETC., }  
cs. }  
..... }

The above named defendant challenges ....., a juror drawn to serve on the trial of this indictment, on the ground that there exists, on the part of such juror such a state of mind, in reference to the case, or to this defendant, that he can not try the issues impartially and without prejudice to the substantial rights of this defendant.

Dated, etc.

Attorney for Defendant.

### No. 363.

#### § 380. Challenge for Implied Bias.

[Title of action as in last form.]

The above named defendant hereby challenges ....., a juror to serve on the trial of this indictment, on the following grounds:

[Here state one or more of the causes specified in section 377.]

A challenge may be oral, but must be entered upon the minutes of the court Section 380.

### No. 364.

#### Order for Removal under § 352.

[Follow No. 159 to end, and add.]

And it is further ordered, that the sheriff of the county of ..... [where defendant is imprisoned], deliver the defendant into the custody of the sheriff of the county of ..... [to which the action is removed].

**No. 365.****§ 477. Bench Warrant.**

The bench warrant must be substantially in the following form:

County of *Albany* [or as the case may be].

In the name of the people of the State of New York—To any sheriff, constable, marshal or policeman in this state. A. B. having been on the ... day of ..., 18 , duly convicted in the court of [SEAL.] sessions of the county of *Albany* [or as the case may be], of the crime of [designating it generally].

You are therefore commanded, forthwith to arrest the above-named A. B., and bring him before that court for judgment; or if the court have adjourned for the term, you are to deliver him into the custody of the sheriff of the county of *Albany* [or as the case may be, or in the city and county of New York, to the keeper of the city prison of the city of New York].

City of *Albany* [or as the case may be], the ... day of ..., 18..

By order of the court.

E. F., Clerk.

**No. 366.****§ 556. Bail Bond on Appeal.**

**KNOW ALL MEN BY THES PRESENTS:**

A verdict of conviction having been rendered on the ... day of ..., eighteen hundred and eighty ..., in a court of ... of the county of ..., and State of New York, held by ..., a ... , whereby the said ... was found guilty of the crime of ..., and the said ... having been sentenced to pay a fine of ... dollars, and he having appealed to the court of ... of said county, and his bail having been fixed in the sum of ... dollars, we, ..., defendant, and ... of ..., by occupation ... , and ..., of ..., by occupation ..., sureties, hereby jointly and severally undertake that the above-named ... shall pay the said fine, or such part of it as the said court of ... may direct, if the judgment be affirmed or modified, or the appeal be dismissed (or if judgment of imprisonment have been given, that the said ... will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed), or if he fail to perform any of the conditions, that we will pay to the People of the State of New York the sum of ... dollars.

Sealed with our seals, and dated this ... day of ..., 18..

COUNTY OF ..., ss.:

... being duly sworn, ... says, that he is a ... holder in the state of New York, and resides in the county of ..., and is worth the sum of ... dollars, over and above all debts and liabilities and property exempt from execution.

Sworn to before me this ... day of ..., 18..

COUNTY OF ..., ss.:

On this ... day of ..., in the year 18.., before me personally came ... and ..., to me known to be the individuals described in ..., and who executed the foregoing bond, and they severally acknowledged that they executed the same.

THE PEOPLE }  
against }  
..... }

**BAIL BOND ON APPEAL.**

I approve of the within bond, both as to its manner and form, and as to the sufficiency of the sureties therein.

Dated ..., 18..

No. 367.

§ 568. Bail Before Indictment.

As order having been made on the . . . . . day of . . . . ., eighteen hundred and . . . . ., by A. B., a justice of the peace of the town of . . . . . [or as the case may be], that C. D. be held to answer upon a charge of [stating briefly the nature of the crime], upon which he has been duly admitted to bail in the sum of . . . . . dollars.

We [C. D., defendant, if the defendant join in the undertaking], of [stating his place of residence and his occupation], and E. F. and G. H. [stating place of residence and occupation] surety or sureties [as the case may be], hereby undertake; jointly and severally, that the above-named C. D. shall appear and answer the charge above mentioned, in whatever court it may be prosecuted; and shall at all times render himself amenable to the orders and process of the court; and, if convicted, shall appear for judgment, and render himself in execution thereof; or if he fail to perform either of these conditions, that we will pay to the people of the State of New York, the sum of . . . . . dollars, [inserting the sum in which the defendant is admitted to bail].

[Signature.]

No. 368.

§ 608. Subpoena.

In the name of the people of the State of New York:  
To . . . . .  
You are hereby commanded to appear before the undersigned . . . . ., a justice of the peace of the town of . . . . ., at his office in said town on the . . . . . day of . . . . ., 18.., at . . . . . o'clock, .. M., as a witness in a proceeding then and there pending before the said justice, for the purpose of investigating whether an offense has been committed.

Dated at, etc.,

.....  
Justice of the Peace

No. 369.

§ 658. Oath of Commissioners.

STATE OF NEW YORK, }  
COURT OF . . . . . }  
THE PEOPLE, ETC., }  
    *vs.* }  
    . . . . . }  
... .. COUNTY OF . . . . ., ss.:

....., counselor-at-law, ..... M. D., and . . . . . being severally duly sworn, does each for himself say, that he will faithfully and fairly determine the questions referred to them, and make a just and true report, according to the best of his understanding.

Jurat.

.....,  
.....,  
.....

No. 370.

§ 774. Oath to Interpreter.

You solemnly swear that you will truly interpret to the witness the oath that shall be administered to him upon this inquest, and shall also truly interpret between the coroner, the jury and the witness. So help you God.

**No. 371.**

## § 781. Warrant of Commitment by Coroner.

STATE OF NEW YORK, }  
COUNTY OF ... .. } ss.:

In the name of the people of the State of New York:

To the sheriff of ... .. county:

An order having been this day made by me that ... .. be held to answer to the court of ... .. upon a charge of ... .. ;

You are commanded to receive him in your custody and detain him, until he is legally discharged.

Dated at ... .., this ... .. day of ... .., 18..

.....,  
Coroner.

**No. 372.**

## § 792. Subd. 3. Information for Search Warrant.

STATE OF NEW YORK, }  
COUNTY OF ... .. } ss.:

....., being duly sworn, says that he resides in the ... .. of ... .., in said county; that the following property ... .. is in the possession of ... .. at ... .., with the intent to use it as the means of committing a public offense, or is in the possession of ... .., to whom said ... .. has delivered it for the purpose of concealing it, or preventing its being discovered; that the facts upon which this statement is made are as follows:

[Signature.]

Jurat.

The affidavit must name or describe the person, and particularly describe the property, and the place to be searched. Section 793.

**No. 373.**

## § 827. Application for Requisition.

STATE OF NEW YORK,  
DISTRICT ATTORNEY'S OFFICE, }  
COUNTY ... .., 18.. }

To His Excellency the Governor:

SIR.—In compliance with your regulations, I have the honor herewith to make application for a requisition upon the governor of the State of ... .. for ... .. who stands ... .. in this county for the crime of ... .. and who, as appears from the annexed affidavit of ... .. who ... .. responsible person ... .. and entitled to credit, ... .. fugitive from the justice of the State.

In support of the application, I enclose herewith, in duplicate, certified copies of the indictment ... .. against the said ... .. and original affidavits in duplicate alleging the facts required to be established, and respectfully certify:

A. That the full name ... .. of the person ... .. for whom extradition is asked ... .. and the name of the agent whom I hereby designate as such is ... ..

B. That in my opinion the ends of public justice require that the said ... .. be brought to this State for trial, at the public expense, and that I am willing that such expense be a county charge.

C. That I have, as I believe, within my reach, and will be able to produce on the trial, sufficient evidence to insure conviction.



D. That the person ..... named above as agent ..... and ..... proper person ..... to be so designated, and I certify that ..... he ha ... no private interest in the arrest of the fugitive . . . . .

E. No other application has been made, nor has any requisition been issued for th... person ..... growing out of the transaction set out in the present indictment.

F. I believe that the criminal ..... named ... . . . . now under arrest in the State of .... . . . awaiting requisition.

G. That this application is not made for the purpose of enforcing the collec- tion of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said obj cts.

I am informed and believe that the said ..... at the time .... . . . he fled therefrom ..... resident of this State.

H. That all the papers in triplicate herein have been compared with each other, and are, in all respects, exact counterparts.

I. That the defendant .... . . . charged with the commission of a ... . . . under .....

J. That ..... more than one year has elapsed since the commission of the offense charged in the indictment ..... That a warrant has been issued for the arrest of the said ... . . and triplicate certified copies of the same, together with the returns thereto, are attached to this application.

I am sir, very respectfully yours,

.....  
District Attorney.

No. 374.

Voluntary Surrender and Waiver of Requisition.

STATE OF NEW YORK,  
COUNTY OF ... ..,  
OFFICE OF THE SHERIFF,  
....., N. Y. }

To whom it may concern, greeting :

Whereas, by virtue of a requisition heretofore duly made upon him by the governor of the State of ....., accompanied by a duly certified copy of an indictment from the authorities of the said State of ..... charging one ..... with having committed the crime of ..... in the said last-men- tioned State, his excellency ..... governor of the State of New York, did on the ..... day of ..... in the year of our Lord one thousand eight hundred and ....., duly issue and transmit his certain warrant for the arrest of the said ..... as a fugitive from the justice of the said State of ..... to the superintendent, or any inspector of police of New York, therein designating one ..... (the agent named in the said requisition on the part of the said State of ..... ) as the person into whose custody the said ..... might be lawfully delivered ;

And whereas, thereafter and on the ..... day of ..... in the year aforesaid, the undersigned was duly arrested under and by virtue of the said warrant by ... . . a ..... of the municipal police of the said city of New York, to whom the said warrant had been duly entrusted for execution, and in whose cus ody the undersigned is now held by virtue thereof;

And whereas, the undersigned has been duly informed and is now fully aware that before he may be lawfully delivered into the custody of the said ..... as such agent as aforesaid, it is his right and privilege under the laws of the State of New York (unless such right and privilege be waived), to be taken before a judge of the supreme court, ... . . of a superior city court, or the presiding judge of the court of general sessions of the city and county of New York, who would thereupon inform him of the cause of his arrest, the

nature of the process, and instruct him that if he claim not to be the particular person mentioned in said requisition and the indictment and warrant annexed thereto or in the said warrant so duly issued thereon, he may have a writ of *habeas corpus* upon filing an affidavit to that effect ;

Now, therefore, know ye, that the undersigned, acknowledging himself to be the particular person in the said requisition and the indictment and warrant annexed thereto, and also in the warrant so duly issued thereon, mentioned and described as ..... does hereby voluntarily, and not by reason of any threats or undue influence on the part of any person or persons whatsoever, consent to waive, and does hereby waive, his right to be taken before any or either of such judges for the purposes aforesaid.

In witness whereof, the undersigned has to his consent or waiver duly subscribed his name this ..... day of ..... in the year aforesaid.

In the presence of .....  
....., the officer entrusted with the execution of the warrant of the governor of this State herein, and ....  
....., a counselor-at-law of this State.

.....

No. 375.

Affidavit under Rule 2.

To comply with rule 2 as to requisition, the facts should be set forth explicitly, and as nearly as possible in manner following:

STATE OF NEW YORK, }  
COUNTY OF ..... }

John Doe, being duly sworn, deposes and says, that a warrant for the arrest of Richard Roe, charging him, the said Richard Roe, with grand larceny in the second degree, has been issued; that a triplicate copy of said warrant and the information and depositions on which said warrant was issued are hereto annexed (if the proceedings are founded upon an indictment and affidavits, those facts should be recited instead of the above), that the facts and circumstances respecting the commission of said offense are correctly stated in said information and depositions. (All after the last parenthesis may be omitted if indictment is found.)

Deponent further says, upon information and belief, that the said Richard Roe is now under criminal arrest and held in custody on said charge by the authorities at ....., in the county of ..... in the State of .....; that the sources of his information and belief are that a telegram was sent to the chief of police at ....., by ....., chief of police in the village of ..... county of ....., the place where the offense was committed, requesting the police at ..... to arrest said Richard Roe; that an answer thereto has been received to-day from such chief of police at ..... stating that the said Richard Roe had been arrested, all of which deponent believes to be true, and that deponent has seen the telegrams received by said .....

Deponent further says that he is informed and believes that the said Richard Roe has fled from the justice of this State, and his reasons for such belief are as follows:

That the said Richard Roe left ..... aforesaid on the tenth day of April, 1887; that for more than five years prior thereto he had been a resident of ..... aforesaid, and for six months just preceding his departure he had been in the employ of .....; that on the said tenth day of April, 1887, he told deponent that he desired to attend a show which was then exhibiting in .....; that he left deponent's store in said village about three o'clock in the afternoon and has not since returned to said village; that in the afternoon of

that day deponent made inquiries after the said Richard Roe and learned that instead of attending said show he had taken the train for ... .. in said county, to which point his baggage had that day been checked as deponent learned; that he thereupon telegraphed to ... .. and found that said baggage had been called for; that deponent found upon investigation that the said Richard Roe had sold or disposed of nearly all of his household property; that he had left his wife in ... .. aforesaid utterly destitute of money or means of support, and had told her that he was going to . .... in said county to look for a situation and would return on the following day; that deponent began to ascertain the whereabouts of the said Richard Roe; that deponent next heard of said Roe in ... .., then in ... .., and next in .... .; that deponent's information relative to his whereabouts was obtained through detectives or police officers; that no one has received any letter or word from said Richard Roe directly since leaving .... .; that at the time of his flight said Richard Roe was by occupation a shoemaker, and at the time was a resident of the village of ... .., county of ... .., State of ... .., and was such at the time of the commission of the alleged crime; that he was married twice and was divorced from his first wife; that the said Richard Roe was quite largely indebted; that he had money in his hands which he received as treasurer of the Shoemakers' Association; that he purchased clothing the day of his departure on representations that he was going to ... .. aforesaid to look for a situation and would return on the following day when he would pay for the same, none of which he did; that as to his previous history, its main features, so far as known to deponent, have already been stated therein; that he is in the State of ... .. only temporarily (or permanently, as the case may be).

Deponent, therefore, by reason of the facts and circumstances set forth above, verily believes and charges the fact to be that the said Richard Roe has fled from the State of .. .... for the purpose of avoiding arrest for the crime with which he is charged; that he is a fugitive from the justice of this State (the following should be added if it is true) and is now under criminal arrest in the State of ... .. and held in said State to await his extradition to and return to the State of .... .

JOHN DOE.

Subscribed and sworn to, this }  
first day of June, 18.. }

.....  
Police Justice of the ... ..

No 876.

§ 858. Undertaking to be Given by Mother of Bastard,  
to Appear at the County Court.

STATE OF NEW YORK, }  
COUNTY OF ... .., } ss.

Whereas, by an order heretofore, on the ... .... day of ... .., 18.., duly made by ... .. and ... .., justices of the peace of the county of ... .., the mother of a bastard child, now a charge upon the town of, in said county of [or against said county of] ... .., was adjudged to pay the superintendents [or overseers] of the poor of said county [or town] of ... .., the weekly sum of ... .. dollars for the support of said child, unless she should herself support the same, so that it should not be or become a public charge;

And, whereas, though such order has been duly served upon her, she has not complied therewith;

Now, therefore, we, ... .., of the ... .. of ... .., in said county, by occupation a ... .., and ... .., of the ... .. of ... .., in said county, by occupation a ... .., do hereby, jointly and severally undertake to pay to the people of the state of New York, the sum of ... .. dollars,

for the payment of which we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents:

The condition of this obligation is such that, if the said ..... shall personally appear at the next county court of the county of ...., to answer the matters stated in the above mentioned order, and obey its order thereon, then this undertaking to be void; otherwise to remain in full force and effect.

Dated at ....., this ..... day of ....., 18..

In presence of .....

.....,  
.....,  
.....

Add acknowledgment and justification clauses.

#### **No. 377.**

#### **§ 866. Warrant for Discharge of Putative Father after Commitment.**

STATE OF NEW YORK, }  
COUNTY OF ....., } ss.

In the name of the people of the State of New York:

To the keeper of the common jail of the county of ....., greeting:

Whereas, .... was, on the ..... day of ....., 18.., duly committed to your custody on a warrant issued by us for disobeying an order of filiation, whereby he was adjudged to be the putative father of a bastard child, of which ..... was then supposed to be pregnant;

And, whereas, it now appears that the said .... was in fact not pregnant [or was married before delivery, or the child was not born alive];

Now, therefore, you are hereby commanded to discharge the said ..... from custody, unless he is there lawfully detained on some other warrant.

Dated at ....., this ..... day of ....., 18..

.....

.....,  
.....,

Justices of the Peace.

#### **No. 378.**

#### **§ 889, subd. 3. Warrant for Disorderly Person.**

STATE OF NEW YORK, }  
COUNTY OF . . . . ., } ss.

....., being duly sworn, says that he resides in the ..... of ..... in said county, and that ..... is a disorderly person residing in said county, for the reason that he pretends to tell fortunes [or where lost and stolen goods may be found], to the end that he \* may extort money, in that, etc. [here describe the manner of operation, etc.]

Jurat.

#### **No. 379.**

#### **§ 899, subd. 4.**

[Follow last form down to \*, and then proceed.]

keeps a bawdy house therein, or a house for the resort of prostitutes, drunkards, tipplers, gamblers, habitual criminals, or other disorderly persons, in the town of ....., in said county, in that, etc. [here state the facts and circumstances showing the nature of the place or the character of the persons resorting thereto.]

Jurat.

The above forms may be adapted to the subsequent subdivisions of this section.

## No. 380.

## FORMS AND INSTRUCTIONS

## CODE OF CRIMINAL PROCEDURE.

## Part 6, title 10. Of Criminal Statistics.

§ 941. Within ten days after the adjournment of any criminal court of record in this state, the district attorney of the county in which the court shall be held, must furnish to the clerk of the court such a description of the offense committed by every person convicted of crime, abridged from the indictment, as would be sufficient to maintain the averments relating to such offense, or necessary to be made in an indictment for a second offense.

§ 942. Within twenty days after the adjournment of any criminal court of record, the clerk thereof must transmit to the office of the secretary of state, such statement furnished by the district attorney of all convictions had at such court.

§ 943. Within twenty days after the adjournment of any criminal court of record, the clerk thereof must also transmit to the office of the secretary of state, a duly certified statement of the number of indictments tried at such court, specifying the number for each separate offense, the number on which convictions were had, and on which defendants were acquitted, and of indictments against persons who were convicted on confession, and against persons who were discharged without trial,

§ 944. On or before the fifth day of every month, the clerk of each county must transmit to the secretary of state, copies of all certificates of convictions made by any court of special sessions, and required by law to be filed with such clerk, and which have been filed in the office of the county clerk during the previous month.

§ 945. A report must be made by the sheriff of every county in which there is a city, on the first day of every month to the secretary of state, of the number of persons convicted in city courts courts of special sessions and police courts during the preceding month. Such reports must specify the crimes, the whole number convicted, the sex, age, nativity, and whether married or single; the degree of education, religious instruction, whether parents living or dead, temperate or intemperate, and whether before convicted or not of any crime.

§ 946. Within twenty days after the adjournment of any criminal court of record, the sheriff of the county in which such court shall be held must report to the secretary of state, the name, occupation, age, sex and native country of every person convicted at such court of any offense, and the degree of instruction which each person so convicted has received, and also such other items of information in relation to such convicts and their offenses, as the secretary of state shall require.

§ 947. The report required by this title must be made in the form prescribed by the secretary of state.

§ 948. For every neglect of magistrate, clerk or sheriff to comply with the requirements of this title, he forfeits the sum of fifty dollars, to be recovered in a civil action, in the name of the people of this state.

§ 949. The secretary of state must cause this title to be published, with forms and instructions for the execution of the duties therein prescribed, and to be distributed among the officers therein mentioned; the expense of which must be paid by the Treasurer, on the warrant of the comptroller. He must also annually report to the legislature the results of the information obtained in pursuance of this title.

*To District Attorneys :*

It is not considered necessary to issue extended instructions or forms for the guidance of district attorneys, who are officers learned in the law—except to promote uniformity of returns from county clerks.

The duties of the district attorney arise under section 941 of title 10, part 6 of the Code of Criminal Procedure, and are not directly related to this office, but with the county clerk of his county. The county clerk is, however, greatly dependent upon the district attorney of his county, for such statements as will enable such county clerk to promptly make an intelligent report to the secretary of state as to convictions in criminal courts of record.

By section 941 of the Code of Criminal Procedure, the duty is imposed upon the district attorney of the county in which any criminal court of record is held, to furnish, within ten days after the adjournment of said court, to the clerk of such court, such a description of the offense committed by every person convicted of crime, abridged from the indictment, as will be sufficient to maintain the averments relating to such offense, or necessary to be made in an indictment for a second offense.

The object of the law is, doubtless, chiefly to furnish evidence which will be sufficient, on an indictment for a second offense, to prove the facts of a prior conviction.\* A general statement that the defendant was convicted of, say robbery, or any other similar and general description of the offense, will not prove the facts necessary to be established on the trial of an indictment for a second or subsequent offense. Such an indictment must aver that the defendant, at a particular court, held at a particular time and place, before persons to be named, was convicted of a specific offense, to wit, of robbery, first (or second) degree, which must be stated with as much precision and certainty, as to time, place, manner, person on whom committed, and with all the legal requisites to constitute crime, as in the first indictment. Of course these averments must be sustained by proof and particulars; and the description furnished by the district attorney is the proof which the law intends should be adduced. This is done to promote public justice, to save trouble to district attorneys, or their successors in future years, and to avoid the large expense of procuring exemplifications of records of conviction.

These general remarks will, perhaps, be sufficient to guide district attorneys in preparing their statements. But as section 949 of the Code of Crim. Procedure requires the secretary of state to publish forms and instructions for its execution, such forms and instructions will be herein presented. To furnish forms for all cases of criminal convictions would be a work of unnecessary labor and of no practical utility. All that can be done is to give general directions applicable to the great mass of cases, and a few instances of forms to exemplify the instructions.

Generally speaking, it will be more convenient, and more likely to insure accuracy, to recite the charging part of the indictment, omitting only the synonymous words which it sometimes contains. Thus, in a case of *perjury*, where the indictment necessarily contains special averments, the statement of conviction may be in the following form:

John Jackson, having been indicted, for that, at a circuit of the supreme court, held at, etc., in and for the county of . . . . ., on the . . . . . day of . . . . ., 18.., a certain issue joined in the supreme court between Thomas Stiles, plaintiff, and Rebecca Stiles, defendant, in an action for divorce (or other civil action), came on to be tried before said circuit court and a jury of the county then and there duly impanelled and sworn; and that the said John Jackson was then and there produced as a witness by and on behalf of the said Thomas Stiles, and was then and there duly sworn, according to law, etc. (reciting the substantial part of the indictment); and having been duly tried by a jury, and found guilty of the offense of which he was so indicted, to wit, *perjury*; he is thereupon by the court here sentenced to imprisonment in the state prison at Auburn for . . . . . years.

A similar form will be necessary in stating convictions for *duelling*, *incest*,

\* See, also, sections 8, 9 and 10 of article first, title 6, chapter 2, part 4 of the Revised Statutes.



*rape*, and many other crimes, and particularly certain *misdeemeanors*, in which special averments are necessary to describe the offense.

There are some cases in which an abbreviated form may be adopted, of which the following are examples:

*Murder, first degree.*—John Jackson, having been duly tried by a jury and found guilty of murder, first degree, for which he had been indicted, in feloniously killing Thomas Styles, on the ..... day of ..... , at the town of ..... in the county of ..... , by feloniously shooting the said Styles with a pistol loaded with gunpowder and ball, he is sentenced, etc.

*Arson in the first degree.*—James Jackson, having been duly tried by a jury, and found guilty of arson in the first degree, for which he had been indicted, in willfully and feloniously burning in the night-time, on the ..... day of ..... , at the town of ..... , in the county of ..... , the dwelling house of John Styles, in which there was at the time a human being, to wit: Nancy Styles; he is sentenced to be imprisoned, etc.

*Manslaughter.*—James Williams, having been duly tried by a jury, and found guilty of manslaughter in the first degree [or whatever degree was found by the jury], for which he had been indicted, in killing John Doe, on the ..... day of ..... , at the town of ..... , in the county of ..... , in the heat of passion, but in a cruel and unusual manner, by stabbing him with a dangerous weapon, to wit: a knife, he is sentenced to imprisonment in the state prison at Sing Sing for .... years.

The various degrees of manslaughter depend so much on the circumstances of each case, that, as a general rule, the form of reciting the charging part of the indictment, as given before in the case of *perjury*, had better be adopted, as there will be much less liability to mistake.

*Rape.*—James Jackson, having been duly tried by a jury, and found guilty of rape, for which he had been indicted, in carnally and unlawfully knowing Julia Jones, a female child under the age of ten years, on the ..... day of ..... , at the town of ..... , in the county of ..... , he is sentenced to imprisonment in the state prison at Dannemora for ..... years.

*Assault in first degree.*—James Thomas, having been duly tried by a jury, and found guilty of shooting a pistol loaded with gunpowder and ball at William Townsend, on the, etc., at the town, etc., with intent to kill the said Townsend, for which he had been indicted, he is sentenced, etc.

*Grand larceny, second degree.*—John Jackson, having been duly tried by a jury, and found guilty of having, on the, etc., at the town, etc., feloniously taken and carried away one gold watch of the value of twenty-six dollars, the personal property of William Jones, for which offense he has been indicted, he is sentenced to imprisonment, etc.

When the conviction is founded on a plea of confession, the commencement of the forms should vary from those before given, and should be stated thus:

John Jackson, having been indicted for grand larceny, second degree, in having, on the ..... , at the town of, etc., feloniously stolen, taken and carried away one gold watch of the value of twenty-six dollars, the personal property of William Jones, and on being arraigned upon the said indictment, having confessed the said offense, and pleaded guilty to said indictment, he is sentenced, etc.

Where there are several counts in an indictment, intended to describe the same offense, the statement of the crime need not be repeated according to the formal variations in the different counts, but should be stated once only, according to the count which was proved on the trial.

The foregoing instructions are addressed more particularly to district attorneys, although the same will be useful to clerks of criminal courts, to enable them to prepare entries of judgments if that duty is neglected by the district attorney.

#### *To County Clerks:*

The following appear to be the only instructions necessary to be given to clerks of criminal courts: (See §§ 942 and 943, Code of Criminal Procedure.)

They are specially requested to report promptly every case of neglect by a



district attorney, to furnish them with the statements required by the statute to be prepared by him.

Every judgment must be entered in the court minutes at the time of the sentence, or before the court adjourns, and the transcript must be sent within twenty days after the adjournment; and if the district attorney has omitted to prepare the statements of the offenses upon which convictions have been had, the clerk must do it for his own protection, and submit them to the court before entering them in the minutes.

A transcript may and should contain all the convictions had at the same term or session of the court. The following will be the form of the caption:

Transcript of the entries in the minutes of the court of Oyer and Terminer or general sessions of the peace, held at the court house in the town of.....; in and for the county of....., on the ..... day of .. ..., one thousand eight hundred and ....., by and before Hon. ———, justice of the supreme court (or Hon. ———, county judge of said county, and A. B. and C. D., esquires, justices of the sessions of the county, of all convictions for criminal offenses had at the said court, and of the sentences thereon.

It is important that the title of the court and the names of the judges should be given in full.

The minutes of the judgment or conviction and of the sentence are then to be copied separately.

*The minutes of the trial are not required by law to be furnished to the Secretary of State, and are of no official use to him, and the practice of some clerks of copying out these minutes containing the names of jurors and witnesses is altogether irregular and unnecessary.*

After entering all the convictions and sentences, the following certificate should be added:

I, ....., clerk of the county of ....., do hereby certify that the foregoing is a true and correct transcript of all the convictions for criminal offenses had at the court of ...., held in and for the said county on the ..... day of .... 18.., as entered in the minutes of said court kept by me, as the clerk thereof, and of the sentences thereon.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of my office, at ...., the ... day of ....., 18..

In the city and county of New York, the clerks of the criminal courts will, of course, describe their official character according to the fact, and the clerks of certain city courts in Brooklyn and Buffalo, will also use their peculiar titles in this certificate.

Under section 943 of the Code of Criminal Procedure, it is also required of the clerk of the court to transmit within twenty days, to the office of the secretary of state, the statements of indictments tried, etc. These should be made under this caption.

Statement of the number of indictments tried at the court of oyer and terminer, held at the court house in the town of .... in and for the county of ...., on the ..... day of ....., in the year one thousand eight hundred and ....., by and before Hon ... , justice of supreme court of the ..... judicial district, and A. B. and C. D., justices of the sessions of the said county; and also the number of indictments pending in the said court against persons who were discharged during the session of the said court without trial.

The whole number of indictments tried at the said court was .....

Of which *one* was for murder, first degree, in which the defendant was found guilty (or was acquitted).

*Three* for grand larceny, first degree, in two of which the defendants were tried, and in one was found guilty or was acquitted.

*One* for assault, first degree, in which the defendant was.....

That the whole number in which convictions were had was....., and the whole number in which the defendant was acquitted was.....

That the whole number of indictments on which persons were discharged without trial during the session of the said court was.....

Of which..... was for assault, second degree.

And ..... were for grand larceny, second degree.

[Or, and that no person was discharged at the said court without trial.]

I, ....., clerk of the county of ....., and clerk of the court of oyer and terminer, held in and for the county of ....., on the ..... day of ....., 188..., do hereby certify that the foregoing is a true and correct statement of the number of indictments tried at the said court, and of the number of indictments against persons who were discharged at the said court without trial.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of my office, at ..... this ..... day of ... .., 188..

This form will be varied according to the style and name of the court, whether of general sessions of the peace, oyer and terminer, recorder's court, in certain cities named in Code of Criminal Procedure, or otherwise, and according to the official title of the clerk.

In case of convictions on plea of guilty the following form may be used:

[Caption as in case of foregoing statement.]

There were also two persons convicted at the said court upon their own confession and plea of guilty, one of whom was indicted for . ....., and the other for.....

#### CONVICTIONS IN COURTS OF SPECIAL SESSIONS.

By section 944 of the Code of Criminal Procedure, county clerks are required to transmit to the secretary of state *copies* of all certificates of convictions by any court of special sessions filed with them.

The following will be the form of such returns:

A return of copies of all certificates of convictions made by courts of special sessions in the county of ....., filed with the county clerk of the said county, since the transmission by him of any transcripts of criminal convictions.

The certificates are then to be copied *verbatim*, to which the following certificate should be added:

I, ....., county clerk of the county of ....., do hereby certify that the foregoing are true and correct copies of all certificates of convictions made by any court of special session, and filed in my office within the period above specified.

Given under my hand and seal of office, at ..... this ..... day of .... .., 188....

The reports of county clerks must be written in a plain hand, so that no mistakes may occur in the filing and recording thereof in the office of the secretary of state. Any material informality in said reports will compel the secretary of state to send the same back at the expense of the county clerks for amendment, and the penalty may be enforced as if the same had never been transmitted. Hereafter the statistical year as to criminal returns, will end on the 31st of October, so as to give the necessary time to the secretary of state to make up his annual report to the legislature.

The transcripts of convictions and the copies of certificates must be on separate sheets of paper, and should be enclosed in a strong envelope or wrapper, directed to the secretary of state, and sent by mail or by express at the expense of the county clerk. The fees of county clerks for all services in transmission of transcripts of conviction and reports upon statistics of crime to the secretary of state, are prescribed by the Revised Statutes of this state.

It is respectfully suggested to county clerks, in order to secure prompt and full returns of convictions in courts of special sessions (not of record) before police justices, justices of the peace, etc., that a circular letter sent by each county clerk, to each local magistrate in his county, before whom any convictions in special sessions may be had, in language and form somewhat as in the subjoined letter, may conduce to favorable results. It is also respectfully suggested, that county clerks inform justices of the peace, when administering to them the oath of office, or when meeting them at courts, or elsewhere, as to their duties under the Code of Criminal Procedure.

COUNTY CLERK'S OFFICE,  
....., 188.. }

To ....., *Justice of the Peace (or Police Justice)*:

DEAR SIR — The Code of Criminal Procedure requires the county clerk to report to the secretary of state on or before the fifth day in each month, all certificates of convictions made by any court of special sessions (such as your court) during the previous month.

Will you please make a monthly statement to the county clerk from time to time as to all such convictions, and in case there have been no convictions in your court, at any time during the preceding month, then please make and send me a statement to that effect, over your official signature.

As a guide in preparing certificates of convictions, I would also respectfully suggest that law stationers and law blank publishers at Albany, Rochester, New York city and elsewhere, publish blank forms which will aid materially in making up the proper form of certificates of convictions.

Yours respectfully,

A. B.,

*County Clerk.*

N. B.—Justices of the peace, police justices, etc., in making certificates of conviction, will observe care in properly describing the offense as defined by the Code of Criminal Procedure now in force.

The following blank form of certificate of convention in justice's courts, etc., is recommended for use of local magistrates in reporting convictions to county clerks, or in case the justice has no blank form, he may write out the same adapted to the case.

*Certificate of Conviction—General.*

COURT OF SPECIAL SESSIONS,

County of ....., Town of .....

THE PEOPLE OF THE STATE OF NEW YORK

*against*

JOHN DOE.

....., 188..

The above named John Doe, having been brought before John Johnson, Esq., a justice of the peace of the town of ....., and forming a court of special sessions, charged with ..... And the above named John Doe, having thereupon pleaded .... guilty and demanded (or failed to demand) a jury, and having been thereupon duly tried, and upon such trial duly convicted ....., I have adjudged that he be imprisoned in the .... county jail ..... days, or pay a fine of ..... dollars, and be imprisoned until it be paid, not exceeding ..... days.

Dated at the said town of ....., the ..... day of ....., 188..

.....

*Justice of the Peace.*

File with county clerk.

A like form may be used by police justices.

*To Sheriffs:* It will be noticed by the provisions contained in the Code of Criminal procedure, § 946, that within twenty days after the adjournment of any criminal court of record, the sheriff in the county in which such court shall have been held, is required to transmit to the office of the secretary of state, certain statistics in relation to persons convicted of criminal offenses.

The fees and compensation for services of sheriffs in reporting statistics of crime are a county charge, to be audited by board of supervisors.

Section 949 of the said Code of Criminal Procedure imposes the duty upon the secretary of state to issue such forms of instruction as he may deem proper and requisite for the execution of the duties therein prescribed.

The following instructions to sheriffs are according given:

**First.** To all sheriffs transmitting reports which relate only to persons convicted in courts of *record*, the following will be the form of *caption*:

*Report* of the sheriff of the county of . . . . ., to the Secretary of State of the state of New York, respecting the persons convicted of offenses at the court of general sessions of the peace (or at the oyer and terminer or any other court of record), held in and for the said county, on the . . . . . day of . . . . ., made pursuant to section 946 of the Code of Criminal Procedure.

The following will be the *subjects* of the report:

First. You will state the *name* of the convict, and if he or she has two or more names (or *alias*), you will state them.

Second. The crime of which *he or she was convicted*, at the court held in your county, such as perjury, rape, etc.

Third. His or her occupation, whether a mariner, tradesman, blacksmith, merchant, lawyer, tailoress, and the like.

Fourth. Age at the time of conviction, and sex.

Fifth. Is he or she married or single.

Sixth. His or her native country.

Seventh. The degree of instruction he or she has received; whether he or she can read and write, or can read only, or whether he or she be entirely uneducated. What opportunities he or she has had of religious instruction.

Eighth. Whether his or her parents, or either of them, are living, and which of them.

Ninth. Whether he or she has formerly been imprisoned for any offense; if any, state it.

Tenth. His or her habits in respect to the immoderate use of ardent spirits.

Eleventh. Any other fact or circumstance in his or her condition, habits or circumstances that you may deem useful to communicate.

This return must be made within *twenty* days after the adjournment of every criminal court of record held in the county, and according to the annexed tabular form marked A, and it should be signed by the sheriff in his official character, and dated at the time of signature.

The opportunities which the jailers and turnkeys have of conversing with the prisoners will generally enable them to acquire the knowledge necessary to make out the statements; and the sheriff should instruct them accordingly, to enable them to do so. A copy of this pamphlet should be kept in the jails for the information of their keepers. Constables who bring prisoners to the jail will often be able to communicate information upon many of the subjects. The friends and relatives, also, of the convict may have no objection to do the same; and during the trial of the cause, the witnesses will be able to inform the sheriffs generally on all the desired particulars.

With all these means of information, the results will, doubtless, sometimes be imperfect. Still they are ample, and, if faithfully improved, the returns will be almost universally full and accurate.

**Second.** To the sheriffs named in section 945 of the Code of Criminal Procedure, to wit: in counties in which a city (or cities) is situated.

In said section 945, it is provided that the sheriffs of the respective counties in which incorporated cities are situated, shall also transmit a statement of the number of persons convicted in courts of special sessions, city courts and police courts in those cities, together with such specifications in each case, as are required by said section. Such returns must be regularly transmitted to the office of the secretary of state, on the first day of every month, in order that the same may be fully entered in the annual report required from this office.

This duty, it will be seen, relates to convictions in certain minor city courts, courts of special sessions and police courts held in the various cities of the state. The reports, which should be transmitted to this office on the first day of every month, will be in tabular form, like the annexed, marked B. The form should be printed on ruled paper, the ruling directly opposite the printed matter on the left margin of the report, in order that a systematic report may be had from all the sheriffs alike.

(A.)

FORM OF REPORT CONCERNING PERSONS CONVICTED IN COURTS OF RECORD.

*REPORT of the Sheriff of the County of \_\_\_\_\_ to the Secretary of State of New York, respecting the persons convicted of criminal offenses at the Court of \_\_\_\_\_, held in and for the said county, on the \_\_\_\_\_ day of \_\_\_\_\_, 188 \_\_\_\_\_, made pursuant to the 946th section of the Code of Criminal Procedure.*

NAME OF CONVICT.	Crime of which convicted.	Occupation.	Sex.	Age.	Social relations.	Place of b <sup>r</sup> h.	Secular instruction.	Religious instruction.	Parents.	Former offense.	Habits of life.
James Edwards, alias Thomas Smith.	Grand larceny, 1st degree.	Laborer.	Male.	35	Married.	Massachusetts	Read and write.	Had religious instruction.	Father.	Grand larceny, 2d degree.	Intemperate
Eliza Jones.	Arson, 2d degree.	Tailorress.	Female.	20	Single.	N. Y. State.	Cannot read or write.	Never had religious instruction.	Mother.	None.	Temperate.

Dated at \_\_\_\_\_, 188 \_\_\_\_\_.

\_\_\_\_\_,  
*Sheriff of the County of \_\_\_\_\_*

(B.)

# FORM OF REPORT CONCERNING PERSONS CONVICTED AT COURTS OF SPECIAL SESSIONS.

*REPORT of the Sheriff of the county of \_\_\_\_\_ to the Secretary of State, respecting the  
persons convicted of criminal offenses at the Courts of Special Sessions, held in and  
for the city of \_\_\_\_\_, for the month of \_\_\_\_\_, 188 \_\_\_\_\_, pursuant to section 945, Code of  
Criminal Procedure.*

[Write the offenses in this heading, classifying them in alphabetical order.]	Assault, 3d degree.	Crucify to animals.	Disordly conduct.	Intoxication.	Malicious trespass.	Petit larceny, first offense.	Selling lottery tickets.	Vagrancy.	Violating city or statute.
Number reported .....									
Males .....									
Females ..									
Under 15 years of age.....									
From 15 to 21 years of age.....									
From 21 to 25 years of age, .....									
From 25 to 30 years of age, .....									
From 30 to 40 years of age, .....									
From 40 to 50 years of age, ..									
From 50 to 60 years of age, .....									
Over 60 years of age .....									
Unknown age... ..									
Married .....									
Married and having children.....									
Single ..									
Unknown .....									
Natives of United States.....									
Natives of Ireland .....									
Natives of Germany .....									
Natives of England .....									
Natives of Scotland.....									
Natives of France .....									
Natives of Canada.....									
Other foreign countries .....									
Unknown .....									
Can read and write ... ..									
Can read only ..									
Cannot read or write .....									
Unknown.....									
Had religious instruction .....									
Never had instruction.....									
Unknown ..									
Parents living. ....									
Father living.....									
Mother living.....									
Parents dead .....									
Unknown ..									
Before convicted .									
Never before convicted .....									
Unknown .....									
Temperate .....									
Intemperate .....									
Unknown.....									

Dated at \_\_\_\_\_, 188 .

Sheriff of the County of \_\_\_\_\_

(C.)

## FORM OF REPORT FOR COLLECTING PERSONAL STATISTICS.

COURT....OF....., }  
COUNTY OF..... }

THE PEOPLE }

vs. }

..... } ....day of....18S..

Question—What is your name and occupation ?

Answer—

Question—What is your age ?

Answer—

Question—Where were you born ?

Answer—

Question—Are you married or single ?

Answer—

Question—What religious instruction have you received, and in what religious nomination have you received it ?

Answer—

Question—What education have you received ?

Answer—

Question—Are your parents living or dead ?

Answer—

Question—Are you temperate or intemperate ?

Answer—

Question—Have you been before convicted, or not, of any crime ; if you have, of what crime and where convicted ?

Answer—

.....

*Justice.*

This form is suggested for convenience of sheriffs and justices of peace, etc., in procuring information respecting convictions in courts of special sessions, and in eliciting the information indicated.

The Code of Criminal Procedure, in section 948, prescribes a penalty for neglect of duty upon the part of any county clerk, or sheriff, or magistrate, and the manner of enforcing the same, which the secretary of state sincerely hopes there may be no occasion to enforce. With an intelligent and prompt compliance on the part of the officials charged with the duty of making reports upon criminal convictions to the office of the secretary of state, whether in courts of record or special sessions, it is believed that a complete and valuable report upon criminal statistics, may be annually made from this office to the legislature.

Respectfully submitted.

FREDERICK COOK,

*Secretary of State.*



No. 382.

Extradition.

**MEMORANDUM RELATIVE TO APPLICATIONS FOR THE EXTRADITION FROM FOREIGN COUNTRIES OF FUGITIVES FROM JUSTICE.**DEPARTMENT OF STATE,  
WASHINGTON, *October, 1892.* }

Extradition will only be asked from a government with which the United States has an extradition treaty, and only for an offense specified in the treaty.

All applications for requisitions should be addressed to the Secretary of State, accompanied by the necessary papers as herein stated.\* When extradition is sought for an offense within the jurisdiction of the State or Territorial courts, the application must come from the Governor of the State or Territory. When the offense is against the United States, the application should come from the Attorney-General.

In every application for a requisition it must be made to appear that one of the offenses enumerated in the extradition treaty between the United States and the government from which extradition is sought has been committed within the jurisdiction of the United States, or of some one of the States or Territories, and that the person charged therewith is believed to have sought an asylum or has been found within the dominions of such foreign government.

The extradition treaties of the United States ordinarily provide that the surrender of a fugitive shall only be granted upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her commitment for trial if the crime or offense had been there committed.

If the person whose extradition is desired has been convicted of a crime or offense and escaped thereafter, a duly authenticated copy of the record of conviction and sentence of the court is ordinarily sufficient.

If the fugitive has not been convicted, but is merely charged with crime, a duly authenticated copy of the indictment or information, if any, and of the warrant of arrest and return thereto, accompanied by a copy of the evidence upon which the indictment was found, or the warrant of arrest issued, or the original depositions setting forth as fully as possible the circumstances of the crime, are usually necessary. Many of our treaties require the production of a duly authenticated copy of the warrant of arrest in this country; but an indictment, information, or warrant of arrest alone, without the accompanying proofs, is not ordinarily sufficient. It is desirable to make out as strong a case as possible, in order to meet the contingencies of the local requirements at the place of arrest.

If the extradition of the fugitive is sought for several offenses, copies of the several convictions, indictments, or informations, and of the documents in support of each should be furnished.

Application for the extradition of a fugitive should state his full name, if known, and his alias, if any, the offense or offenses in the language of the treaty upon which his extradition is desired, and the full name of the person proposed for designation by the President to receive and convey the prisoner to the United States.

As the application proper is desired solely by the Department as a basis for its action, and is retained by it, it is not necessary that it should be attached to the evidence.

Copies of the record of conviction, or of the indictment, or information, and of the warrant of arrest, and the other papers and documents going to make

\* The only exception is found in the treaty with Mexico, under which, in the case of crimes committed in the frontier States or Territories, requisitions may be made directly by the proper authorities of the State or Territory. (Article 2, treaty with Mexico, concluded December 11, 1861.)

evidence are required by the Department, in the first instance, as a basis for requesting the surrender of the fugitive, but chiefly in order that they may be authenticated under the seal of the Department, so as to make them admissible as evidence where the fugitive is arrested, upon the question of his guilt.

All of all papers going to make up the evidence, transmitted as herein provided, including the record of conviction, or the indictment, or information, or the warrant of arrest, must be duly certified and then authenticated under the great seal of the State making the application or the seal of the Department of Justice, as the case may be; and this Department will authenticate the seal of the State or of the Department of Justice. For example, if an arrest is made before a justice of the peace, the official character of the justice and his authority to administer oaths should be attested by the county clerk or other superior certifying officer; the certificate of the county clerk should be authenticated by the Governor or Secretary of State under the seal of the State, and the latter will be authenticated by this Department. If there is no authentication, it should plainly cover all the papers attached.

*The papers herein required in the way of evidence must be transmitted in duplicate, one copy to be retained in the files of the Department, and the other, authenticated by the Secretary of State, will be returned with the Presidential warrant, for the use of the agent who may be designated to receive the fugitive. As the Governor of the State, or the Department of Justice, also requires a copy, prosecuting attorneys should have all papers made in duplicate.*

In the practice of some of the countries with which the United States has treaties, in order to entitle copies of depositions to be received in evidence the producing agent is required to declare under oath that they are true copies of the original depositions. It is desirable, therefore, that such agent, either by comparison of the copies with the originals, or from having been present at the attestations of the copies, should be prepared to make such declaration. When the original depositions are forwarded, such declaration is not required.

Applications by telegraph or letter are frequently made to this Department for intervention to obtain the provisional arrest and detention of fugitives in foreign countries, in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. Such applications should specify the name of the fugitive, the offense with which he is charged, the circumstances of the crime as fully as possible, and a description and location of the accused. It is always helpful to show that an indictment has been found or a warrant of arrest has been issued for the apprehension of the fugitive. In Great Britain the practice makes it essential that it shall appear that a warrant of arrest has been issued in this country.\*

The agent should be taken to observe the provisions of the particular treaty under which extradition is sought, and to comply with any special provisions contained therein. The extradition treaties of the United States may be found in several volumes of the Statutes at Large, in the "Revised Statutes of the United States relating to the District of Columbia and Post Roads, together with the Public Treaties in force on the 1st day of December, 1873," and in the "Digest of Public Treaties, 1887." Copies of individual treaties will be furnished by the Department upon application.

If the offense charged be a violation of a law of a State or Territory, the agent authorized by the President to receive the fugitive will be required to deliver him to the authorities of such State or Territory. If the offense charged be a violation of a law of the United States, the agent will be required to deliver the fugitive to the proper authorities of the United States for the district having jurisdiction of the offense.

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For fuller information with respect to procedure in cases of provisional arrest within the jurisdiction, see Department's memorandum of May, 1890.

Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only when the offense is against its own laws.

A strict compliance with these requirements may save much delay and expense to the party seeking the extradition of a fugitive criminal.

## MEMORANDUM RELATIVE TO THE EXTRADITION OF FUGITIVES FROM THE UNITED STATES IN BRITISH JURISDICTION.

DEPARTMENT OF STATE,  
WASHINGTON, *May*, 1890. }

Where application is made for a requisition for the surrender of a fugitive from the justice of the United States in British jurisdiction, it must be made to appear—

1. That one of the offenses enumerated in the treaties between the United States and Great Britain has been committed within the jurisdiction of the United States, or of some one of the States or Territories.

2. That the person charged with the offense has sought an asylum or been found within the British dominions.

All applications for requisitions should be addressed to the Secretary of State, and forwarded to the Department of State, accompanied with the necessary papers, as herein stated, and must furnish the full name of the person proposed for designation by the President to receive the prisoner and convey him to the United States. When the offense is within the jurisdiction of the State courts, the application must come from the Governor of the State. When the offense is against the United States, the application must come from the Attorney General or the proper executive department.

It is stipulated in the treaties with Great Britain that extradition shall only be granted on such evidence of criminality as, according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed.

It is admissible as constituting such evidence to produce a properly certified copy of an indictment found against the fugitive by a grand jury, or of any information made before an examining magistrate, accompanied by one or more depositions setting forth as fully as possible the circumstances of the crime. An indictment alone has been held to be insufficient.

By the fourteenth section of the English extradition act of 1870, "depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of, or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence of proceedings under this act."

The fifteenth section of the same act provides as follows: "Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of, or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this act if authenticated in manner provided for the time being by law, or authenticated as follows: (1) If the warrant purports to be signed by a judge, magistrate or officer of the foreign state where the same was issued; (2) if the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; and (3) if the certificate of, or judicial documents stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and if in every case the warrants, depositions, statements

copies, certificates and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other minister of state; and all courts of justice, justices and magistrates, shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof."

If the fugitive be charged with the violation of a law of a State or Territory, his delivery will be required to be made to the authorities of such State or Territory.

If the offense charged be a violation of a law of the United States (such as piracy, murder on board vessels of the United States, or in arsenals or dockyards, etc.), the delivery will be required to be made to the officers or authorities of the United States.

Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only where the offense is against its own laws.

#### PROVISIONAL ARREST.

Applications both by telegraph and by letter, are frequently made to this department for its intervention to obtain the arrest and provisional detention of fugitives from justice in England, Scotland, or Ireland in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. In such cases the only manner in which the department can intervene is by informing the Minister of the United States in London of the facts and instructing him to take the necessary measures. This the Minister does by authorizing some one connected with the Legation to make complaint on oath before a magistrate, in accordance with the requirements of the British extradition act of 1870. The form of this complaint is hereto annexed as appendix 2. Attention is invited to its provisions, and especially to the statement deponent is required to make that he is informed and believes that a warrant has been issued in the foreign country for the arrest of the accused. This department, when requested to intervene in such a case, should always be enabled to inform the Minister that such a warrant has been issued, in order that the complaint before the British magistrate may be made in due form and without delay.

#### APPENDIX 1.

The tenth article of the treaty between the United States and Great Britain, concluded August 9, 1842, provides for the surrender of criminals for (1) murder, (2) assault with intent to commit murder, (3) piracy, (4) arson, (5) robbery, (6) forgery, (7) the utterance of forged paper.

The convention concluded July 29, 1889, provides for extradition for the following additional offenses:

1. Manslaughter, when voluntary.
2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.
3. Embezzlement; larceny; receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen or fraudulently obtained.
4. Fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any company, made criminal by the laws of both countries.
5. Perjury, or subornation of perjury.
6. Rape; abduction; child-stealing; kidnapping.
7. Burglary; house-breaking or shop-breaking.
8. Piracy by the law of nations.
9. Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or de-

stroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries.

By the seventh article of the convention of 1889, it is stipulated as follows: "The provisions of the said tenth article (of the treaty of 1842) and of this convention shall apply to persons convicted of the crimes therein respectively named and specified whose sentence therefor shall not have been executed."

The eighth article of the convention of 1889, is as follows: "The present convention shall not apply to any of the crimes herein specified which shall have been committed, or to any conviction which shall have been pronounced, prior to the date at which the convention shall come into force."

The ninth article provides that the convention "shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the high contracting parties." The convention was proclaimed both in the United States and in Great Britain March 25, 1890, and thus came into force in both countries April 4, 1890.

APPENDIX 2.

[Form of information used in obtaining provisional warrants of arrest in the United Kingdom of Great Britain and Ireland.]

Metropolitan Police District, } The INFORMATION OF....., to wit :  
of ..... taken on oath this ..... day of ....., in the year of our Lord one thousand eight hundred and ....., at the Bow street police court, in the county of Middlesex, and within the Metropolitan police district, before me, the undersigned, one of the magistrates of the police courts of the metropolis, sitting at the police court aforesaid.  
Who saith that ....., late of ....., is accused [or convicted] of the commission of the crime of ..... within the jurisdiction of ....., and now suspected of being in the United Kingdom. I make this application on behalf of the ..... government.  
I produce .....  
I am informed and verily believe that a warrant ..... has been issued in ..... for the arrest of the accused; that the said government will demand h ..... extradition in due course, and that there are reasonable grounds for supposing the accused may escape during the time necessary to present the diplomatic requisition for h ..... surrender, and I therefore pray that a provisional warrant may issue under the provisions of 33 and 34 V. c. 52 s. 8.  
Sworn before me, the day and year first above mentioned, at the police court aforesaid.

Extradition Forms  
L. 12.  
—  
INFORMATION.

STATE OF NEW YORK,  
EXECUTIVE CHAMBER. }

The following rules will be observed by the Governor of the State of New York in reference to applications for requisitions on governors of other States and Territories, and the Chief Justice of the Supreme Court of the District of

Columbia (U. S. R. S., § 5278; R. S. relating to the District of Columbia, § 843).

The application must be made by the district attorney of the county in which the offense was committed, and must be in duplicate original papers, except indictments, which must be certified copies.

The following must appear by the certificate of the district attorney:

A. The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be accurately spelled, in Roman capital letters, for example: JOHN DOE.

B. That in his opinion the ends of public justice require that the alleged criminal be brought to this State for trial, at the public expense, and that he is willing that such expense be a charge on the county in which the crime was committed.

C. That he believes he has sufficient evidence to secure a conviction of the fugitive.

D. That the person named as agent is a proper person, a public officer (naming his official position), and that he has no interest in the arrest of the fugitive.

E. If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

F. If the fugitive is known to be under either civil or criminal arrest, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

G. That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

H. That all papers in duplicate have been compared with each other and are, in all respects, exact counterparts.

I. Whether the offense charged is a felony or a misdemeanor, with a concise definition thereof, and a particular reference to the statute, giving chapter, title, article, page and section, together with any amendments thereto, defining the offense and stating the punishment therefor.

J. When more than one year has elapsed since the commission of the crime, a full explanation must be given; and upon an application where no indictment has been found, the reasons therefor must be stated.

1. In cases of false pretenses, embezzlement or forgery, and all offenses known as such prior to the enactment of the Penal Code, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes.

2. Proof by affidavit of *facts and circumstances* satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. No mere unsupported allegation will be received or accepted as conclusive upon this point. In addition to the *facts and circumstances* required, it must affirmatively appear what the occupation of the accused at the time of flight was; whether he was a resident or only in the State transiently; whether he was married; when the alleged fugitive left the State, and in general the previous history of the accused so far as it can be ascertained — in short, the affiant's reasons for his belief that the accused is a fugitive from justice, and whether he is in the surrendering State transiently, or making it his residence, and his occupation therein. If the affidavit be not made by the district attorney or some public officer, the district attorney must certify that the affiant is a respectable person and entitled to credit.



3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found the *facts and circumstances* showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by depositions taken before a *magistrate* (a notary public is not a magistrate within the meaning of the statutes) in support of an information which must always be furnished in such case, and no application will be received or considered which is based on an information standing by itself. Conclusions will not be considered except in connection with the facts and circumstances from which they are drawn.

5. If the crime of forgery is charged, an affidavit of the person whose name is alleged to have been forged, must be produced, or its absence satisfactorily explained.

6. If the crime charged is seduction, corroborative evidence must be furnished by affidavit of one or more witnesses taken before a magistrate whether an indictment has been found or not.

7. Except as to the whereabouts of the accused, the sources of information and belief stated, must be given and the reason why such information is not verified by the person possessing it stated.

8. It should be shown that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, must be furnished upon an application.

9. In all cases of extradition where the fugitive is beyond the jurisdiction of the United States, the application must, in the first instance, be presented to the Governor. All such papers must be presented in *triplicate*, and conform to the foregoing rules. The triplicate copies must each be certified by the *magistrate* and must each contain a copy of the information, of the depositions in support thereof, and of a *warrant* issued thereon against the accused for the offense charged. Triplicate copies of *all* papers are absolutely necessary. In foreign countries indictments are not recognized and are absolutely useless.

In Canadian extradition each of the three sets of the papers required must contain one of the three triplicate copies of the information, depositions and one of the three *triplicate original* warrants issued thereupon; also each original warrant must be accompanied by a copy of itself, and all certified in the form given on page 145, sixth Moak's English Reports. Follow closely the practice given in this volume, pages 144-147.

A copy of the rules governing United States extradition will be furnished upon application to the State Department at Washington.

10. Applications will not be considered unless it affirmatively appears that at the alleged fugitive was in this State at the time of the commission of the offense. Extraterritorial crime is not within the extradition laws.

11. The official character of the officer taking the affidavits or depositions and of the officer who issued the warrants must be duly certified.

12. The district attorney asking a requisition must, within six months, unless sooner requested, after it is issued, make a return, accompanied by the affidavit of the agent named therein, fully stating all proceedings had thereunder and upon the information or indictment on which the same was based.

13. The Governor of this State will deliver over to the Executive of any other State or Territory persons charged therein with crime, only when the demand is accompanied by documents and proofs which are in accordance with the extradition laws.

14. Upon the renewal of an application, for example: on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, new papers in conformity with the above rules must be furnished.

15. All rules heretofore issued by the Executive, in the matter of the extradition of fugitives from justice, are hereby abrogated.

Approved January 1, 1892.

ROSWELL P. FLOWER,

Governor.



## No. 382.

## Restoration to Citizenship.

STATE OF NEW YORK,  
EXECUTIVE CHAMBER,  
ALBANY, *October 12, 1885.* }

Applications for restoration to citizenship may be made at such time after discharge from imprisonment as the Executive shall deem reasonable, under the following regulations:

I. All applications must be presented by petition, which should be written in a distinct hand, subscribed and sworn to by the applicant.

II. Give full name and *alias* in Roman letters, for example, JOHN DOE.

III. The petition must give the following particulars of the conviction: 1. The place and county. 2. The crime. 3. The court. 4. Name of judge and district attorney, if known. 5. The date of sentence. 6. The date when received in prison. 7. The term. 8. The amount of reduction of sentence earned by good conduct. 9. The date of discharge. 10. The name of prison or penitentiary. 11. Place of residence at time of conviction. 12. The *alias* given on conviction.

IV. The petition must state if any previous application has been made for restoration.

V. The certificate of prison officials upon discharge from prison, showing that the applicant earned reduction of sentence for good conduct, must be produced, or its absence satisfactorily explained.

VI. A certified copy of the sentence or record of conviction must be furnished.

VII. If the applicant has a family, the petition must so state.

VIII. The petition must fully give the history and occupation of the applicant since his discharge from prison, to the date of the application.

IX. The petition must be accompanied by letters from reputable persons and employers, if any, who have been acquainted with the applicant since his discharge from prison, showing that he has lived a life of sobriety, industry and honesty, and that if he has a family, he has faithfully cared for it to the best of his ability.

X. Upon the renewal of an application, new papers in conformity with the above must be furnished.

XI. If the applicant has been convicted of an offense or offenses other than that for which he seeks restoration, he must so state, give the particulars required by Rule III in each, and comply with Rule VI. A restoration to citizenship covers only the particular offense therein recited.

XII. By reason of the pressing engagements of the governor during the session of the legislature, and for thirty days thereafter, no application will be considered or decided during that period, but applications will be received at any time, and considered in the order of their presentation, after the period above mentioned.

XIII. Applications must be indorsed with the name and post-office address with street and number, if any,) of the person with whom correspondence may be had concerning the restoration, and to whom the writ, if granted, may be mailed.

XIV. Papers must be separately prepared in accordance with the above rules for each applicant for restoration.

.....18....

To the Governor of the State of New York:

I hereby make application for restoration to citizenship.

My full name is [Give name and *alias* in Roman letters, for example, JOHN DOE. See Rule II] .....; the name I gave on conviction was .....; I was convicted in the county of ..... of the crime of ..... in the court of . . . . ., Hon . . . . ., Judge, presiding; prosecuted by . . . . ., district attorney; sentenced . . . . ., 18..; received in . . . . . prison, county

penitentiary, ..... , 18..; for the term of ..... years, ..... months,  
fine, \$. ..; earned ..... years, ..... months, ... .. days for good  
conduct, and was discharged therefrom ..... , 18.. (See Rule III.) I  
have not been convicted of any other offense except as follows [If convicted of  
any other offense or offenses give particulars as required by Rule XI]:.....  
.....  
.....

I made a previous application for restoration to citizenship on or about  
..... , 18.. (See Rule IV.) At the time of my conviction I resided at (see  
Rule III).....  
My history and occupation from the date of my discharge from prison to this  
date have been as follows (see Rule VIII).....  
.....  
.....

Annexed hereto and forming a part of this application is my certificate of  
discharge from prison, showing that I earned a reduction of my sentence for  
good conduct therein (see Rule V).....  
.....  
.....  
and letters from reputable persons, among them those of my employers since  
my discharge from prison, who have been well acquainted with me since that  
date, showing that I have lived a life of sobriety, industry and honesty (see  
Rule IX), and that I have faithfully cared for my family to the best of my  
ability, which consists of the following persons: (see Rule VII).....  
.....  
.....

Annexed hereto and forming a part of this application is a certified copy of  
my sentence or record of conviction. (See Rule VI.)  
..... [Petitioner sign name here.]

STATE OF ..... } ss.  
COUNTY OF .....

....., being duly sworn, says that the foregoing petition is true  
to his own knowledge, except as to the matters therein stated to be alleged on  
information and belief, and as to those matters he believes it to be true. (See  
Rule I.)

..... [Petitioner sign name here.]  
No.....street,  
.....

Subscribed and sworn to before me, }  
this ..... day of ....., 18.. }

.....  
....., 18..

[Endorsement on back.]

Rules and Application for Restoration to Citizenship of .....

Correspondence may be had with, and the restoration, if granted, may be  
mailed to

.....,  
No.....street,  
....., New York.

**No. 383.****Pardon and Commutations.****STATE OF NEW YORK,****EXECUTIVE CHAMBER,****ALBANY, *January*, 1892.****RULES GOVERNING APPLICATIONS FOR PARDONS AND COMMUTATIONS OF SENTENCE.**

1. All applications and accompanying documents should be written in a distinct hand, and include the following papers, information and statements prepared as hereinafter described.

a. Certified copy of the record of conviction.

b. The full name of the person for whom clemency is asked, accurately spelled in Roman Capital letters, for example: JOHN DOE—and the alias (if any), under which he may have been convicted, together with the names of any, under which he may have been convicted, together with the names of those persons (if any) charged to have been connected with the same offense, and a statement as to whether the applicant has been previously convicted, and if so, of what offense, and the sentence therefor.

2. Applications must be indorsed with the name and post-office address (with street and number, if any) of the person with whom correspondence may be had concerning the pardon or commutation.

3. Applications will not be received which contain the names of more than one person for whom clemency is asked. Papers must be separately prepared in each individual case.

4. A brief statement of the grounds upon which the application is based—a schedule of papers—the facts to sustain the grounds in the form of a history of the case—a brief abstract of the evidence as taken upon a preliminary examination, or before a coroner's jury, if no trial was had, or upon the trial, and letters from responsible persons in the community where the crime was committed, must be furnished.

5. All facts relied upon to sustain any allegation as a ground for clemency (other than certificates of prison officials, which are only furnished at the request of the governor), must be proved by affidavit.

6. In applications based upon the grounds of a mistrial, or improper conviction, the allegations must be sustained by such reasons and evidence as would have been a good ground for a new trial, and in applications based upon the ground of newly discovered evidence, the evidence must be such as would, in all probability, have produced an acquittal on a second trial; and where the court has overruled any motion for a new trial, based upon any of the foregoing grounds, such questions will not be reconsidered, except on the recommendation of the judge before whom such motion was heard.

7. No abstract of evidence as taken on a preliminary examination, or before a coroner's jury, or upon a trial, will be received or considered unless it be approved by the judge before whom a plea of guilty was entered, or who presided at the trial, or by the district attorney of the county in which the conviction was had, with an indorsement that it is in all respects a fair statement of the case.

8. In cases other than capital, where, in the discretion of the governor, it is necessary to file the whole evidence as taken upon the trial, it must be accompanied by a brief or abstract having reference to the original pages, and indorsed by one of the court officers as required by Rule 7.

9. No application that has been refused will be reconsidered, unless substantial grounds for reopening the case are formally presented in writing in the manner above set forth.

10. Under the statutes of the state of New York, notice is not required to be given to court officers. In all instances such officers are notified from the executive chamber of the application, and are requested, among other things, to give such opinion on the merits of the application as they may deem proper.

11. By reason of the pressing engagements of the governor during the session of the legislature, and for thirty days thereafter, no application will be considered or decided during that period, unless it be one which by reason of the nature of the circumstances surrounding it, cannot be delayed; but applications will be received as usual.

12. No applications will be considered in cases of sentences imposed by courts of special sessions, or sentences to imprisonment for a term which does not exceed one year, exclusive of a fine, except upon the sole ground of entire innocence of the offense charged, supported by the papers required by Rule 8; and only on this ground will applications for clemency be considered in cases of inmates of houses of refuge and reformatories.

13. No applications will be considered until all necessary inquiries are made and replies received.

14. Applications for clemency in capital cases must be presented at least two weeks prior to the date set for execution.

15. All applications will be considered in the order of their presentation, unless special reasons are given for precedence; and counsel will not be heard in their support, unless the circumstances are such that it is a matter of imperative necessity, and it is requested by the Governor.

16. All applications and communications should be addressed to "The Governor of the State of New York, Albany, N. Y."

17. These rules will be waived only in those cases wherein their enforcement would work manifest injustice.

ROSWELL P. FLOWER.

STATE OF NEW YORK, EXECUTIVE CHAMBER, ALBANY, *March 26, 1886.*  
The attention of all officers charged with the administration of the criminal law is directed to the provisions of section 697 of the Penal Code, as amended by chapter 68 of the Laws of 1886, which is as follows:

“SECTION 697. Where a convict is sentenced to be imprisoned in a State prison or a penitentiary for a longer period than one year, the court before which the conviction is had must limit the term of the sentence having reference to the probability of the convict earning a reduction of his or her term for good behavior, as provided by statute, and assuming that such reduction will be earned, so that it will expire between the month of March and the month of November, unless the exact period of the sentence is fixed by law.” This section, as amended, went into effect March 25, 1886.

The copies of commitments to the various prisons and penitentiaries and the reports of commutation received each month at the Executive chamber, show that ninety-five per centum of convicts earn the reduction allowed under the provisions of the statute.

The wise and humane intention of the act above quoted, which aims at the release of convicts during the season of mild weather, and when the chances of employment are the best, should be strictly observed.

It is also proper that attention should be directed to section 2 of chapter 21 of the Laws of 1886, which provides that in estimating commutation, all the terms under which a convict is imprisoned shall be construed as one continuing term.

For the convenience of courts, the following tables, showing the amount of commutation which may be earned on a given number of years or fractions thereof, have been prepared and issued.

DAVID B. HILL.

*The Commutation allowed by law for Good Behavior, is Two Months for the First Year, Two Months for the Second Year, Four Months for the Third and Fourth, and Five Months each for the Fifth and all subsequent years.*

TABLE—SHOWING COMMUTATION ON SENTENCES FOR YEARS, FROM 1 TO 35 INCLUSIVE.

Sent. Years.	Commutation.		Sent. Years.	Commutation.		Sent. Years.	Commutation.		Sent. Years.	Commutation.	
	Years.	Months.		Years.	Months.		Years.	Months.		Years.	Months.
1	....	2	8	2	8	15	5	7	23	8	6
2	....	4	9	3	1	16	6	....	23	8	11
3	....	8	10	3	6	17	6	5	24	9	4
4	1	....	11	3	11	18	6	10	25	9	9
5	1	5	13	4	4	19	7	3	26	10	2
6	1	10	13	4	9	20	7	8	27	10	7
7	2	3	14	5	2	21	8	1	28	11	....



COMMUTATION — (Continued).

Sentence.		Commutation.		Sentence.		Commutation.		Sentence.		Commutation.		Sentence.		Commutation.	
Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.
9	8	3	4	11	10	4	3	14	1	5	2	16	2	6	1
9	9	3	4	11	11	4	3	14	1	5	2	16	3	6	1
9	10	3	5	12	..	4	4	14	2	5	2	16	4	6	2
9	11	3	5	12	1	4	4	14	3	5	3	16	5	6	2
10	..	3	6	12	2	4	4	14	4	5	3	16	6	6	2
10	1	3	6	12	3	4	5	14	5	5	4	16	7	6	3
10	2	3	6	12	4	4	5	14	6	5	4	16	8	6	3
10	3	3	7	12	5	4	6	14	7	5	4	16	9	6	3
10	4	3	7	12	6	4	6	14	8	5	5	16	10	6	4
10	5	3	8	12	7	4	6	14	9	5	5	16	11	6	4
10	6	3	8	12	8	4	7	14	10	5	6	16	..	6	5
10	7	3	8	12	9	4	7	14	11	5	6	16	1	6	5
10	8	3	9	12	10	4	8	14	..	5	7	16	2	6	5
10	9	3	9	12	11	4	8	14	1	5	7	16	3	6	6
10	10	3	10	12	..	4	9	15	2	5	7	16	4	6	6
10	11	3	10	12	1	4	9	15	3	5	7	16	5	6	7
11	..	3	11	13	2	4	9	15	4	5	8	16	6	6	7
11	1	3	11	13	3	4	9	15	5	5	8	16	7	6	7
11	2	3	11	13	4	4	10	15	6	5	9	16	8	6	8
11	3	4	4	13	5	4	10	15	7	5	9	16	9	6	8
11	4	4	4	13	6	4	11	15	8	5	10	16	10	6	9
11	5	4	4	13	7	4	11	15	9	5	10	16	11	6	9
11	6	4	4	13	8	5	11	15	10	5	10	16	..	6	10
11	7	4	4	13	9	5	11	15	11	5	11	16	11	6	10
11	8	4	4	13	10	5	11	15	..	6	11	16	..	6	11
11	9	4	4	13	11	5	11	15	1	6	11	16	1	6	11
..	..	4	4	13	12	5	11	15	2	6	11	16	2	6	11
..	..	4	4	13	13	5	11	15	3	6	11	16	3	6	11
..	..	4	4	13	14	5	11	15	4	6	11	16	4	6	11
..	..	4	4	13	15	5	11	15	5	6	11	16	5	6	11
..	..	4	4	13	16	5	11	15	6	6	11	16	6	6	11
..	..	4	4	13	17	5	11	15	7	6	11	16	7	6	11
..	..	4	4	13	18	5	11	15	8	6	11	16	8	6	11
..	..	4	4	13	19	5	11	15	9	6	11	16	9	6	11
..	..	4	4	13	20	5	11	15	10	6	11	16	10	6	11
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Sentence.		Commutation.			Sentence.		Commutation.			Sentence.		Commutation.			Sentence.		Commutation.		
Yrs.	Mos.	Yrs.	Mos.	Days.	Yrs.	Mos.	Yrs.	Mos.	Days.	Yrs.	Mos.	Yrs.	Mos.	Days.	Yrs.	Mos.	Yrs.	Mos.	Days.
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